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

Commissioner Azcuenaga dissenting.

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

STATEMENT OF THE FEDERAL TRADE COMMISSION

Today the Commission issues its complaint and (with two minor modifications) its final consent order in Dell Computer Corporation. The Commission reached this decision after a careful and thorough evaluation of the public comments received on the proposed order. Because the proposed order generated considerable public comment, we offer these views to improve understanding of this enforcement action.

The outcome of any Commission enforcement action depends on the facts of the particular case. The Dell case involved an effort by the Video Electronics Standards Association ("VESA") to identify potentially conflicting patents and to avoid creating standards that would infringe those patents. In order to achieve this goal, VESA -- like some other standard-setting entities -- has a policy that member companies must make a certification that discloses any potentially conflicting intellectual property rights. VESA believes that its policy imposes on its members a good-faith duty to seek to identify potentially conflicting patents. This policy is designed to further

VESA's strong preference for adopting standards that do not include proprietary technology.

This case involved the standard for VL-bus, a mechanism to transfer instructions between a computer's central processing unit and its peripherals. During the standard-setting process, VESA asked its members to certify whether they had any patents, trademarks, or copyrights that conflicted with the proposed VL-bus standard; Dell certified that it had no such intellectual property rights.[1] After VESA adopted the standard -- based, in part, on Dell's certification -- Dell sought to enforce its patent against firms planning to follow the standard.

We believe that in the limited circumstances presented by this case, enforcement action is appropriate. In this case--where there is evidence that the association would have implemented a different non-proprietary design had it been informed of the patent conflict during the certification process, and where Dell failed to act in good faith to identify and disclose patent conflicts -- enforcement action is appropriate to prevent harm to competition and consumers.[2]

The remedy in this case is carefully circumscribed. It simply prohibits Dell from enforcing its patent against those using the VL-bus standard.[3] This relief assures that the competitive process is not harmed by the conduct addressed in the Commission's complaint. Moreover, the remedy in this case is consistent with those cases, decided under the concept of equitable estoppel, in which courts precluded patent-holders from enforcing patents when they failed

---

[1] The dissent seems to suggest that the actions of the Dell representative in submitting the certification did not bind the corporation. Dissenting statement at 25-26. Contrary to that suggestion, Dell's voting representative made his certification on behalf of the corporation. This is supported by VESA's construction of its procedures. Corporations act through their agents, and when an agent acts in his capacity as an agent, as was the case here, he acts for the corporation. *See* Fletcher Cyclopedia of the Law of Private Corporations 30, 279 (1990).

[2] The Commission has reason to believe that once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder. This market power was not inevitable: had VESA known of the Dell patent, it could have chosen an equally effective, non-proprietary standard. If Dell were able to impose a royalty on each VL-bus installed in 486-generation computers, prices to consumers would likely have increased.

The dissent speculates that computer manufacturers could have readily shifted to a new standard. Dissenting Statement at 10. Although that alternative might be possible in some settings, it was not in this case where the market had overwhelmingly adopted the VL-bus standard.

[3] It also prohibits Dell from enforcing patent rights in the future when it intentionally fails to disclose those rights upon request of any standard-setting organization during the standard-setting process.

properly to disclose the existence of those patents.[4] In this case, Dell is precluded from enforcing the patent only against those implementing the relevant standard.[5]

Some of those who commented on the Agreement Containing Consent Order suggested that this matter expresses an endorsement of certain types of standards (*i.e.*, those including only non-proprietary technology versus those including proprietary technology) or of a certain form of standard-setting process. On the contrary, the Commission's enforcement action does not address, and is not intended to address, any of these broader issues.

Other commenters asked whether the Commission intended to signal that there is a general duty to search for patents when a firm engages in a standard-setting process. The relief in this matter is carefully limited to the facts of the case. Specifically, VESA's affirmative disclosure requirement creates an expectation by its members that each will act in good faith to identify and disclose conflicting intellectual property rights. Other standard-setting organizations may have different procedures that do not create such an expectation on the part of their members.[6] Consequently, the relief in this case should not be read to impose a general duty to search.

