

The Digital Age at the FTC: Current Issues in Electronic Document Production and Review

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Document “discovery”—the search for, production, and review of relevant documents—lies close to the heart of the American legal process, both in terms of its centrality to the resolution of legal issues and in the time and effort it requires. The last decade has seen a sea change in document discovery, from a world in which discovery largely involved the production in paper form of parties’ paper files, to a world in which most documents exist and, increasingly, are produced in electronic form. While this transformation was pioneered in private litigation, the Federal Trade Commission has recently begun to address the challenges presented to antitrust investigation and law enforcement by the rapid shift from hard copy or “analog” documents to a digital world. In this article, I review the recent history of the FTC’s Bureau of Competition’s experiences with electronic document production, provide a synopsis of the Bureau’s current approach to the issue, and discuss some unresolved questions with which we continue to grapple.¹

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A Brief History of the FTC’s Recent Treatment of Electronic Discovery

Electronic documents and, of course, electronic discovery, have been around for quite some time. In fact, case law dealing with the discovery of electronic documents dates back more than twenty years.² Parties have been producing electronic documents to the FTC for at least that long, whether in the merger review process or in litigation. Until recently, however, the FTC did not distinguish between electronic and paper documents in the production and review process mandated by the Second Request and, in particular, did not usually focus on the issues presented by electronic document production. The Model Second Request, though specifically requiring companies to search and produce electronic files, gave parties the choice either to have those files “printed and produced in hard copy” or, instead, “produced in machine-readable form (provided that Commission representatives determine prior to submission that it would be in a format that allows the agency to use the computer files), together with instructions and all other materials necessary to use or interpret the data.”³ The lack of guidance concerning what constituted a “machine-readable form” of an electronic document that would be acceptable to the investigating staff, combined with other production instructions couched exclusively in terms relevant to

¹ In the interests of space, I focus this discussion on the production of documents by electronic means (particularly in the merger context), rather than on the interesting but complex issue of how parties can properly search for and identify responsive electronic documents (though I comment briefly on some issues related to this point). Also, these comments, within the merger investigation context, are strictly related to the second request process, and are not related to the HSR notification process.

² See, e.g., *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257 (E.D. Pa. 1980).

³ Model Second Request, Instruction C, available at <http://www.ftc.gov/bc/modelguide.htm>.

paper,⁴ seems to have resulted in most productions taking place in paper form, even where the producing parties had obtained the documents in electronic form and conducted their document review without reducing the documents to paper.⁵

By early 2002, it had become apparent that the growing volume of electronic documents, the special production and review challenges they posed, and the increased availability (and falling cost) of sophisticated systems for electronic review mandated a fresh look at electronic discovery. As a result, then-Bureau of Competition Director Joe Simons made electronic document production a centerpiece of the issues raised and considered in the merger review process he announced on March 15, 2002.⁶ This process, which involved workshops held at numerous locations across the country and numerous submissions by various interested entities, culminated in the Bureau's December 11, 2002 Statement on Guidelines for Merger Investigations.⁷

In this Statement, the Bureau for the first time explicitly encouraged parties to submit "materials in electronic format rather than in hard copy in response to a second request."⁸ The goals in doing so were two-fold: (1) to reduce the burden of document production and review (for both producing parties and the staff), while maintaining or improving the quality of the information received; and (2) to improve the speed and efficacy of Commission merger investigations. To achieve these goals, the Statement suggested changes in the Model Second Request's instructions, discussed some issues of particular importance at the time (such as the use of term searches to identify responsive documents, and issues associated with so-called backup and archive files), and, perhaps most importantly, encouraged parties to work with investigating staff to make electronic production feasible. The Statement also discussed certain production formats, based on the best information available to the Bureau at the time. Of course, as anyone dealing with digital issues might expect, the landscape in this area has changed rapidly in even the short time that has elapsed since the Statement.

