

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Today the Commission issues its complaint and final consent order against Dell Computer Corporation ("Dell"), accompanied by an unusual explanatory statement on behalf of the majority. The case, which was touted in the Commission's press release soliciting public comment as "precedent-setting," has aroused a high degree of interest. Several thoughtful comments have been received.

The complaint against Dell does not articulate a violation of Section 5 of the FTC Act under any established theory of law. Under any novel theory, the competitive implications of the conduct alleged remain unclear. As confirmed by the comments we have received, a host of questions needs to be resolved before the Commission creates a new antitrust-based duty of care for participants in the voluntary standards-setting process.¹

The statement of the majority appears intended to respond to the concerns raised in the comments. Unfortunately, it does not resolve those concerns. Instead, by failing to take a clear stand on what legal standard it intends to apply, the majority creates more confusion. In its explanatory statement, the majority tries to have it both ways: it manages at once to suggest that this case is based on a traditional theory, which requires a showing of intent, and at the same time to say that this case is based on a novel theory, apparently to explain the absence of any showing or allegation of intent. The complaint and order combined with the explanatory statement of the majority give rise to troubling implications about the duty of care in the standards-setting process.

I. FACTUAL BACKGROUND

This is a case about alleged abuse of the standards-setting process by a patent holder. The facts alleged in the complaint are not complex. The Video Electronics Standards Association ("VESA") is a private standards-setting organization, including as members both computer hardware and software manufacturers. In 1991 and 1992, VESA developed a standard for a computer bus design, called the VESA Local Bus ("VL-bus"). The bus carries information and instructions between the computer's central processing unit and

¹ My dissenting statement when the order was first published invited comment on these issues. See Dissenting Statement of Commissioner Mary L. Azcuenaga in this matter (October 30, 1995).

peripheral devices. In August 1992, VESA conducted a vote to approve its VL-bus standard. The VESA ballot required each member's authorized voting representative to sign a statement that "to the best of my knowledge," the proposal did not infringe the member company's intellectual property rights.²

According to the Commission's complaint, after adoption of the standard, the VL-bus design was incorporated in many computers. The complaint alleges that Dell subsequently asserted that the "implementation of the VL-bus [by other computer manufacturers] is a violation of Dell's exclusive [patent] rights." For purposes of antitrust analysis, it is important to note that the complaint does not allege that Dell's representative to VESA had any knowledge of the coverage of Dell's relevant patent (known as the "481" patent) or of the potential infringement by the VL-bus at the time he cast the ballot.

Nothing in the limited information available to the Commission suggests that Dell had any greater role in the development and promulgation of the VESA VL-bus standard than that described in the minimal factual allegations in the complaint. For example, the complaint does not allege that Dell proposed or sponsored the standard, that Dell urged others to vote for the standard, that Dell employees participated in drafting the standard, that Dell employees were present, in person or online, during the committee drafting sessions, that Dell steered the VESA committee toward adopting a standard that incorporated Dell technology, or that Dell had any hand whatsoever in shaping the standard.

The sole act for which Dell is charged with a violation of law is that Dell's voting representative, in voting to adopt the standard, signed a certification that to the best of his knowledge, the proposed standard did not infringe on any relevant intellectual property.

II. INTENTIONAL FRAUD OR ABUSE OF THE STANDARDS PROCESS

This might have been a routine antitrust case. A traditional antitrust analysis of Dell's conduct would have centered on two

² The ballot contained the following certification:

I certify that I am the VESA member listed at the top of this ballot, or am authorized by such member to submit this ballot. By casting this vote I also certify that, to the best of my knowledge, this proposal does not infringe on any trademarks, copyrights, or patents, with the exception of any listed on the comment page. I understand that my vote and any comments will become public.

questions: whether Dell intentionally misled VESA into adopting a VL-bus standard that was covered by Dell's '481 patent and whether, as a result of the adoption of such a standard, Dell obtained market power beyond that lawfully conferred by the patent. If Dell had obtained market power by knowingly or intentionally misleading a standards-setting organization, it would require no stretch of established monopolization theory to condemn that conduct. Indeed, Section IV of the order against Dell seems to address precisely such a traditional antitrust violation. It prohibits Dell's enforcement of intellectual property rights only if in response to a written inquiry "respondent intentionally failed to disclose such patent rights" during the standards-setting process. (Emphasis added). The public comments, the majority, and I all seem to agree that Section 5 of the Federal Trade Commission Act ("FTC Act") prohibits knowing deception of standards makers to acquire market power and other intentional abuses of the standards process. If the case had gone only this far, it likely would not have elicited comment or controversy.³

