



**Alliance for Telecommunications
Industry Solutions**

*Problem Solvers to the
Telecommunications Industry*

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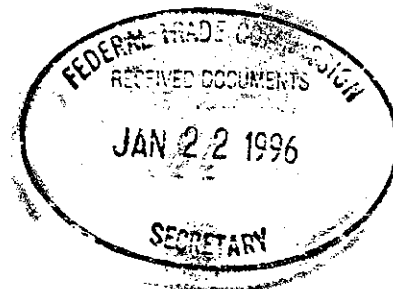
Standards Committee 05

Electronic Communications
Service Provider Committee

Network Reliability
Steering Committee

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Forum

January 22, 1996



**Federal Trade Commission
Donald Clark, Secretary
Office of the Secretary
Room 159
6th Street and Pennsylvania Avenue, N.W.
Washington, DC 20580**

Re: In the Matter of Dell Computer Corporation,
File No. 931-0097

Dear Mr. Clark:

The Alliance for Telecommunications Industry Solutions, Inc. ("ATIS") submits these comments in connection with the proposed consent agreement in the above-referenced proceeding, in response to the Notice published at 60 Federal Register 57870, dated November 22, 1995.

ATIS submits that it is important and appropriate that the proposed consent agreement seeks to address conduct presumably involving an intentional failure to disclose relevant intellectual property rights ("IPR") in the voluntary standard setting context. Such conduct can be antithetical to the open procedures that are essential to voluntary standards setting, and could result in anticompetitive or competitively unfair effects that, in appropriate circumstances, should properly be challenged under Section 2 of the Sherman Act or Section 5 of the Federal Trade Commission Act.

ATIS also submits, however, that the proposed consent agreement must be cognizant of and accommodate the legitimate rights of IPR owners, including respondent, and thereby foster the significant procompetitive benefits that result from an IPR holder's exercise of its exclusive rights. Accordingly, unwarranted obligations should not be imposed upon respondent, and by implication upon other patent owners, that would have the unintended effect of stifling innovation, limiting access to desirable technology and otherwise creating disincentives for participation in voluntary standards development.



For these reasons, ATIS submits that it may be appropriate for the Commission to reconsider certain aspects of the proposed consent agreement in this proceeding, particularly Section IV. While some language of the Section appears to be too narrowly drawn, other proposed terms may be too broad.

BACKGROUND

ATIS (formerly the Exchange Carriers Standards Association) was established in 1983 as a not-for-profit corporation by members of the wireline exchange carrier industry to develop exchange carrier telecommunication interconnection standards and to address other technical issues in response to and as part of the divestiture of the former Bell system. In 1993, recognizing the rapid evolution occurring in the telecommunications industry and the need to be responsive to an even wider array of participants in the marketplace, ATIS expanded its membership to include, in addition to exchange carriers, interexchange carriers, competitive access providers, cellular carriers and others. Most recently, in the fall of 1995, ATIS expanded its membership further to include North American and World Zone I Caribbean telecommunications service providers, telecommunications equipment manufacturers, resellers of telecommunications services, and enhanced service providers.

The primary purpose of ATIS remains to promote the timely resolution of national and international issues involving telecommunications standards and the development of operational guidelines through the sponsorship and support of open industry committees and forums. These groups address such issues as network interconnection, open network architecture, network outage analysis, installation, testing and maintenance, ordering and billing, toll fraud prevention, and electronic data interchange.

One of ATIS' sponsored committees is Committee T1, which was established and accredited by the American National Standards Institute ("ANSI") in October 1984. Committee T1 develops technical standards and reports supporting the interconnection and interoperability of telecommunications networks at interfaces with end-user systems, carriers, information and enhanced service providers and customer premises equipment. At this time, Committee T1 has sixty-four (64) voting members and forty-four (44) non-voting members, and approximately fifteen hundred (1,500) domestic and foreign engineers and subject matter experts take part in its voluntary standards development activities. Such individuals represent exchange carriers, interexchange carriers, manufacturers and users. In addition, representatives of foreign



governments, including Japan, Korea, Australia and various South American countries, participate in T1's activities.

T1 develops standards not only for the U.S. public telecommunications network, but also serves as the primary source of U.S. technical contributions to the Telecommunications Sector of the International Telecommunication Union ("ITU-T") through the U.S. State Department. Contributions from T1 to the ITU-T total approximately 1,000 annually. T1's pace for developing American National Standards and/or technical reports has reached an output rate of one and one-half per week.

As respects all of its activities, Committee T1 is highly cognizant of issues relating to IPR, and specifically patented technology. The ANSI patent policy has been adopted by Committee T1, and to date it has successfully served to accommodate the need for both the effective and timely development of standards, including those that might incorporate proprietary technology, as well as the interests of patent owners in controlling their inventions. (A copy of the ANSI patent policy as adopted by Committee T1 is annexed hereto as Exhibit A.)

More specifically, by reliance on the ANSI patent policy, Committee T1 has permitted patent owners the ability to contribute proprietary technologies to the standards process without forfeiting the opportunity to be adequately reimbursed for the time, money and effort that was required to develop their patented inventions. As a result, the procompetitive interests of encouraging invention and the requisite investment for creating new technologies is accommodated by Committee T1 through its utilization of the ANSI patent policy.

Likewise, the clear economic benefit of having one's proprietary technology adopted as a voluntary industry standard serves as a strong incentive for patent owners to contribute their protected works to the standards process. This has permitted the industry as a whole to benefit by having access to the most technologically meritorious alternatives, irrespective of IPR claims, for purposes of developing telecommunications standards.

The ANSI patent policy as adopted by Committee T1 also serves to encourage the disclosure and identification of patent rights and proposed license terms early in the standards process by allowing a patent owner the opportunity to negotiate license arrangements on a bilateral confidential basis. T1's procedures also call for (but do not mandate) the disclosure of relevant patents throughout the standards development process. Specifically, at all levels, including in T1 technical subcommittees, letter ballots (the medium through which it is determined whether a consensus exists) request the disclosure of patents relevant to the matter being balloted



based upon the best knowledge at the time of the T1 member casting the ballot. In addition, meetings of the various T1 technical subcommittees are opened with a request for disclosure of known patents by the patent holder or others who may have knowledge that a patent exists.

More stringent or mandatory requirements in this regard have been determined to be inappropriate and unworkable by Committee T1. For example, in its deliberations as respects a proper patent policy, T1 expressly rejected a requirement mandating the disclosure of relevant patents. In so doing, T1 recognized the enormous and unreasonable burden that would be placed on firms with large patent portfolios that participate in numerous standards-setting forums, if such firms faced potential liability, if they did not review their portfolios for relevant patents in connection with each standard being developed in each organization. Moreover, such reviews would be ongoing because of the dynamic nature of standards development. Faced with such an allegation, it was feared that firms would sooner withdraw from the T1 standards-setting process than incur the costs and expend the effort that would be required.

Thus, T1 seeks to rely upon marketplace incentives for early disclosure of patents, and to date has succeeded in this approach. Moreover, if any mandatory disclosure requirements existed, Committee T1 would become an enforcement agency, rather than an impartial vehicle through which the most technologically advantageous telecommunications standards could be developed.

Thus, as Committee T1 has recognized, to realize the optimal benefits from standards-setting, a balance must exist between the complementary interests of the industry at large and the rights and interests of IPR owners. Such a balance will not be possible to attain, however, if unnecessary risks of liability arise from the imposition upon IPR owners of unwarranted legal duties or obligations.