Others suggested that the theory supporting this enforcement action could impose liability for an unknowing (or "inadvertent") failure to disclose patent rights. Again, the Commission's enforcement action is limited to the facts of this case, in which there is reason to believe that Dell's failure to disclose the patent was not

---

[4] *See, e.g., Potter Instrument Co., Inc. v. Storage Technology Corp.*, 641 F.2d 190 (4th Cir.), *cert. denied*, 454 U.S. 832 (1981); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q.2d 1481 (C.D. Cal. 1993); *Stambler v. Diebold, Inc.*, 11 U.S.P.Q.2d 1709, 1715 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989).

[5] The dissent seems to suggest that relief should be limited to those firms that relied on Dell's certification. Dissenting statement at 13. The equitable estoppel doctrine, which seeks to remedy harm to the aggrieved companies, would support such a limited remedy. But from the Commission's perspective, based on our responsibility to protect the competitive marketplace, broader relief is warranted.

Here the market adopted the VL-bus standard. Both those who relied on Dell's representation, and others who had to adopt the industry standard, were faced with potential harm. Absent out enforcement action, Dell could have required royalties from all firms that adopted the standard. Where the market has chosen a particular technology believed to be available to all without cost, limiting the order solely to those companies that relied on Dell's certification might not fully protect the competitive process or consumers.

[6] Contrary to the dissent's assertion (dissenting statement at 20), the VESA policy for dealing with proprietary standards is not "very like ANSI's patent policy." ANSI does not require that companies provide a certification as to conflicting intellectual property rights. Therefore, its policy, unlike VESA's, does not create an expectation that there is no conflicting intellectual property.

inadvertent. The order should not be read to create a general rule that inadvertence in the standard-setting process provides a basis for enforcement action. Nor does this enforcement action contain a general suggestion that standard-setting bodies should impose a duty to disclose.

Finally, some commenters suggested that private litigation is sufficient to address this type of controversy. Although there has been private litigation for failure to disclose patent rights under equitable estoppel theories, enforcement of Section 5 of the Federal Trade Commission Act also serves an important role in this type of case, where there is a likelihood of consumer harm. Moreover, unlike other antitrust statutes, Section 5 provides only for prospective relief. In fact, the judicious use of Section 5 -- culminating in carefully tailored relief -- is particularly appropriate in this type of case, in which the legal and economic theories are somewhat novel.[7]

One topic considered by the Commission's hearings last fall on Global and Innovation-Based Competition was the important role of standard-setting in the technological innovation that will drive much of this nation's competitive vigor in the 21st Century. The record of those hearings is replete with discussion of the procompetitive role of standard-setting organizations. The Commission recognizes that enforcement actions in this area should be undertaken with care, lest they chill participation in the standard-setting process. Nevertheless, a standard-setting organization may provide a vehicle for a firm to undermine the standard-setting process in a way that harms competition and consumers.[8] We believe that the commission's enforcement action in Dell strikes the right balance between these important objectives.[9]

---

[7] *Cf. Charles Pfizer & Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); Report of the American Bar Association, Section of Antitrust Law, Special Committee To Study the Role of the Federal Trade Commission 18 (Apr. 7, 1989).

[8] *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

[9] The dissent takes issue with the our reliance on facts not alleged in the complaint. Dissenting statement at 21-23. It is entirely within the Commission's discretion to interpret its complaint and consent order and provide any information it deems helpful in assisting interested persons to interpret the order. *Cf.* Commission Rule 2.34, 16 CFR 2.34 (1996). It would be odd, indeed, for the Commission to spell out in the complaint each and every fact on which it relies when it issues a consent order. In any case, we note our disagreement with the dissent's own assessment of the record.