The novelty of the case against Dell, the reason it has been characterized as precedent-setting, is that the order prohibits Dell from enforcing the '481 patent without any allegation in the complaint that Dell intentionally and knowingly misled VESA and without any allegation that Dell obtained market power as a result of the misstatement at issue.⁴ The complaint does not allege that Dell's voting representative was aware either of the patent or of the potential infringement at the time the vote was taken.

The way in which the Commission handles the factual questions of intent and knowledge is critical to the policy issue at the core of this case, which is the nature and extent of the duty under Section 5 of the FTC Act of a member of a standards-setting organization in the

³ A party who has engaged in intentional and knowing misleading conduct in the standards process may be estopped from asserting a patent. See *Stambler v. Diebold Inc.*, 11 U.S.P.Q. 1709, 1714 (E.D.N.Y. 1988), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989) (individual inventor sat on an ANSI committee without disclosing his patent "after concluding that the proposed thrift and MINTS standards infringed on his patent"); *Wang Laboratories Inc. v. Mitsubishi Electronics America Inc.*, 29 U.S.P.Q. 1481, 1495 (C.D. Cal. 1993) (allegation that "Wang persuaded JEDC to adopt its memory '30-pin' module configuration as the industry standard, without disclosing the pending patent application on said module"). See also *Potter Instrument Co. v. Storage Technology Corp.*, 207 U.S.P.Q. 763 (E.D.Va. 1980), *aff'd*, 641 F.2d 190 (4th Cir. 1981), *cert. denied*, 454 U.S. 832 (1981).

⁴ The majority in its statement asserts that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is reasonable to assume that the majority crafted its statement with care, and this sole reference to market power does not suggest that Dell wrongfully obtained market power, but rather that the standard conferred it.

standards-setting process. It is one thing to prohibit a knowing misrepresentation or an intentional manipulation; under that standard, it is clear how to avoid liability. It is quite another matter to base liability on constructive knowledge or unsubstantiated inferences. It is possible to assert that Dell "must have" known of the patent, because obviously some people at Dell did know about the patent.⁵ That sort of logic leads to a strict liability standard, under which a company would place its intellectual property at risk simply by participating in the standards-setting process. No matter how much money, time and talent a company might devote to avoiding mistakes in the certification process, a mistake still would be possible and potentially very costly.

By finding a violation of Section 5 in the absence of any allegation of a knowing or intentional misrepresentation, the Commission effectively imposes a duty of disclosure on Dell beyond what VESA required. The Commission may have the authority to do this but the question is whether it is advisable. VESA might have required, but did not, that each voting representative certify, on behalf of the entire company, that nothing in its entire patent portfolio overlapped with the standard and have made the certification binding regardless of any mistakes or subsequent, good faith discoveries.⁶ Had that been the standard, the process of collecting votes likely would have been quite prolonged and, perhaps, even impossible. Nevertheless, VESA could have structured its process in this more exacting way. Perhaps there is a good reason why it did not.

The theory of antitrust liability for intentional abuse of the standards process is similar to the monopolization theory applied in cases of fraud on the Patent and Trademark Office ("PTO"). In addition, although the decisions of the Court of Appeals for the Federal Circuit in patent cases are not controlling in cases under

⁵ Knowing of the patent is not the same as knowing that the standard would infringe the patent. One might expect this to be particularly true in high technology industries. The majority does not address this issue, although it would appear to be relevant in adopting a duty of care not based on intent. Another relevant question is what to do about an informed opinion, later disputed, that a standard would not infringe a patent. It would not be difficult to think of numerous other questions relevant to defining the duty of care.

⁶ One view is that because the VESA ballot required a certification that the person signing is authorized to vote, the statement "to the best of my knowledge" refers to Dell's collective corporate knowledge rather than the personal knowledge of the voting representative. But the complaint did not adopt that construction of the ballot. Instead, paragraph seven of the complaint alleges that the "Dell representative certified in writing that, to the best of his knowledge," the standard did not infringe Dell's intellectual property claims. (Emphasis added.) See discussion at 25-26, below.