DISCUSSION

A. Intentional Non-Disclosure of IPR Undermines The Voluntary Standards Process.

There should be no dispute that the intentional non-disclosure of a patent that is necessary for the implementation of a standard could have the effect of undermining the voluntary standards process, if the owner of such a patent later sought to enforce its rights and thereby exclude competition or otherwise improperly exercise monopoly power in a market defined by the patented technology or the standard incorporating that technology. This so-called "snake in the grass" scenario would be particularly deleterious in circumstances where a voluntarily developed standard has gained widespread market acceptance prior to the assertion of any rights by a patent



holder. Thus, we are pleased to advise that such conduct has not been encountered by Committee T1, and we understand it is rare in other ANSI committees.

In the off-chance that such conduct were to occur, however, established legal principles under Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act exist that should provide the Commission with a basis to challenge it.¹ In essence, a claim could be made that through a willful non-disclosure, a patent holder unlawfully used its monopoly power in a patented technology to exclude or raise the cost of entry by its rivals. Assuming, of course, that evidence existed proving the patented technology to be a properly defined relevant market and that the patent owner's challenged conduct was an improper use of monopoly power, then such a claim would succeed.

From a standards setting organization's perspective, compelling reasons exist for such conduct to be challenged on such grounds. Indeed, if such conduct were left unchallenged, the incentive for industry members to participate in the voluntary standards process could be undermined.

Most particularly, significant investment is made by participants in the standards setting process toward the development of private technical industry standards. As respects Committee T1, for example, such investment is reflected by the time and support provided by members to T1's efforts through attendance at meetings, preparation of technical contributions, serving in leadership roles, and the like. If it became impossible or too expensive to benefit from T1-developed standards as the result of after-the-fact assertions of patent rights, the advantages of participating in the standards process would be lost and the costs of doing so would likely no longer be justifiable.

Another negative consequence that might arise from an improper and intentional failure to disclose relevant IPR would be that the most appropriate of alternative technologies might not be selected for standardization. The possibility that implementation of a standard may require use of a patented technology is certainly a factor that may be relevant in developing a consensus regarding the selection of a technology for standardization, and an intentional withholding of information regarding potentially relevant patent rights would deny the industry timely access to such information and could cause the selection of the patented technology to the exclusion of a preferable competitive technology.

¹ A private party could also raise equitable defenses, including waiver and estoppel, to a patent owner's attempt to enforce a patent that was intentionally withheld from disclosure.



B. The Rights of IPR Owners Must Be Accommodated.

In assessing the scope of conduct that should properly be subject to challenge in connection with the non-disclosure of IPR, however, accommodation of the legitimate rights of IPR owners must also be made. If, in an attempt to address what might appear to be otherwise improper conduct, such rights were compromised, the required balance between such rights and the industry's interest in gaining access to proprietary technology would be disrupted, and the procompetitive benefits that are derived from an owner's exercise of its exclusive IPR would be lost.

Thus, at one end of the spectrum, an easy case would be the type of situation described above, where a patent owner participates in a standards-setting group that is developing a standard based upon the patent owner's technology, and for the purpose of excluding competing technologies from the market or to raise the cost of entry for such competing technologies, the patent owner intentionally fails to disclose the existence of a patent it knows exists and knows is relevant to the standard under development. Then, assuming evidence exists sufficient to prove that such conduct was undertaken by a monopolist, there should be little issue of the IPR owner's anticompetitive use of its proprietary exclusivity to the detriment of the standards process and consumer welfare.

On the other hand, where a patent owner unknowingly fails to disclose its proprietary rights, but discovers later, after adoption of a standard, that utilization of the standard implicates its patent, there would appear to be no basis for a legal challenge if the patent owner then either disclaims any intention to enforce its rights or indicates a willingness to license its patent royalty free. No negative impact on the standards setting process would likely arise in such circumstances because the patent owner's willingness to make its proprietary technology available would eliminate any likelihood that the patent owner would be able to obtain any unfair competitive advantage.

Even a willingness to license on reasonable and non-discriminatory terms and conditions in such circumstances should avoid the types of adverse effects identified above. Such license terms would be consistent with the requirements of ANSI's (and Committee T1's) patent policy, and would recognize the balance that must be made between the legitimate rights of patent owners and participants in the standards process. More specifically, absent the ability to extend such a license, a patent owner would have to choose between either dedicating its invention to the public through a disclaimer of its intention to enforce its patent rights or by extending royalty free



licenses, or precluding any use of the invention thereby depriving the industry of the standard. Either alternative would be unsatisfactory.

Further, even if a patent owner unintentionally did not disclose the existence of a relevant patent, and then, upon its discovery of the patent's relevance, declined to grant any licenses for its utilization, no antitrust claim would be appropriate. The patent owner's decision to grant no licenses would not create an anticompetitive effect, but would rather be an exercise of its legitimate rights under the patent.

Nor would it be appropriate to consider as improper a patent owner's failure to investigate its patent holdings to determine if any of its patents are relevant to the implementation of a standard under consideration. As discussed above, whereas Committee T1 requests the disclosure of relevant patents throughout the standards development process, such disclosure is not mandated because of the prospect that holders of even modest patent portfolios would sooner opt to withdraw from the standards setting process than face the daunting, if not impossible, task of ascertaining with any degree of accuracy whether in connection with each phase of a standard being developed one of its patents might be implicated.

C. Reconsideration Of Section IV Of The Proposed Consent Agreement May Be Appropriate.

In view of the foregoing, it may be appropriate if the Commission were to reconsider certain aspects of Section IV of the proposed consent agreement. As presently drafted, this Section would preclude respondent from enforcing or threatening to enforce any patent rights, by asserting or alleging that any person's or entity's use or implementation of an industry standard infringes such patent rights, if, in response to a written inquiry from a standard-setting organization the respondent "intentionally failed to disclose such patent rights while such industry standard was under consideration."

First, limiting Section IV solely to circumstances where a patent owner fails to disclose its patent in response to a written inquiry from a standard-setting organization appears to be too narrowly focused. Not all standards developing organizations request such disclosure, much less make their requests in writing. Likewise, some organizations, including Committee T1, purposefully have avoided imposition of any mandatory obligation to respond to inquiries regarding the possible existence of relevant patents as respects a specific standard. Yet, an intentional exclusionary non-disclosure could have the same effect if it occurs in response to any type of inquiry, or simply is based upon a patent owner's own volition. The conduct either will or

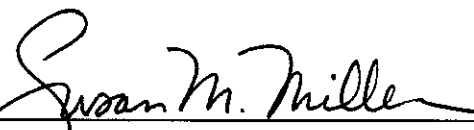


will not be exclusionary in purpose and effect, and the existence or absence of such effects should be dispositive for purposes of the consent agreement.

Second, Section IV as presently drafted, especially when considered in conjunction with Section V of the proposed decree, may be ambiguous regarding whether the "intentional" conduct contemplated would include an intentional decision not to investigate regarding the potential relevance of any of respondent's patents to a contemplated standard, whether or not a request for disclosure is made by a standards body. As previously discussed, the imposition of such an obligation would not be appropriate, and ATIS suggests that the language of Section IV be reviewed to ensure that no such interpretation is possible.

Respectfully submitted,

ALLIANCE FOR TELECOMMUNICATIONS
INDUSTRY SOLUTIONS, INC.