Current Status and Recent Developments

In the wake of the December 2002 Statement, the Bureau has taken a variety of steps to encourage electronic production. For example, though the FTC has not yet finalized a revised Model Second Request, second requests issued after the Statement have typically dealt with electronic production issues more clearly than prior versions. Thus, recent second requests have typically:

- Changed the definition of "documents" to include, specifically, "metadata and other bibliographic or historical data describing or relating to documents created, revised, or distributed on computer systems;"
- Specifically encouraged parties to discuss burden and other issues involved in the search and production of backup and archive materials, and identified options investigating staff will consider to address legitimate concerns;

⁴ See, e.g., Instruction O(2) (requiring documents to be submitted "in sturdy cartons").

⁵ As I discuss below, electronic documents differ from paper printouts of those documents in important respects. These differences, when properly taken into account, can and should significantly influence the decision as to the proper production format.

⁶ FTC Initiates "Best Practices Analysis" for Merger Review Process, available at <http://www.ftc.gov/opa/2002/03/bcfaq.htm>.

⁷ FTC Competition Director Announces Best Practices for Merger Investigations, available at <http://www.ftc.gov/opa/2002/12/mergerguides.htm>.

⁸ *Id.*

- Revised the instruction on production techniques to provide that parties may produce electronic reproductions in lieu of original documents or photocopies, provided, among other things, that the staff approve the production format in advance; and
- Specified that the staff would consider two kinds of production formats: (a) production in a common page-based format, such as .pdf or .tiff, providing images linked to searchable text and made available to the Commission by a secure online Web-based or equivalent hosted facility offering industry standard functionality; or (b) a similar format, except produced on CD or hard drive directly to the Commission in a searchable local database format such as Summation®.⁹

Though the Statement by its terms dealt only with merger investigations, the Bureau has also sought to apply its concepts to document production in nonmerger investigations and in litigation.

The Bureau has subsequently had numerous experiences with electronic production, in a variety of formats, and has hopefully continued to learn from these experiences. Additionally, the technologies continue to advance with great rapidity—and, perhaps less positively, the volume of electronic documents and information created and retained by companies continues to grow, seemingly at an even greater rate. As a result, the Bureau has gradually changed its approach to some of the items discussed above: notably, the format for the production of electronic documents.

Several experiences with document productions in the form of large volumes of images on CDs or hard drives produced directly to staff along with Summation load files have convinced the Bureau that, at least for now, this form of production is not feasible in many merger cases. There are a lot of reasons for this. One, of course, comes down to resources. The FTC is not a computer document production company and, as a result, there are limits on its capacity to handle the logistics of electronic document productions. By necessity, and in the interest of efficiency, the FTC allocates most of its resources and energy to the actual legal and factual analysis of anti-trust issues. It cannot—and probably should not—allocate most or even a large fraction of its resources to handling the mechanics of electronic discovery. In contrast, vendors who provide electronic production services devote all or at least most of their resources to just that, including developing features, setting up and maintaining the Web sites on which the documents are produced, getting documents loaded quickly, and ensuring that access works. Perhaps not surprisingly, the Bureau's experience has been that these vendors (frequently described as "Application Service Providers" or "ASPs") handle electronic production faster and better than it does. Since speed and efficiency are of the essence to all parties in merger investigations, we have recently been reluctant to accept electronic productions (in the second request context) via CD-ROM or hard drive. Instead, the Bureau is generally looking for production through hosted repositories administered by ASPs, and it has modified the language of recent second requests to make this clear.¹⁰

⁹ The actual model text from these early post-Statement second requests stated: "Electronic formats and production methods the Commission representative will consider include, without limitation, production in a common page-based format providing images combined with or linked to searchable text files, with the files provided to the Commission either through a secure online Web-based or equivalent hosted document repository offering industry-standard access, security, and functionality deemed acceptable by the Commission representative in advance, or on an external network appliance or CD-ROM providing the files in a searchable local database format such as Summation® that provides functionalities equivalent to those available on hosted online repositories, and deemed acceptable by the Commission representative in advance."