Section 5 of the FTC Act, it may be useful to consider the principles in those cases.

Two standards have been applied by the courts, respectively, in determining fraud on or inequitable conduct before the PTO. First, to prove fraud on the PTO necessary to make an unlawful monopolization claim, based on the Supreme Court's decision in *Walker Process*, a party must make out a common law fraud claim, including proof of a material misrepresentation, intentionally made to deceive, and reasonably relied on by the PTO.⁷ Second, although the showing of inequitable conduct as a defense to a patent infringement claim is less rigorous than that necessary to establish common law fraud, the Court of Appeals for the Federal Circuit nonetheless requires clear and convincing evidence that the patent applicant failed to disclose material information known to the applicant, or that the applicant submitted false information with the intent to act inequitably.⁸ Patent law is not within the institutional expertise of the Commission, but it would seem useful to study the history and policy underlying these strict requirements for establishing liability before setting forth in a different direction and creating new theories under Section 5 of the FTC Act.

III. ANTICOMPETITIVE EFFECTS

A second notable omission from the Dell complaint is any allegation that the company acquired or extended market power.⁹ Instead, paragraph nine of the complaint alleges that Dell unreasonably restrained competition in four ways: (1) industry

⁷ See, e.g., *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965); *Argus Chemical Corp. v. Fibre Glass-Evercoat, Inc.*, 812 F.2d 1381, 1384-85 (Fed. Cir. 1987). In *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), the court found, by analogy to *Walker Process*, that the Commission had authority to order compulsory licensing of a patent obtained by fraud and remanded for a hearing de novo. The compulsory license was upheld. See *American Cyanamid Co.*, 72 FTC 623, 684-85 (1967), *aff'd sub nom. Charles Pfizer & Co.*, 410 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). Section 6 of the Antitrust Guidelines for the Licensing of Intellectual Property (April 6, 1995) states that enforcement of patents "obtained by inequitable conduct that falls short of fraud under some circumstances may violate Section 5 of the Federal Trade Commission Act."

⁸ See, e.g., *Heidelberger Druckmaschinen v. Hantscho Commercial Products, Inc.*, 21 F.3d 1068, 1073 (Fed. Cir. 1994); *Labounty Manufacturing, Inc. v. ITC*, 958 F.2d 1066, 1076 (Fed. Cir. 1992); *SmithKline Diagnostics, Inc. v. Helena Labs.*, 859 F.2d 878, 891 (Fed. Cir. 1988); *Specialty Composites v. Cabot Corp.*, 845 F.2d 981, 991 (Fed. Cir. 1988); *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1415 (Fed. Cir. 1987).

⁹ The complaint does not identify or allege any relevant product or geographic market. Usually, the antitrust analysis of particular practices begins with the identification of relevant product and geographic markets.

acceptance of the VL-bus "was hindered"; (2) systems using the VL-bus "were avoided"; (3) uncertainty concerning the acceptance of the VL-bus design standard "raised the costs of implementing the VL-bus design" and "of developing competing bus designs"; and (4) "willingness to participate in industry standards-setting efforts have [sic] been chilled." Assuming the allegations are true, none of them suggests that Dell acquired the power to control price and output in a relevant antitrust market.¹⁰ Indeed, if, as appears from the allegations to be the case, computer producers readily could switch to bus designs that do not incorporate Dell's technology, no monopoly seems possible. The first three allegations regarding delay in acceptance of the standard, avoidance of systems using the VL-bus, and uncertainty about the bus standard, all relate to the speed and breadth of industry acceptance of the standard. Assuming that industry acceptance of the bus was slower or less extensive than it otherwise would have been, those effects do not necessarily translate into higher prices of computers for consumers, restricted output of computers in any relevant geographic market, or any other harm to consumers or competition.

Although the complaint does not allege that Dell acquired market power, the majority asserts in its explanatory statement that "once VESA's VL-bus standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder." Statement at 2, n.2. It is worth noting that even here the majority does not allege that Dell did anything to acquire market power. In addition, the majority fails to identify the relevant market in which market power assertedly was "conferred." Dell is a producer of computers, and the press release announcing that the order had been accepted for public comment stated that Dell restricted competition "in the personal computer industry." Perhaps the majority actually does mean to find that Dell has market power in the personal computer industry; if so, some explanation is needed to make the finding more plausible, and an allegation to that effect in the complaint would seem to be in order.