By 
Susan M. Miller
Vice President and General Counsel

14. PATENT POLICY

Committee T1 has adopted the ANSI Patent Policy which is reprinted here. This material is reproduced with ANSI's permission from Appendix I of the ANSI publication: *Procedures for the Development and Coordination of American National Standards*, copyright 1987.

14.1 Inclusion of Patents in American National Standards.

There is no objection in principle to drafting a proposed American National Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach.

If the Institute receives a notice that a proposed American National Standard may require the use of a patented invention, the procedure in Sections 14.2 through 14.5 shall be followed.

14.2 Statement from Patent Holder.

Prior to approval of such a proposed American National Standard, the Institute shall receive from the patent holder (in a form approved by the Institute) either: assurance in the form of a general disclaimer to the effect that the patentee does not hold and does not anticipate holding any invention whose use would be required for compliance with the proposed American National Standard or assurance that:

- (1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard, or
- (2) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

The terms and conditions of any license shall be submitted to ANSI for review by its counsel, together with a statement of the number of independent licensees, if any, which have accepted or indicated their acceptance of terms and conditions of the license.

14.3 Record of Statement.

A record of the patent holder's statement (and a statement of the basis for considering such terms and conditions free of any unfair discrimination) shall be placed and retained in the files of the Institute.

14.4 Notice.

When the Institute receives from a patent holder the assurance set forth in 14.2(1) or 14.2(2), the standard shall include a note as follows:

NOTE: The user's attention is called to the possibility that compliance with this standard may require use of an invention covered by patent rights.

By publication of this standard, no position is taken with respect to the validity of this claim or of any patent rights in connection therewith. The patent holder has, however, filed a statement of willingness to grant a license under these rights on reasonable and nondiscriminatory terms and conditions to applicants desiring to obtain such a license. Details may be obtained from the publisher.

14.5 Responsibility for Identifying Patents.

The Institute shall not be responsible for identifying all patents for which a license may be required by an American National Standard or for conducting inquiries into the legal validity or scope of those patents that are brought to its attention.

FTC news

Federal Trade Commission Washington, D.C. 20580 (202) 326-2180

FOR RELEASE: NOVEMBER 2, 1995

DELL COMPUTER SETTLES FTC CHARGES; WON'T ENFORCE PATENT RIGHTS FOR WIDELY USED COMPUTER FEATURE

In a precedent-setting decision announced today, Dell Computer Corporation has agreed to drop patent claims that affect millions of personal computers using the industry standard "VL-bus". The decision follows Federal Trade Commission charges that Dell restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise undisclosed patent rights against computer companies adopting the VL-bus standard. To settle the FTC charges, Dell has agreed not to enforce its patent rights against computer manufacturers using the VL-bus, a mechanism to transfer instructions between the computer's central processing unit and its peripherals, such as a hard disk drive or video display hardware. VL-bus is the technology of choice in computers that use "486" chips.

Dell, a leading U.S. manufacturer of personal computers, is based in Austin, Texas.

According to the FTC complaint detailing the charges, Dell was a member of the Video Electronics Standards Association (VESA), a non-profit standards-setting organization, when the association began setting a design standard for a computer bus design to respond to demand for faster graphics performance. VESA members, representing virtually all major U.S. computer hardware and software manufacturers, voted to approve the new VL-bus standard in 1992. As part of that approval, a Dell representative allegedly certified that he knew of no patent, trademark or copyright that the bus design would violate.

After the VESA VL-bus design standard became successful and computer manufacturers had sold more than 1.4 million personal computers incorporating the VL-bus, Dell contacted certain VESA members and asserted that it obtained a patent in 1991 that they were violating by using the VL-bus standard, the complaint alleges.

This is the first time federal enforcement authorities have taken action against a

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(Dell-11/2/95)

company for acting through a standard-setting association to unilaterally seek to impose costs on its rivals through abuse of the standard-setting process, according to William J. Baer, Director of the FTC's Bureau of Competition.

"Voluntary standard-setting in high tech industries results in greater compatibility among products, which in turn gives consumers a broader range of choices," said Baer. "Open, industry-wide standards also benefit consumers because they can be used by everyone without cost. This settlement makes it clear that firms cannot commit to an open standard, and then, after it becomes successful, assert patent rights in an effort to block use of the design or drive up the price through royalty payments. In this case, Dell's certification to the Association led the industry to believe the standard was truly open. If Dell had informed the Association of its patent claims during the standard-setting process, the Association could have adopted a different standard that would not have conflicted with the patent," he said.

The FTC charged that Dell's actions were unfair and that they unreasonably restrained competition in the following ways, according to the complaint:

- industry acceptance of the VESA VL-bus standard was hindered pending a resolution of the patent issue;

- companies avoided using systems incorporating the VL-bus design because they were concerned that the patent issue would chill its acceptance as the industry standard;

- uncertainty about acceptance of the design standard raised the cost of implementing the VL-bus design and the costs of developing competing bus designs; and

- willingness to participate in industry standard-setting efforts has been chilled.

To settle the charges, Dell has agreed not to enforce its patent against computer manufacturers incorporating the VL-bus design in their products. In addition, Dell would be prohibited from enforcing any of its patent rights that it intentionally fails to disclose upon request of any standard-setting organization during the standard-setting process. The settlement also contains various reporting requirements that would assist the FTC in ensuring Dell's compliance.

The Commission's vote to accept the proposed settlement for public comment was 4-1, with Commissioner Mary L. Azcuenaga dissenting. In her dissenting statement, Commissioner Azcuenaga said, "Because the complaint does not allege and the evidence does not support a violation of Section 5 of the FTC Act under any established theory of law, and because under any novel theory the competitive implications of the conduct alleged remain unclear, I dissent. One antitrust theory might be that Dell intentionally misled VESA regarding the scope of its patent

(Dell--11/2/95)

rights; that VESA, relying on Dell's misrepresentations, adopted a standard that conflicted with Dell's rights; and that as a result of the standard, Dell acquired market power. No evidence supports a finding of such intentional conduct....Another Section 5 theory might be that by participating in a private trade association's standard-setting activities, a firm assumes an affirmative duty to identify the boundaries of its intellectual property rights and to warn the association of any potential conflicts....Adoption of this novel theory of liability may affect a range of standard-setting organizations. In creating a new antitrust-based duty of care for participants in the voluntary standard-setting process, a host of questions needs to be resolved. I welcome public comment on the appropriate nature and scope of any such duty, and I look forward to reassessing the case at the end of the comment period."

The agreement will be published in the Federal Register shortly and will be subject to public comment for 60 days, after which the Commission will decide whether to make it final. Comments should be addressed to the FTC, Office of the Secretary, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

NOTE: A consent agreement is for settlement purposes only and does not constitute an admission of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of \$10,000.

Copies of the complaint, proposed consent agreement and an analysis of the agreement to assist the public in commenting, are available from the FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; 202-326-2222; TTY for the hearing impaired 202-326-2502. To find out the latest FTC news as it is announced, call the FTC's NewsPhone recording at 202-326-2710. FTC news releases and other materials also are available on the Internet at the FTC's World Wide Web Site at: <http://www.ftc.gov>

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MEDIA CONTACT: Claudia Bourne Farrell, Office of Public Affairs
202-326-2181

STAFF CONTACT: William J. Baer, Bureau of Competition
202-326-2932

(FTC File No. 931 0097)

(Dell1)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

File No. 931-0097,

DELL COMPUTER CORPORATION,
a corporation.