¹⁰ Specifically, the FTC no longer includes the last phrase of the instruction cited above. The instruction now reads: "Electronic formats and production methods the Commission representative will consider include, without limitation, production in a common page-based format

With that limit, the Bureau remains flexible in terms of the ASPs, formats, and systems that it will accept. In general, of course, these issues are the parties' choices. What matters is that the system will enable the FTC to conduct an efficient and effective investigation.

Good Practices in Electronic Production

As with all merger practice, the general guideline for "good" practice in the context of electronic document production is to be informative and cooperative. In this specific context, because of the relative novelty of electronic production and the many forms it can take, it is particularly important to provide the FTC staff the opportunity to review and analyze the proposed production system in advance so that the producing parties can obtain the staff's approval. As a result, our best experiences so far have been with electronic production that involved parties who took the initiative to discuss the issues with the staff at as early a point in the process as reasonably possible. Typically, these parties have included in the discussions corporate personnel from the information technology department (so as to be able to answer staff's questions about the location, format, and storage and retrieval techniques applicable to the company's electronic documents). Though the parties' lawyers should of course be involved, filtering highly technical information through the lawyers without providing the staff the opportunity for direct contact with technical personnel tends to impede the flow of information, raise costs, and cause delays.

Similarly, the best experiences have often involved parties bringing in representatives of their proposed ASP so that the staff can meet the vendor and receive a hands-on demonstration of the system, along with an informed, accurate discussion of its features, nuances, and limitations.¹¹ This also provides the best opportunity to recognize and alleviate potential problems before they occur. The parties should also provide a "live" trial opportunity, where the staff can actually work with real documents posted on the actual system that will be in use, and should also provide production on a "rolling" basis, rather than producing all of the documents at once. (This is almost always a good idea, but it is particularly important with electronic production because it provides opportunities to identify and correct logistical or technical problems at an early point.)

Some Interesting Issues

The subject of electronic discovery by the FTC often generates strong reactions by some parties and can raise some interesting and challenging issues. Many of those issues will evolve and develop along with both electronic production technologies and the Commission's experience with them.

Do I Have to Produce Electronically? Some parties seem particularly resistant to producing electronically, and sometimes couch the issue as a legal question going to the FTC's power to compel such production. To a large extent, this issue is more illusion than substance. The relevant instruction in the second request does not presently require electronic production, even of documents that exist only in electronic form. Rather, the choice to produce electronically or not is generally left to the parties.

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¹¹ Needless to say, demonstrating important functionalities to the staff in the approval phase, and then eliminating or limiting access to those functionalities during the production phase, would not be a good practice.

There are, of course, constraints on that choice that may militate toward producing at least electronic documents in an electronic format. First, electronic documents often include important information, frequently described as metadata, that may not appear when the document is printed and produced in hard copy. But some of that information (such as “blind copies” on e-mail, date information, and certain kinds of formulas, hidden text, comments, and others) is plainly responsive to the second request, and so must be produced. In such cases, producing in paper form is likely to be much more difficult than producing in electronic form.

Second, there are some kinds of documents that may not be appropriately produced in paper format alone. One likely example is Excel spreadsheets, which are not really designed to be printed. Just printing a spreadsheet and producing the printed copy omits critical information. In fact, for that precise reason the staff has typically required that spreadsheets, or at least some of them, be produced in their native formats, as reducing them to a page-based format such as .pdf or .tiff often omits much of the same information that disappears when the document is printed.

Finally, parties should seriously consider producing electronically—whether they are legally required to do so or not—for the same reasons that the Bureau is now encouraging electronic production. Electronic production can expedite the review process and allow the review to be more finely honed, allowing the staff more time to focus on substance (which is nearly always in the parties’ interest). And it appears that electronic production may be no more expensive than paper production (or even less), especially when the parties’ internal document review will use an electronic system or when the production will have to be made to more than one government agency.