The fourth allegation in the complaint, that Dell "chilled" willingness to participate in standards-setting, is particularly odd. Under the Dell order, a participant in a VESA-like standards process would be well advised not only to review its patent portfolio carefully

¹⁰ Market power is the ability to raise prices above the competitive level. *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984).

before permitting its voting representative to sign a ballot, but if it has valuable intellectual property to protect, it might well consider not voting at all. The danger that voting on a standard might result in the loss of a company's intellectual property rights may dissuade some firms from participating in the standards-setting process in the first place.¹¹ That would be a curious result indeed for an order resting on a complaint that alleges, as an anticompetitive effect, that "[w]illingness to participate in industry standard-setting efforts ha[s] been chilled."

IV. REMEDY

The relief imposed by the majority seems unnecessarily harsh. The order prohibits Dell from enforcing its '481 patent against any firm using the patented technology to implement the VL-bus design for the life of the patent. In effect, the order requires Dell to provide a global royalty-free license to any firm that may have used the technology in the past, or may use it in the future, to implement the standard. The explanatory statement of the majority indicates that the relief is "carefully limited to the facts of the case," because VESA's disclosure requirement "creates an expectation by its members" that intellectual property rights will be disclosed. Statement at 3. This emphasis on an "expectation" sounds like a private patent estoppel case, not a competition case brought in the interest of the public. In any event, the complaint did not allege an "expectation" by VESA members as an element of the offense or of the competitive effects.

The private remedy of patent estoppel should suffice to remedy expectations based on Dell's conduct by barring inappropriate enforcement of a patent claim. The three elements of patent estoppel are: (1) a misleading communication by way of words, conduct or silence by a knowledgeable patentee; (2) reliance by another party on the communication; and (3) material prejudice to the other party if the patent holder is allowed to proceed. *E.g.*, *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1041-43 (Fed. Cir. 1992). If Dell's vote with its accompanying certification was misleading, and if another VESA member relied on the certification to its material prejudice, then the other firm may assert estoppel as a

¹¹ Several of the comments the Commission received assert that the Dell order will chill participation in the standards-setting process.

bar to any claims under the patent. The Commission order, however, bars Dell from enforcing its patent without regard to whether the infringer relied on the miscommunication or whether the infringer would be materially prejudiced. If, as the majority suggests in its explanatory statement, an "expectation" is a critical underpinning of the remedy, it seems curious to bar enforcement of the patent without some better proof of expectation.

The anticompetitive effects alleged in the complaint were all highly ephemeral; they involved a delay in industry acceptance of the VL-bus design standard, avoidance of systems using the standard, and increased costs due to uncertainty about acceptance of the VL-bus and development of competing bus designs. As a practical matter, a Commission order, entered in 1996, can do little to correct any uncertainty and delay that might have occurred in early 1993, when Dell asserted the claim. Presumably, companies have long since decided what bus design to select. In a "precedent-setting" matter such as this one, the Commission should attempt to identify the relevant competitive interests and strike a fair balance among them. An order limiting enforcement of an undisclosed patent for an ample period of time to permit modification of the standard to eliminate the patent conflict would be less draconian than the majority's permanent ban on enforcement and seems more proportional to the alleged harm.

V. PUBLIC COMMENTS

Eleven thoughtful comments reflecting diverse viewpoints in the business community have been received. The comments contain a wealth of information and analysis, and I commend them in their entirety to anyone with an interest in this area. The comments reflect an unusual degree of concern and apprehension about the implications of the order. Several of the nation's most significant standards-setting organizations have written to state their opposition to the broad implications of the order and its possible chilling effect on the participation of firms with broad patent portfolios in the standards-setting process. VESA and a few other groups, however, support this or an even stronger order.