AGREEMENT CONTAINING
CONSENT ORDER TO
CEASE AND DESIST

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Dell Computer Corporation ("Dell"), and it now appearing that Dell Computer Corporation, hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from engaging in the acts and practices being investigated, and providing for other relief,

IT IS HEREBY AGREED by and between the proposed respondent, by its duly authorized officer and its attorney and counsel for the Commission that:

1. Proposed respondent Dell is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2214 West Braker Lane, Austin, Texas 78758.
2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.
3. Proposed respondent waives:
 - (a) any further procedural steps;
 - (b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;
 - (c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
 - (d) any claim under the Equal Access to Justice Act.

4. Proposed respondent shall submit with this agreement an initial report signed by the proposed respondent setting forth in precise detail the manner in which the proposed respondent will comply with Paragraph IV of the order when and if entered. Such report will not become part of the public record unless and until

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the accompanying agreement and order are accepted by the Commission. At the time such report is submitted, proposed respondent may request confidentiality for any portion thereof with a precise showing of justification therefor.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules of Practice, the Commission may, without further notice to the proposed respondent, (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or agreement may be used to vary or contradict the terms of the order.

8. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I

IT IS ORDERED that, as used in this order, the following definitions shall apply:

A. "Respondent" or "Dell" means Dell Computer Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Dell Computer Corporation, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. "Designated representative" means the person appointed by Dell to the standard-setting organization who communicates respondent's position regarding respondent's patent rights related to any standard under consideration by the standard-setting organization.

C. "VESA" means the Video Electronics Standards Association, located at 2150 North First Street, Suite 440, San Jose, California, 95131.

D. "VL-bus" means the computer local bus design standard VESA established in August 1992 for the transmission of computer information between a computer's central processing unit and certain computer peripheral devices.

E. "'481 patent" means United States patent number 5,036,481.

F. "Commission" means the Federal Trade Commission.

II

IT IS FURTHER ORDERED that, within thirty (30) days after the date this order becomes final, and until July 31, 2008, respondent shall cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitrations, mediations, or any other form of private dispute resolution; through or in which respondent has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

III

IT IS FURTHER ORDERED that, until July 31, 2008, respondent shall not undertake any new efforts to enforce the '481 patent by threatening, prosecuting or defending any suit or other action, whether legal, equitable, or administrative, as well as any

arbitration, mediation, or other form of private dispute resolution, through or in which respondent claims that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

IV

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights, if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, respondent intentionally failed to disclose such patent rights while such industry standard was under consideration.

V

IT IS FURTHER ORDERED that, for a period of ten (10) years after this order becomes final, respondent shall maintain the procedure for assuring compliance with Paragraph IV of this order, as accepted by the Commission pursuant to Paragraph 4 of the Agreement Containing Consent Order to Cease and Desist.

VI

IT IS FURTHER ORDERED that respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to any other person or entity to whom respondent has sent notice regarding its claim that the implementation of the VL-bus standard conflicts with or infringes the '481 patent.

B. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to every officer and director of respondent, and to every employee of respondent whose responsibilities include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member.

C. For a period of five (5) years after the date this order becomes final, furnish a copy of this order and complaint to each new officer and director of respondent and to every new employee of respondent whose responsibilities will or do include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this paragraph VI.C., "new employee" shall include without limitation any of respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any standards-setting organization, group or similar body of which respondent is a member.

D. For a period of ten (10) years after the date this order becomes final, respondent shall furnish each standard-setting organization of which it is a member and which it joins a copy of the order and respondent shall identify to each such organization the name of the person who will serve as respondent's designated representative to the standard-setting organization. ~~IS FURTHER ORDERED THAT RESPONDENT SHALL~~

A. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondent, require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

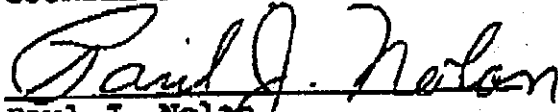
B. For a period of ten (10) years after the date this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Paragraphs V and VI of this order.

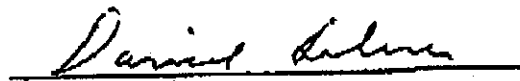
C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change

in respondent that may affect compliance obligations arising out of this order.


Signed this _____ day of _____, 19____

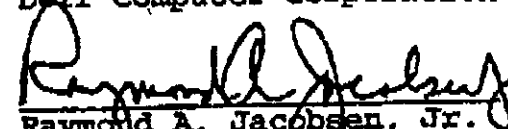
COUNSEL FOR FEDERAL TRADE COMMISSION


Paul J. Nolan



Daniel Silver


DELL COMPUTER CORPORATION



Richard Salwen
Vice-President and Deputy
General Counsel for
Dell Computer Corporation

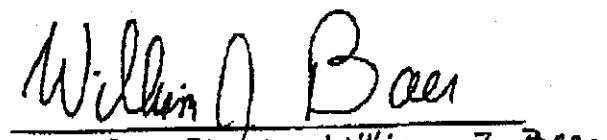

Raymond A. Jacobsen, Jr.
Counsel for
Dell Computer Corporation

APPROVED:


Richard B. Dagen
Deputy Assistant Director


Michael E. Antalics
Assistant Director


~~Barbara A. Clark~~ Mark D. Whitener
Deputy Director for Litigation


~~Mary Lou Steptoe~~ William J. Baer
Acting Director
Bureau of Competition

Appendix A

Announcement

Dell Computer Corporation has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [Date] that prohibits Dell from enforcing its United States patent number 5,036,481 against any company for such company's use of the Video Electronics Standards Association's VL-bus standard.

For more specific information, please refer to the FTC order itself, a copy of which is attached for your information.

General Counsel
Dell Computer Corporation

DRAFT

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

DELL COMPUTER CORPORATION,
a corporation.

File No. 931-0097

INITIAL REPORT OF DELL COMPUTER CORPORATION CONCERNING
COMPLIANCE WITH CONSENT ORDER

Pursuant to Paragraph 4 of the Agreement Containing Consent Order To Cease And Desist dated April __, 1995, Dell Computer Corporation ("Dell") submits this report setting forth the manner in which it will comply with Paragraph IV of the Consent Order ("the Order") when and if entered.

Paragraph IV requires that, for a period of ten (10) years after the Order becomes final, Dell will cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent right if, in response to a written inquiry from the standard-setting organization to Dell's designated representative, Dell intentionally failed to disclose such patent rights while such industry standard was under consideration. To comply with this provision, Dell will institute the following procedure if and when the Order becomes final, which procedure shall be maintained for a period of ten (10) years after the Order becomes final:

A. Dell will identify one or more employees who shall maintain familiarity with Dell's intellectual property rights;

- 2 -

B. Upon receipt of written inquiry from a standard-setting association as provided in Paragraph IV of the Order, Dell's designated representative to that association will confer, prior to responding to such written inquiry, with an employee identified pursuant to Paragraph A above, as to whether the proposed standard infringes any of Dell's patent rights;

C. Dell will maintain a file containing a copy of (1) each written inquiry received from a standard-setting association as provided in Paragraph IV of the Order and (2) any reply to such written inquiry; and

D. In the event that Dell proposes to enforce, or threaten to enforce, any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights, Dell shall cause the file created pursuant to Paragraph C above, to be searched for any reference to the industry design standard whose use or implementation is being proposed as the basis for the accusation of infringement.