What About Paper Documents? Parties also often want to know whether they are required to produce paper documents by electronic means. The answer to the preceding question should make this answer obvious: for now, at least, parties are free to produce electronically, and as a result, are free to choose whether or not to include paper documents in the electronic production. However, converting paper documents into electronic form raises a number of technical issues that are beyond the scope of this article but that should be carefully considered. Not the least of these is that because it is considerably more burdensome for the staff to review non-searchable electronic images of documents than it is to review paper, we discourage (and likely would not accept) an electronic production of scanned paper documents unless those documents have been made effectively searchable, such as by having optical character recognition software generate a searchable text file to accompany each image.¹² The cost of doing this, however, seems to be falling, and parties should bear in mind that the advantages described above—combined with the advantage of having all of the relevant documents in one place and one format—may well support the investment.

“Duplicate” Documents, Date Codes, and Other Peculiarities of Electronic Production. Electronic document production does raise a number of issues that are insignificant or irrelevant in old-fashioned paper production. The list of these issues is far too long for this article, but a couple of recent experiences merit some discussion. For example, the second request does not require parties to produce “identical” copies of documents. In the paper world, this was both obvious and largely unimportant: obvious, because whether paper copies are “identical” duplicates or not is apparent from their face (for example, if a document has handwritten notes on it, it is not identical to a copy that does not!), and unimportant because the cost of eliminating all “identical” paper dupli-

¹² For much the same reason, the Commission is unlikely to accept any electronic production that consists of non-searchable images.

cates often exceeds any conceivable benefit of such redaction, requiring as it does a physical inspection of each potential duplicate.

Neither of these things is necessarily true with electronic documents. First, determining whether documents are identical may not be nearly as intuitive or obvious as is true with paper. For example, documents containing date codes—codes that automatically update the document whenever it is accessed—may appear identical on casual inspection, but in fact each copy may be “non-identical” in the sense that each date will change whenever the document is viewed or printed.¹³ Second, many electronic discovery systems offer relatively inexpensive “de-duping,” in which all “identical” copies of an electronic document can be deleted from a company’s production, leaving only one. This process can substantially reduce the volume of a document production, offering benefits to both parties and the FTC. However, parties who choose to de-dupe must be mindful of their obligation to eliminate only truly identical duplicates and to produce bibliographic metadata with the document so that its authorship, distribution, and other pertinent information can be readily ascertained by the staff.

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Another issue unique to electronic production through third-party vendors is the question of control over the produced documents. Obviously, when paper documents are delivered to FTC, they are out of the parties’ control, and the same is true with CDs or hard drives containing electronic documents. However, production through ASPs raises the possibility of the parties retaining some measure of control over the produced documents (such as the ability to add or remove documents after certifying substantial compliance, or to delete documents which may be subject to a claim of privilege and inadvertent production). Parties should resist any temptation to try to retain control over the documents once they are produced to the agency via the vendor, and parties and their vendors should work carefully with the staff to ensure that the applicable agreements provide adequate safeguards against any post-production interference by parties. If the staff cannot be certain that they will have the same degree of control and security over documents produced by electronic means as they would over documents produced by paper, they will rightly reject the production technique.

The Future

As the litigation bar and the courts have long recognized, electronic production is the inevitable future of document discovery. And so it is with document production at the FTC. Though the staggering volume of electronic documents will continue to present challenges, there seems to be no doubt that whatever set of those documents must be searched and then produced will increasingly be searched and produced by electronic means. The FTC is committing considerable resources to ensure that parties employing those electronic means and willing to work in good faith find an informed and receptive audience at the agency. ●

¹³ Producing documents containing date codes presents another challenging issue. Just printing the documents freezes the date at the time of printing, which does not accurately reflect the potentially important fact that the document contains a date code. Loading the document into a document production system may have the same effect. The fact that the document contains a date code—and information such as the date on which the document was actually created, viewed, or printed—can be determined from the metadata, but not necessarily from anything apparent from the document’s face. This underscores the importance of producing metadata.