Seven commenters strongly opposed the imposition on participants in the standards-setting process of any duty to identify and disclose patents. The American National Standards Institute

("ANSI"), an umbrella organization that accredits standards development organizations, supported liability for failure to disclose relevant patents only insofar as a firm "intentionally and deliberately fails to disclose . . . in an attempt to gain an unfair advantage." ANSI opposed the imposition of any affirmative duty to identify and disclose patents, because it would chill participation in standards development. ANSI also expressed concern that the Dell remedy, which could be characterized as forfeiture of patent rights or mandatory licensing, might harm the United States' position in international negotiations.¹² Five standards development organizations and an intellectual property law bar association filed comments that supported all or parts of ANSI's comment.

The American Intellectual Property Law Association ("AIPLA"), a national bar association of intellectual property attorneys, supported the reconciliation of the rights of standards users and owners of intellectual property as set forth in ANSI's patent policy.¹³ AIPLA agreed with ANSI that unless limited to egregious facts, the Dell order will discourage industry cooperation in standards-setting.¹⁴ Because patent disputes in the standards as in other contexts are highly fact specific, AIPLA said that private patent estoppel litigation is a better forum than a Section 5 proceeding to resolve such disputes. AIPLA noted that the Dell remedy constitutes a forfeiture of patent rights or compulsory licensing and said that the remedy is too drastic and inappropriate for many situations.

Several other commenters also endorsed a standard that requires a showing of intent, including the Electronic Industries Association ("EIA"), the Telecommunications Industry Association ("TIA"), the Standards Board of the Institute of Electrical and Electronic Engineers ("IEEE"), and the Alliance for Telecommunications Industry Solutions, Inc. (ATIS).¹⁵

ANSI addressed the dangers of imposing liability on the basis of an unintentional failure to disclose a patent or of imposing an affirmative obligation to search patent portfolios. For firms with

¹² The majority has not addressed this concern.

¹³ See p. 17, below.

¹⁴ If limited to egregious facts, the order could not apply to this case, which does not involve intent.

¹⁵ ATIS's Committee T1 develops standards for the national telecommunications network. Committee T1 ballots, like VESA ballots, request disclosure of relevant patents "based on the best knowledge at the time of the T1 member casting the ballot." It is significant that ATIS rejected a stricter standard requiring disclosure because that would place an "enormous and unreasonable" burden on participants.

hundreds of employees involved in standards-setting and with tens of thousands of patents, an affirmative obligation to search for patents would present the choice of either avoiding standards-setting or placing their intellectual property at risk. Several other commenters expressed the same concern. The EIA and TIA warned of a "profound chilling effect" on standards-making if Dell is extended to situations of negligent failure to disclose. The Standards Board of the IEEE similarly commented that if "a 'disclose it or lose it' approach becomes the test, the very robust standards-setting activities in industry today will be quickly truncated to a minimal level." Others expressed similar concerns.

The ANSI patent policy reconciles the interests of patent owners with the users of standards. The policy provides that the patent holder must supply ANSI with either:

1. A general disclaimer to the effect that the patent holder does not hold and does not anticipate holding any invention the use of which would be required for, compliance with the proposed standard, or

2. A written assurance that either:

- a) A license will be made available to applicants desiring to utilize the license for the purpose of implementing the standard without compensation to the patent holder, or

- b) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of unfair discrimination.¹⁶

ANSI specifically anticipates and addresses the situation in which intellectual property that bears on a standard is discovered after the standard is adopted. "Under ANSI's patent policy, the patent holder is then required to provide the same assurances to ANSI that are required in situations where patents are known to exist prior to the standard's approval. If those assurances are not forthcoming or if potential users can show that the policy is not being followed, the standard may be withdrawn through the appeals process."¹⁷ Several other commenters follow this ANSI policy. Indeed, the patent policy

¹⁶ ANSI comment at 6-7.

¹⁷ *Id.* at 7.

attached to the VESA comment appears for all practical purposes to be like the ANSI policy.

Two commenters took issue with the statement quoted in the press release announcing the consent order for public comment that "[o]pen, industry-wide standards also benefit consumers because they can be used by everyone without cost." The ITI and the Standards Board of the IEEE disagreed with the view that open standards are standards without cost, observing that the common meaning of an open standard includes standards that incorporate patented technology licensed by the patent owner. It appears from the explanations in the comments that the statement in the Commission's press release was simply a mistake based on a lack of knowledge, rather than an attempt to effect a major change in the way business is done, with the attendant costs and dangers of such a change. The primary significance of this issue is that it illustrates that the Commission does not have a great deal of experience in this area and should tread carefully.