Respectfully submitted,



Richard Salwen
Vice-President and Deputy General
Counsel for
Dell Computer Corporation

Dated:

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

DELL COMPUTER CORPORATION,
a corporation.

DOCKET NO.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Dell Computer Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas 78758.

PARAGRAPH TWO: Respondent is a publicly traded for-profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

PARAGRAPH THREE: Dell's acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers.

PARAGRAPH FIVE: At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus". Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's

peripheral devices such as a hard disk drive, a video display terminal, or a modem.

PARAGRAPH SIX: By June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card." Nonetheless, at no time prior to or after June 1992 did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

PARAGRAPH SEVEN: After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. On August 6, 1992, Dell gave final approval to the VL-bus design standard. As part of this final approval, the Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed.

PARAGRAPH EIGHT: After VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized" Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

PARAGRAPH NINE: By engaging in the acts or practices described in paragraphs Four through Eight of this complaint, respondent Dell has unreasonably restrained competition in the following ways, among others:

- (a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers delayed their use of the design standard until the patent issue was clarified.
- (b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would

affect the VL-bus' success as an industry design standard.

- (c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.
- (d) Willingness to participate in industry standard-setting efforts have been chilled.

PARAGRAPH TEN: The acts or practices of respondent alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____ A.D., 1995, issues its complaint against said respondent.

By the Commission.

Donald S. Clark
Secretary

[seal]

Dell Computer Corporation

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted an agreement to a proposed consent order from Dell Computer Corporation ("Dell"), which is located in Austin, Texas. The agreement would settle charges by the Commission that the proposed respondent violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition related to VL-bus design standards for personal computing systems.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleged that Dell has engaged in acts and practices that have unreasonably restrained competition to use the VL-bus design for personal computers. The complaint alleges that in February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit

standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers. At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus". Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's peripheral devices such as a hard disk drive, a video display terminal, or a modem.

According to the complaint, by June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card."

The complaint states that on July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On August 6, 1992, Dell's

representative approved the final VL-bus design standard. As part of its approval, a Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. At no time during the standard-setting process did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

The complaint alleges that after VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized" Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

The complaint also alleges that the purpose or effects of the challenged acts or practices have been to restrain competition unreasonably in the following ways:

- (a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers

delayed their use of the design standard until the patent issue was clarified.

- (b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would affect the 'VL-bus' success as an industry design standard.
- (c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.
- (d) Willingness to participate in industry standard-setting efforts have been chilled.

If a company misrepresents its patent rights to a standard-setting organization, thereby leading the organization to adopt a particular standard that may infringe on the company's patent rights, the company's later efforts to take advantage of market power resulting from the standard, rather than from some inherent value of the patent, constitutes a violation of Section 5. Cf. Potter Instrument Co. v. Storage Technology Corp., 641 F.2d 190 (4th Cir.) (court would estop enforcement of patent where patent holder participated in a standard-setting process, intentionally failed to disclose the existence of its patent, and waited six years until the standard was widely adopted before seeking to

enforce the patent), cert. denied 454 U.S. 832 (1981); III P. Areeda, Antitrust Law ¶ 707h at 141-42 (1978) (negligent misrepresentation to patent office can constitute exclusionary act for equitable antitrust purposes).

The Proposed Consent Order

Part I of the order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of Dell. The order also defines the terms VL-bus, VESA, and "designated representative," which means the person appointed by Dell to the standard-setting organization who communicates Dell's position regarding its patent rights related to any standard under consideration by the standard-setting organization.

Part II of the order requires Dell to cease and desist from all enforcement efforts where it has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed Dell's '481 patent.

Part III of the order prohibits Dell from undertaking any new efforts to enforce the '481 patent in which Dell would claim that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

Part IV of the order requires that for a period of ten (10) years after the date the order becomes final, Dell shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, Dell intentionally failed to disclose such patent rights while such industry standard was under consideration.

Part V of the order requires that for a period of ten (10) years after this order becomes final, Dell shall maintain the procedure for assuring compliance with Paragraph IV of the order consistent with a compliance procedure Dell has submitted to the Commission.

Part VI of the order requires Dell to distribute a copy of this order, complaint and an announcement to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to other persons respondent has sent notice regarding the '481 patent claim.

Part VI also requires that Dell distribute a copy of this order, complaint and the announcement to new officers and directors of Dell; to every employee of Dell whose responsibilities include acting as Dell's designated

representative to any standard-setting organization, group or similar body of which respondent is a member; and to each standard-setting organization of which Dell is a member. Dell must also identify to each standard-setting organization it joins the name of the person who will serve as its designated representative to the standard-setting organization.

Part VII requires Dell to file compliance reports for five years.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUEENAGA
in Dell Computer Corp., File No. 931-0097

Today, the Commission accepts for public comment a consent order that prohibits Dell Computer Corp. ("Dell") from attempting to enforce its "'481 patent" against anyone "using or applying VL-bus in its manufacture of computer equipment," because Dell failed to warn the Video Electronics Standards Association ("VESA") of Dell's intellectual property rights when VESA adopted its computer local bus design standard ("VL-bus"). Because the complaint does not allege and the evidence does not support a violation of Section 5 of the FTC Act under any established theory of law, and because under any novel theory the competitive implications of the conduct alleged remain unclear, I dissent.

VESA is a private standard-setting association, the members of which include both computer hardware and software manufacturers. In early 1992, a VESA committee developed a proposed standard for a computer bus to carry information between the central processing unit and the peripheral devices of a computer. In August 1992, VESA members, including Dell, voted to approve the proposed standard. The trade association's ballot

required each member's authorized representative to VESA to sign a statement that "to the best of my knowledge," the proposal did not infringe the member company's intellectual property rights. Dell subsequently asserted that implementation of the VL-bus by others infringed Dell's patent rights.

One antitrust theory might be that Dell intentionally misled VESA regarding the scope of its patent rights; that VESA, relying on Dell's misrepresentations, adopted a standard that conflicted with Dell's rights; and that as a result of the standard, Dell acquired market power. No evidence supports a finding of such intentional conduct, and the allegations in the complaint do not seem sufficient to support a finding of liability on the basis of this theory. I welcome comment on the factual showing that would be necessary and appropriate under this theory.

Another Section 5 theory might be that by participating in a private trade association's standard-setting activities, a firm assumes an affirmative duty to identify the boundaries of its intellectual property rights and to warn the association of any potential conflicts. Alternatively, the Commission might impose such a duty only if a firm returns a ballot with a certification like VESA's, so that a firm could escape antitrust exposure by simply not voting.

Adoption of this novel theory of liability may affect a range of standard-setting organizations. In creating a new antitrust-based duty of care for participants in the voluntary standard setting process, a host of questions need to be resolved. I welcome public comment on the appropriate nature and scope of any such duty, and I look forward to reassessing the case at the end of the comment period.

FTC news

Federal Trade Commission Washington, D.C. 20580 (202) 326-2180

FOR RELEASE: NOVEMBER 2, 1995

DELL COMPUTER SETTLES FTC CHARGES; WON'T ENFORCE PATENT RIGHTS FOR WIDELY USED COMPUTER FEATURE

In a precedent-setting decision announced today, Dell Computer Corporation has agreed to drop patent claims that affect millions of personal computers using the industry standard "VL-bus". The decision follows Federal Trade Commission charges that Dell restricted competition in the personal computer industry and undermined the standard-setting process by threatening to exercise undisclosed patent rights against computer companies adopting the VL-bus standard. To settle the FTC charges, Dell has agreed not to enforce its patent rights against computer manufacturers using the VL-bus, a mechanism to transfer instructions between the computer's central processing unit and its peripherals, such as a hard disk drive or video display hardware. VL-bus is the technology of choice in computers that use "486" chips.