Four comments, including one anonymous comment, supported the imposition of a duty to search for and disclose patents during the standards-setting process. The American Committee for Interoperable Systems ("ACIS") argued that it is appropriate to place the burden to search for patent/standard conflicts on the patent holder because the patent holder is in the better position to determine if its patent reads on the standard. ACIS downplayed the concern about chilling participation in the development of standards and noted that participation in standards-setting is motivated by commercial self-interest and "is not a form of charitable or community service."¹⁸ Bay Networks, Inc., also appears to support a strict liability standard. It would require firms participating in standards-setting to identify and disclose intellectual property rights or waive any such rights needed to practice the standard. Bay Networks argued that a requirement to license on reasonable and nondiscriminatory terms may not be sufficient, because firms may disagree about the meaning of these terms.

¹⁸ One of the four comments supporting a more rigorous duty to search for and disclose patents was filed anonymously. As the Court of Appeals for the District of Columbia Circuit has observed, anonymous appearances raise "profound questions of fundamental fairness and perhaps even due process." *United States v. Microsoft Corp.*, 1995-1 Trade Cas. ¶ 71,027 at 74,828 (D.C. Cir. 1995). Nevertheless, I note that the anonymous commenter proposed "an affirmative duty . . . to conduct a search using reasonably diligent efforts to uncover any relevant patents."

VESA favored imposition of a "general duty of members of standards associations to disclose the existence of intellectual property rights (or potential rights) that the member is aware of . . ." In VESA's view, the disclosure duty should not be limited to the engineers involved in the standards-setting process. Instead, VESA favors "implying a duty to disclose on the organization that is participating in the standard-setting activities, as opposed to simply limiting that duty to the engineers involved." VESA would put the burden of showing good faith on the party "belatedly" asserting a patent or other intellectual property rights. The VESA Board Policy for dealing with proprietary standards is very like ANSI's patent policy, which is quoted at pages 6-7 of the ANSI comment.¹⁹ It is not clear why the VESA patent policy was not sufficient to deal with the facts of this case.

Several comments applauded Commission action to halt intentional misrepresentations or intentional abuse of the standards process. These comments appear to be based on the erroneous assumption that the Commission's complaint against Dell alleges knowing, intentional deception of VESA, and they do not address the specific question of conduct that is not based on an allegation of intent or knowing misrepresentation.

VI. THE STATEMENT OF THE MAJORITY

"Because the proposed order generated considerable public comment" and in an attempt "to improve understanding of this enforcement action," the majority has issued an explanatory statement of its decision. Statement at 1. Unfortunately, the statement does not clarify the decision; if anything, it sows greater confusion. The majority attempts to confine the decision to "the

¹⁹ The majority attempts to distinguish VESA's patent policy from ANSI's patent policy on the ground that VESA's certification "create[s] an expectation that there is no conflicting intellectual property." Statement at 3, n.6. The majority seems to confuse VESA's ballot with VESA Board Policy No. 109, which like the ANSI patent policy, does not provide for "certification" regarding intellectual property. Like VESA, many ANSI-accredited standards-setting organizations request disclosure of intellectual property conflicts. For example, ATIS commented that its ballots "request the disclosure of patents relevant to the matter being balloted based on the best knowledge at the time of the T1 member casting the ballot." ATIS Comment at 3-4. In the EIA and TIA, "[c]ommittee and subcommittee chairs ask during the meetings whether any parties are aware of any patents that relate to the contributions under discussion." EIA/TIA Comment at 3. Under the majority's rationale, ANSI-accredited standards-setting organizations that inquired about patent conflicts would thereby create "expectations" that should result in forfeiture of subsequently discovered intellectual property rights. It appears that their concern over this very point is what prompted those organizations to comment on the order.

limited circumstances presented by this case," but those are precisely the circumstances that necessitate setting a new legal standard in order to find Dell's conduct unlawful. The only unique aspect of the case is the majority's use for the first time of a legal standard that omits the element of intent, a standard that, as the commenters recognized, will have widespread applicability.

The majority in its statement alleges facts that are not contained in the complaint that is part of the settlement to which Dell has agreed. To explain this unusual procedure, the majority cites Commission Rule 2.34, 16 CFR 2.34, which provides that when the Commission seeks public comment on a consent order, it "will make available an explanation of the . . . order . . . and any other information which it deems helpful in assisting interested persons to understand the terms of the order." Statement at 4, n.9. The Analysis To Aid Public Comment, to which Rule 2.34 refers, does not become part of the Commission's permanent record of the case, and usually contains the following disclaimer:²⁰

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

FTC Operating Manual, Ch. 6, Illustration 7. The Commission's Operating Manual, although not binding, provides:

The purpose of [the Analysis To Aid Public Comment] is to advise the public concerning the nature of the law violations alleged and the remedies or other basis for disposition and settlement. Any substantive statement must be based upon the agreement documents, although paraphrasing in a few words the substance of a long provision is often appropriate. The focus of this analysis is upon the public impact and anticipated effects, including competitive effects, of the proposed settlement.²¹

FTC Operating Manual, Ch. 6.10.6 (emphasis added). It is one thing for the majority to provide information explaining an order; it is quite another to attempt under cover of Rule 2.34 to suggest support for allegations necessary to establish liability, such as intent or market power, that are entirely missing from the complaint. A more

²⁰ Inexplicably, the disclaimer was omitted in this case.

²¹ This is not to say that the majority can never say anything beyond what is appropriate for inclusion in the Analysis To Aid Public Comment, but the majority should keep in mind that the consent agreement, within its four corners, contains the final decision and order of the Commission. If the majority wants to amend its decision, the proper course is to amend the decisional document.

important reference in this regard would seem to be Commission Rule 3.11, 16 CFR 3.11, which provides that a Commission complaint "shall contain . . . a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be a violation of law . . ." ²²

Setting aside for the moment the process questions raised by alleging new facts in a separate statement, the new factual allegations raise even more questions about the basis for liability in this case. For example, the majority says in its statement that VESA has a "strong preference for adopting standards that do not include proprietary technology." Statement at 1. This assertion, perhaps included to heighten some sense of transgression, adds a questionable spin in characterizing VESA's policy. In fact, VESA recognizes that a standard sometimes will include proprietary technology and that a proprietary interest in a proposed standard will not necessarily preclude adoption of such a standard. The comment filed on VESA's behalf by counsel makes this point, and the VESA Patent Policy (Board Policy No. 109) attached to VESA's comment expressly states in the first paragraph: There is no objection in principle to a VESA proposal or standard that includes the use of patented technology if it is justified for technical reasons." (Emphasis added.) VESA Board Policy No. 109 spells out clearly how it will deal with a standard that requires the use of patented technology, and its procedure appears similar in significant respects to the policies of other standards organizations. On examination, this new factual assertion contributes nothing to a theory of liability.

In its statement, the majority also asserts, for the first time, that if VESA had been informed of Dell's patent during the certification process, VESA "would have implemented a different non-proprietary design." Statement at 1. The majority's assertion is either a throw-away line, or it opens a Pandora's box of difficult technical questions. The complaint does not allege that other equally useful and valuable technologies for implementing the standard were available, and it does not allege that VESA would have adopted a different approach had it known of the Dell patent. The majority also offers the slightly different statement that "had VESA known of the Dell patent, it could have chosen an equally effective, nonproprietary standard." Statement at 2, n.2. Well, maybe. It is possible, as the majority

²² To return to my initial observation about the case, the complaint against Dell does not allege a violation under any established theory of law. See p. 1, above.

suggests, that Dell's invention was one of an array of equally useful and valuable technical alternatives; if so, VESA might have selected an alternative without compromising the standard. It is also possible, however, that Dell's product was technically superior or more efficient, and if so, that a standards-setter might prefer the patented design, even though it would involve the payment of royalties to the inventor. We do not know and can only speculate.

The majority's reliance on supposed technological alternatives is troubling. We have not reviewed the technical merits of Dell's patent vis-a-vis the alternatives, but, in any event, I seriously question whether Section 5 liability should be based on such an assessment. Antitrust enforcement agencies are ill suited to evaluating the technical merits and economic value of patents.