Dell, a leading U.S. manufacturer of personal computers, is based in Austin, Texas.

According to the FTC complaint detailing the charges, Dell was a member of the Video Electronics Standards Association (VESA), a non-profit standards-setting organization, when the association began setting a design standard for a computer bus design to respond to demand for faster graphics performance. VESA members, representing virtually all major U.S. computer hardware and software manufacturers, voted to approve the new VL-bus standard in 1992. As part of that approval, a Dell representative allegedly certified that he knew of no patent, trademark or copyright that the bus design would violate.

After the VESA VL-bus design standard became successful and computer manufacturers had sold more than 1.4 million personal computers incorporating the VL-bus, Dell contacted certain VESA members and asserted that it obtained a patent in 1991 that they were violating by using the VL-bus standard, the complaint alleges.

This is the first time federal law enforcement authorities have taken action against a

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(Dell-11/2/95)

company for acting through a standard-setting association to unilaterally seek to impose costs on its rivals through abuse of the standard-setting process, according to William J. Baer, Director of the FTC's Bureau of Competition.

"Voluntary standard-setting in high tech industries results in greater compatibility among products, which in turn gives consumers a broader range of choices," said Baer. "Open, industry-wide standards also benefit consumers because they can be used by everyone without cost. This settlement makes it clear that firms cannot commit to an open standard, and then, after it becomes successful, assert patent rights in an effort to block use of the design or drive up the price through royalty payments. In this case, Dell's certification to the Association led the industry to believe the standard was truly open. If Dell had informed the Association of its patent claims during the standard-setting process, the Association could have adopted a different standard that would not have conflicted with the patent," he said.

The FTC charged that Dell's actions were unfair and that they unreasonably restrained competition in the following ways, according to the complaint:

- industry acceptance of the VESA VL-bus standard was hindered pending a resolution of the patent issue;
- companies avoided using systems incorporating the VL-bus design because they were concerned that the patent issue would chill its acceptance as the industry standard;
- uncertainty about acceptance of the design standard raised the cost of implementing the VL-bus design and the costs of developing competing bus designs; and
- willingness to participate in industry standard-setting efforts has been chilled.

To settle the charges, Dell has agreed not to enforce its patent against computer manufacturers incorporating the VL-bus design in their products. In addition, Dell would be prohibited from enforcing any of its patent rights that it intentionally fails to disclose upon request of any standard-setting organization during the standard-setting process. The settlement also contains various reporting requirements that would assist the FTC in ensuring Dell's compliance.

The Commission's vote to accept the proposed settlement for public comment was 4-1, with Commissioner Mary L. Azcuenaga dissenting. In her dissenting statement, Commissioner Azcuenaga said, "Because the complaint does not allege and the evidence does not support a violation of Section 5 of the FTC Act under any established theory of law, and because under any novel theory the competitive implications of the conduct alleged remain unclear, I dissent. One antitrust theory might be that Dell intentionally misled VESA regarding the scope of its patent

(Dell--11/2/95)

rights; that VESA, relying on Dell's misrepresentations, adopted a standard that conflicted with Dell's rights; and that as a result of the standard, Dell acquired market power. No evidence supports a finding of such intentional conduct....Another Section 5 theory might be that by participating in a private trade association's standard-setting activities, a firm assumes an affirmative duty to identify the boundaries of its intellectual property rights and to warn the association of any potential conflicts....Adoption of this novel theory of liability may affect a range of standard-setting organizations. In creating a new antitrust-based duty of care for participants in the voluntary standard-setting process, a host of questions needs to be resolved. I welcome public comment on the appropriate nature and scope of any such duty, and I look forward to reassessing the case at the end of the comment period."

The agreement will be published in the Federal Register shortly and will be subject to public comment for 60 days, after which the Commission will decide whether to make it final. Comments should be addressed to the FTC, Office of the Secretary, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

NOTE: A consent agreement is for settlement purposes only and does not constitute an admission of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of \$10,000.

Copies of the complaint, proposed consent agreement and an analysis of the agreement to assist the public in commenting, are available from the FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; 202-326-2222; TTY for the hearing impaired 202-326-2502. To find out the latest FTC news as it is announced, call the FTC's NewsPhone recording at 202-326-2710. FTC news releases and other materials also are available on the Internet at the FTC's World Wide Web Site at: <http://www.ftc.gov>

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MEDIA CONTACT: Claudia Bourne Farrell, Office of Public Affairs
202-326-2181

STAFF CONTACT: William J. Baer, Bureau of Competition
202-326-2932

(FTC File No. 931 0097)

(Dell1)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

File No. 931-0097,

DELL COMPUTER CORPORATION,
a corporation.

AGREEMENT CONTAINING
CONSENT ORDER TO
CEASE AND DESIST

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Dell Computer Corporation ("Dell"), and it now appearing that Dell Computer Corporation, hereinafter sometimes referred to as proposed respondent, is willing to enter into an agreement containing an order to cease and desist from engaging in the acts and practices being investigated, and providing for other relief,

IT IS HEREBY AGREED by and between the proposed respondent, by its duly authorized officer and its attorney and counsel for the Commission that:

1. Proposed respondent Dell is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 2214 West Braker Lane, Austin, Texas 78758.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed respondent waives:

- (a) any further procedural steps;
- (b) the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;
- (c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- (d) any claim under the Equal Access to Justice Act.

4. Proposed respondent shall submit with this agreement an initial report signed by the proposed respondent setting forth in precise detail the manner in which the proposed respondent will comply with Paragraph IV of the order when and if entered. Such report will not become part of the public record unless and until

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the accompanying agreement and order are accepted by the Commission. At the time such report is submitted, proposed respondent may request confidentiality for any portion thereof with a precise showing of justification therefor.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by proposed respondent that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules of Practice, the Commission may, without further notice to the proposed respondent, (1) issue its complaint corresponding in form and substance with the draft complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or agreement may be used to vary or contradict the terms of the order.

8. Proposed respondent has read the proposed complaint and order contemplated hereby. Proposed respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

I

IT IS ORDERED that, as used in this order, the following definitions shall apply:

A. "Respondent" or "Dell" means Dell Computer Corporation, its predecessors, subsidiaries, divisions, groups, and affiliates controlled by Dell Computer Corporation, their successors and assigns, and their directors, officers, employees, agents and representatives.

B. "Designated representative" means the person appointed by Dell to the standard-setting organization who communicates respondent's position regarding respondent's patent rights related to any standard under consideration by the standard-setting organization.

C. "VESA" means the Video Electronics Standards Association, located at 2150 North First Street, Suite 440, San Jose, California, 95131.

D. "VL-bus" means the computer local bus design standard VESA established in August 1992 for the transmission of computer information between a computer's central processing unit and certain computer peripheral devices.