A third new factual allegation is the majority's assertion that "Dell certified [to VESA] that it had no [conflicting] intellectual property rights." Statement at 1. Paragraph seven of the complaint, however, attributes the certification to "a Dell representative." This difference between "Dell" and "a Dell representative" is more significant than at first may appear. The complaint allegations regarding the voting certification are carefully confined to Dell's voting representative.²³ The majority, however, with this statement attributes Dell's corporate wide knowledge, which presumably is all inclusive, to its voting representative. This in turn would mean that the voting representative had constructive knowledge of the '481 patent at the time he signed the certification. In other words, by substituting "Dell" for "a Dell representative" with respect to the certification, the majority suggests that Dell intentionally misled VESA.²⁴ On reflection, it is obvious why Dell did not agree to a complaint allegation like that contained in the majority's statement. This is the first hint in the statement that the majority now might like to suggest that this case does involve intentional conduct.

²³ The majority also says that "Dell's voting representative made his certification on behalf of the corporation," because he was acting in his capacity as an agent. Statement at 1, n.1. This discussion assumes the majority's conclusion. No one contests the validity of the vote cast by Dell's voting representative. Instead, the question is whether, under Section 5 of the FTC Act, the knowledge of the corporation is imputed to the voting representative with respect to this particular certification. The majority's discussion of agency law assumes a strict liability standard inconsistent with its assertion elsewhere (Statement at 3) that we should not infer from this case a general duty to search. It is impossible to discern on which of the majority's inconsistent statements we should rely. If footnote 1 in the majority's statement accurately reflects the majority's position, surely we should alert the press, because this case is precedent-setting, indeed.

²⁴ See discussion at 7, n.6, above.

A fourth new factual allegation in the majority statement is that "Dell failed to act in good faith to identify and disclose patent conflicts." Statement at 2. This assertion seems plainly to be responsive to the concerns expressed by the commenters about abandoning the intent standard, and it brings us directly back to the issue on which this case turns. The statement that Dell did not act in good faith seems to suggest that Dell's conduct was intentional. Having mentioned an absence of good faith, the majority adds that the decision in this case "should not be read to impose a general duty to search." Statement at 3. It would appear that the majority, seeking to assuage the commenters, hopes to suggest that it has not changed the traditional standard based on intent. Unfortunately, there are three reasons why this cannot be true. First, this is a consent order and Dell did not agree to a complaint allegation that it intentionally misled anyone. For a majority of the Commission now to assert in a statement separate from the complaint and order that there was intent would raise serious questions of fundamental fairness.²⁵

The second reason we know that the majority has not employed traditional analysis lies in the express observation that this is the "type of case, in which the legal and economic theories are somewhat novel." Statement at 4. The third reason we know that the majority has not employed a traditional analysis comes from the single sentence that articulates the majority's new standard: the majority asserts that "there is reason to believe that Dell's failure to disclose the patent was not inadvertent." Statement at 3 (emphasis added). Hmmm. . . . The "not inadvertent" standard is not easy to place. If Dell has not consented to an allegation of intent and if this case is "somewhat novel," then "not inadvertent" surely does not mean intentional. Therefore, "not inadvertent" apparently means something that lies somewhere between avoiding intentional misconduct and the general duty to search that the majority specifically rejects.

The choice of the phrase "not inadvertent" seems carefully crafted not to say that Dell acted knowingly or intentionally. "Not inadvertent" is not a familiar legal standard of conduct. Negligence is the legal characterization of conduct that seems closest to the standard of the majority. Negligence, however, implies a violation of some duty of care, presumably in this case a duty to identify and disclose patents. But that brings us back again to the general duty to

²⁵ To state the obvious, if intent is required to establish liability, the Commission has only two choices, either to dismiss the case or to renegotiate the consent agreement with Dell.

search that the majority rejects. Unfortunately, the majority does not enlighten us further, except to conclude that its decision "strikes the right balance." I beg to differ.

I do not favor a departure from the usual requirement that intent must be shown to establish liability. But looking beyond the merits, the decision of the majority is still faulty. The majority fails to articulate its standard in any comprehensible way, much less to explain why it is appropriate in the name of competition to upset a standards-setting process that seems to be well established and working well. When the Commission issues an order based on an adjudicative record, it is held accountable for its decision through the process of judicial review. When the Commission issues a consent order, it must hold itself accountable in the public interest by addressing the issues in a serious and rigorous manner. In carrying out this fundamental responsibility, the Commission has failed even to begin.

I dissent.