E. "'481 patent" means United States patent number 5,036,481.

F. "Commission" means the Federal Trade Commission.

II

IT IS FURTHER ORDERED that, within thirty (30) days after the date this order becomes final, and until July 31, 2008, respondent shall cease and desist all efforts it has undertaken by any means, including without limitation the threat, prosecution or defense of any suits or other actions, whether legal, equitable, or administrative, as well as any arbitrations, mediations, or any other form of private dispute resolution; through or in which respondent has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

III

IT IS FURTHER ORDERED that, until July 31, 2008, respondent shall not undertake any new efforts to enforce the '481 patent by threatening, prosecuting or defending any suit or other action, whether legal, equitable, or administrative, as well as any

arbitration, mediation, or other form of private dispute resolution, through or in which respondent claims that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

IV

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this order becomes final, respondent shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights, if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, respondent intentionally failed to disclose such patent rights while such industry standard was under consideration.

V

IT IS FURTHER ORDERED that, for a period of ten (10) years after this order becomes final, respondent shall maintain the procedure for assuring compliance with Paragraph IV of this order, as accepted by the Commission pursuant to Paragraph 4 of the Agreement Containing Consent Order to Cease and Desist.

VI

IT IS FURTHER ORDERED that respondent shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to any other person or entity to whom respondent has sent notice regarding its claim that the implementation of the VL-bus standard conflicts with or infringes the '481 patent.

B. Within thirty (30) days after the date this order becomes final, distribute a copy of this order, complaint and the announcement shown in Appendix A to this order to every officer and director of respondent, and to every employee of respondent whose responsibilities include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member.

C. For a period of five (5) years after the date this order becomes final, furnish a copy of this order and complaint to each new officer and director of respondent and to every new employee of respondent whose responsibilities will or do include acting as respondent's designated representative to any standard-setting organization, group or similar body of which respondent is a member. Such copies must be furnished within thirty (30) days after any such persons assume their position as an officer, director or employee. For purposes of this paragraph VI.C., "new employee" shall include without limitation any of respondent's employees whose duties change during their employment to include acting as respondent's designated representative to any standards-setting organization, group or similar body of which respondent is a member.

D. For a period of ten (10) years after the date this order becomes final, respondent shall furnish each standard-setting organization of which it is a member and which it joins a copy of the order and respondent shall identify to each such organization the name of the person who will serve as respondent's designated representative to the standard-setting organization.

IS FURTHER ORDERED THAT RESPONDENT SHALL:

A. Within ninety (90) days after the date this order becomes final, and annually thereafter for five (5) years on the anniversary of the date this order becomes final, and at such other times as the Commission may, by written notice to the respondent, require, file a verified written report with the Commission setting forth in detail the manner and form in which the respondent has complied and is complying with this order.

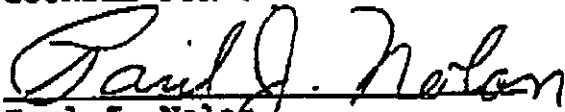
B. For a period of ten (10) years after the date this order becomes final, maintain and make available to Commission staff, for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Paragraphs V and VI of this order.

C. Notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change

in respondent that may affect compliance obligations arising out of this order.


Signed this _____ day of _____, 19____


COUNSEL FOR FEDERAL TRADE COMMISSION


Paul J. Nolan



Daniel Silver


DELL COMPUTER CORPORATION



Richard Salwen
Vice-President and Deputy
General Counsel for
Dell Computer Corporation



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APPROVED:


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Mary Lou Steptoe William J. Baer
Acting Director
Bureau of Competition

Appendix A

Announcement

Dell Computer Corporation has entered into a consent agreement with the Federal Trade Commission. Pursuant to this consent agreement, the Commission issued an order on [Date] that prohibits Dell from enforcing its United States patent number 5,036,481 against any company for such company's use of the Video Electronics Standards Association's VL-bus standard.

For more specific information, please refer to the FTC order itself, a copy of which is attached for your information.

General Counsel
Dell Computer Corporation

DRAFT

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

DELL COMPUTER CORPORATION,
a corporation.

File No. 931-0097

INITIAL REPORT OF DELL COMPUTER CORPORATION CONCERNING
COMPLIANCE WITH CONSENT ORDER

Pursuant to Paragraph 4 of the Agreement Containing Consent Order To Cease And Desist dated April __, 1995, Dell Computer Corporation ("Dell") submits this report setting forth the manner in which it will comply with Paragraph IV of the Consent Order ("the Order") when and if entered.

Paragraph IV requires that, for a period of ten (10) years after the Order becomes final, Dell will cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent right if, in response to a written inquiry from the standard-setting organization to Dell's designated representative, Dell intentionally failed to disclose such patent rights while such industry standard was under consideration. To comply with this provision, Dell will institute the following procedure if and when the Order becomes final, which procedure shall be maintained for a period of ten (10) years after the Order becomes final:

A. Dell will identify one or more employees who shall maintain familiarity with Dell's intellectual property rights;

- 2 -

B. Upon receipt of written inquiry from a standard-setting association as provided in Paragraph IV of the Order, Dell's designated representative to that association will confer, prior to responding to such written inquiry, with an employee identified pursuant to Paragraph A above, as to whether the proposed standard infringes any of Dell's patent rights;

C. Dell will maintain a file containing a copy of (1) each written inquiry received from a standard-setting association as provided in Paragraph IV of the Order and (2) any reply to such written inquiry; and

D. In the event that Dell proposes to enforce, or threaten to enforce, any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights, Dell shall cause the file created pursuant to Paragraph C above, to be searched for any reference to the industry design standard whose use or implementation is being proposed as the basis for the accusation of infringement.

Respectfully submitted,



Richard Salwen
Vice-President and Deputy General
Counsel for
Dell Computer Corporation

Dated:

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
)	
DELL COMPUTER CORPORATION,)	DOCKET NO.
a corporation.)	
)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent, Dell Computer Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH ONE: Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas 78758.

PARAGRAPH TWO: Respondent is a publicly traded for-profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

PARAGRAPH THREE: Dell's acts and practices, including the acts and practices alleged in this complaint, are in or affect commerce as defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers.

PARAGRAPH FIVE: At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus". Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's

peripheral devices such as a hard disk drive, a video display terminal, or a modem.

PARAGRAPH SIX: By June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card." Nonetheless, at no time prior to or after June 1992 did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

PARAGRAPH SEVEN: After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. On August 6, 1992, Dell gave final approval to the VL-bus design standard. As part of this final approval, the Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed.

PARAGRAPH EIGHT: After VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized" Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

PARAGRAPH NINE: By engaging in the acts or practices described in paragraphs Four through Eight of this complaint, respondent Dell has unreasonably restrained competition in the following ways, among others:

- (a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers delayed their use of the design standard until the patent issue was clarified.
- (b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would

affect the VL-bus' success as an industry design standard.

- (c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.
- (d) Willingness to participate in industry standard-setting efforts have been chilled.

PARAGRAPH TEN: The acts or practices of respondent alleged herein were and are to the prejudice and injury of the public. The acts or practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts or practices are continuing and will continue, or may recur, in the absence of the relief requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____ A.D., 1995, issues its complaint against said respondent.

By the Commission.

Donald S. Clark
Secretary

[seal]

Dell Computer Corporation

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted an agreement to a proposed consent order from Dell Computer Corporation ("Dell"), which is located in Austin, Texas. The agreement would settle charges by the Commission that the proposed respondent violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition related to VL-bus design standards for personal computing systems.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleged that Dell has engaged in acts and practices that have unreasonably restrained competition to use the VL-bus design for personal computers. The complaint alleges that in February 1992 Dell became a member of the Video Electronics Standards Association ("VESA"), a non-profit

standards-setting association composed of virtually all major U.S. computer hardware and software manufacturers. At or about the same time, VESA began the process of setting a design standard for a computer bus design, later to be known as the VESA Local Bus or "VL-bus". Like all computer buses, the VL-bus carries information or instructions between the computer's central processing unit and the computer's peripheral devices such as a hard disk drive, a video display terminal, or a modem.

According to the complaint, by June 1992 VESA's Local Bus Committee, with Dell representatives sitting as members, approved the VL-bus design standard, which improved upon then-existing technology by more quickly and efficiently meeting the transmission needs of new, video-intensive software. One year earlier, in July 1991, Dell had received United States patent number 5,036,481 (the "'481 patent"), which, according to Dell, gives it "exclusive rights to the mechanical slot configuration used on the motherboard to receive the VL-bus card."

The complaint states that on July 20, 1992, Dell voted to approve the preliminary proposal for the VL-bus standard. As part of this approval, a Dell representative certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. After committee approval of the VL-bus design standard, VESA sought the approval of the VL-bus design standard by all of its voting members. On August 6, 1992, Dell's

representative approved the final VL-bus design standard. As part of its approval, a Dell representative again certified in writing that, to the best of his knowledge, "this proposal does not infringe on any trademarks, copyrights, or patents" that Dell possessed. At no time during the standard-setting process did Dell disclose to VESA's Local Bus Committee the existence of the '481 patent.

The complaint alleges that after VESA's VL-bus design standard became very successful, having been included in over 1.4 million computers sold in the eight months immediately following its adoption, Dell informed certain VESA members who were manufacturing computers using the new design standard that their "implementation of the VL-bus is a violation of Dell's exclusive rights." Dell demanded that these companies meet with its representatives to "determine . . . the manner in which Dell's exclusive rights will be recognized" Dell followed up its initial demands by meeting with several companies, and it has never renounced the claimed infringement.

The complaint also alleges that the purpose or effects of the challenged acts or practices have been to restrain competition unreasonably in the following ways:

- (a) Industry acceptance of the VL-bus design standard was hindered because some computer manufacturers

delayed their use of the design standard until the patent issue was clarified.

- (b) Systems utilizing the VL-bus design standard were avoided due to concerns that patent issues would affect the VL-bus' success as an industry design standard.
- (c) The uncertainty concerning the acceptance of the VL-bus design standard raised the costs of implementing the VL-bus design as well as the costs of developing competing bus designs.
- (d) Willingness to participate in industry standard-setting efforts have been chilled.

If a company misrepresents its patent rights to a standard-setting organization, thereby leading the organization to adopt a particular standard that may infringe on the company's patent rights, the company's later efforts to take advantage of market power resulting from the standard, rather than from some inherent value of the patent, constitutes a violation of Section 5. Cf. Potter Instrument Co. v. Storage Technology Corp., 641 F.2d 190 (4th Cir.) (court would estop enforcement of patent where patent holder participated in a standard-setting process, intentionally failed to disclose the existence of its patent, and waited six years until the standard was widely adopted before seeking to

enforce the patent), cert. denied 454 U.S. 832 (1981); III P. Areeda, Antitrust Law § 707h at 141-42 (1978) (negligent misrepresentation to patent office can constitute exclusionary act for equitable antitrust purposes).

The Proposed Consent Order

Part I of the order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of Dell. The order also defines the terms VL-bus, VESA, and "designated representative," which means the person appointed by Dell to the standard-setting organization who communicates Dell's position regarding its patent rights related to any standard under consideration by the standard-setting organization.

Part II of the order requires Dell to cease and desist from all enforcement efforts where it has asserted that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed Dell's '481 patent.

Part III of the order prohibits Dell from undertaking any new efforts to enforce the '481 patent in which Dell would claim that any person or entity, by using or applying VL-bus in its manufacture of computer equipment, has infringed the '481 patent.

Part IV of the order requires that for a period of ten (10) years after the date the order becomes final, Dell shall cease and desist from enforcing or threatening to enforce any patent rights by asserting or alleging that any person's or entity's use or implementation of an industry design standard infringes such patent rights if, in response to a written inquiry from the standard-setting organization to respondent's designated representative, Dell intentionally failed to disclose such patent rights while such industry standard was under consideration.

Part V of the order requires that for a period of ten (10) years after this order becomes final, Dell shall maintain the procedure for assuring compliance with Paragraph IV of the order consistent with a compliance procedure Dell has submitted to the Commission.

Part VI of the order requires Dell to distribute a copy of this order, complaint and an announcement to VESA, to those members of VESA that Dell contacted regarding possible infringement of the '481 patent, and to other persons respondent has sent notice regarding the '481 patent claim.

Part VI also requires that Dell distribute a copy of this order, complaint and the announcement to new officers and directors of Dell; to every employee of Dell whose responsibilities include acting as Dell's designated

representative to any standard-setting organization, group or similar body of which respondent is a member; and to each standard-setting organization of which Dell is a member. Dell must also identify to each standard-setting organization it joins the name of the person who will serve as its designated representative to the standard-setting organization.

Part VII requires Dell to file compliance reports for five years.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in Dell Computer Corp., File No. 931-0097

Today, the Commission accepts for public comment a consent order that prohibits Dell Computer Corp. ("Dell") from attempting to enforce its "'481 patent" against anyone "using or applying VL-bus in its manufacture of computer equipment," because Dell failed to warn the Video Electronics Standards Association ("VESA") of Dell's intellectual property rights when VESA adopted its computer local bus design standard ("VL-bus"). Because the complaint does not allege and the evidence does not support a violation of Section 5 of the FTC Act under any established theory of law, and because under any novel theory the competitive implications of the conduct alleged remain unclear, I dissent.

VESA is a private standard-setting association, the members of which include both computer hardware and software manufacturers. In early 1992, a VESA committee developed a proposed standard for a computer bus to carry information between the central processing unit and the peripheral devices of a computer. In August 1992, VESA members, including Dell, voted to approve the proposed standard. The trade association's ballot

required each member's authorized representative to VESA to sign a statement that "to the best of my knowledge," the proposal did not infringe the member company's intellectual property rights. Dell subsequently asserted that implementation of the VL-bus by others infringed Dell's patent rights.

One antitrust theory might be that Dell intentionally misled VESA regarding the scope of its patent rights; that VESA, relying on Dell's misrepresentations, adopted a standard that conflicted with Dell's rights; and that as a result of the standard, Dell acquired market power. No evidence supports a finding of such intentional conduct, and the allegations in the complaint do not seem sufficient to support a finding of liability on the basis of this theory. I welcome comment on the factual showing that would be necessary and appropriate under this theory.

Another Section 5 theory might be that by participating in a private trade association's standard-setting activities, a firm assumes an affirmative duty to identify the boundaries of its intellectual property rights and to warn the association of any potential conflicts. Alternatively, the Commission might impose such a duty only if a firm returns a ballot with a certification like VESA's, so that a firm could escape antitrust exposure by simply not voting.

Adoption of this novel theory of liability may affect a range of standard-setting organizations. In creating a new antitrust-based duty of care for participants in the voluntary standard setting process, a host of questions need to be resolved. I welcome public comment on the appropriate nature and scope of any such duty, and I look forward to reassessing the case at the end of the comment period.