



# DEPARTMENT OF JUSTICE

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## ANTITRUST AND INTELLECTUAL PROPERTY

Address by

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## **I. Introduction**

Good afternoon. It is a pleasure to appear at the AIPLA Institute to speak about the intersection of antitrust and intellectual property. For some time now, this has been the “issue du jour” among antitrust practitioners, with countless ABA and other CLE programs having been devoted to this topic. Having done a fair amount of IP litigation in private practice, I can say with some confidence that the topic has occupied the time and attention of a number of IP practitioners as well.

Most of the discussion and debate in this area has been directed to patents. Trademarks have generated little public policy controversy. Copyright is an area now full of controversy, but for the most part the controversy is not stated in antitrust terms.

The Antitrust Division and Federal Trade Commission recently concluded a months-long series of hearings on “Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy.”<sup>1</sup> We undertook these hearings in order to improve our understanding of the antitrust/IP interface, and to better inform our enforcement approach to matters that implicate IP rights. As my predecessor, former AAG Charles A. James, noted at the outset of the hearings, we hoped to “enhance our understanding of how antitrust and IP law and policy affect innovation and other aspects of consumer welfare.”<sup>2</sup>

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<sup>1</sup>Prepared testimony and submitted comments are available at <<http://www.ftc.gov/opp/intellect/index.htm>>.

<sup>2</sup>Charles A. James, Opening Remarks, Joint DOJ-FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Feb. 6, 2002, available at <<http://www.ftc.gov/opp/intellect/james.htm>>.

Many observers, particularly in the antitrust community, contend there is a tension between antitrust and intellectual property, arguing that the antitrust laws seek to eliminate monopolies and encourage competition, while the intellectual property laws reward creators and inventors with a limited monopoly. Some suggest that there is a need for an expansion of antitrust that would place severe limits on the enjoyment of intellectual property rights. They say that courts afford “undue weight” to intellectual property protections in the balancing of the two regimes.<sup>3</sup>

There may be legitimate room for debate. I would suggest, however, that this tension is overstated. To quote AIPLA President Ronald Myrick, who testified at the hearings on March 19, 2002: “I do not believe that the relationship between the IP laws and the antitrust laws is out of balance.”<sup>4</sup> Antitrust continues to be a vital means of ensuring continued innovation and economic growth, including cases and transactions that involve intellectual property. At the same time, the antitrust bar should not feel threatened by the recognition of a robust system of intellectual property rights. There may be legitimate room for debate as to the optimal scope of intellectual property rights, the ease with which they may be obtained, and their duration. These are proper areas of inquiry for those charged with administering our patent and copyright laws.

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<sup>3</sup>*See, e.g.* Robert Pitofsky, “Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy,” Remarks Before the Antitrust, Technology and Intellectual Property Conference, Berkeley Center for Law and Technology, University of California, Berkeley (March 2, 2001) (transcript available at <<http://www.ftc.gov/opa/2001/03/pitofskyberkeley.htm>>); James B. Kobak, Jr., The Federal Circuit as a Competitive Law Court, 83 J. Pat. & Trademark Off. Soc’y 527 (2001).

<sup>4</sup>Ronald Myrick, Testimony, Joint DOJ-FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, March 19, 2002, available at <<http://www.ftc.gov/opp/intellect/020319ronmyrickpreparedtestimony.pdf>>.

Calls for more aggressive antitrust enforcement as a vehicle for cabining the enjoyment of intellectual property rights should, however, be viewed with great caution.

A few decades ago, it might have been accurate to say that antitrust and IP were in conflict. In fact, for many years my own agency had a “Professions and Intellectual Property” section that was active in opposing the exercise of IP rights. In that era, our view was that intellectual property rights regimes created monopolies to spur innovation, while the antitrust laws sought to eliminate monopolies. The modern view, in contrast, is that intellectual property and antitrust laws both seek to promote innovation and consumer welfare.

The 1995 Joint DOJ/FTC Intellectual Property Guidelines<sup>5</sup> acknowledged this complementarity, indicating that:

- Intellectual Property should be treated no differently than other forms of property;
- Patents do not necessarily confer market power; and,
- Licensing generally is procompetitive and will in most cases be analyzed under the Rule of Reason.

Courts likewise have acknowledged this complementarity, and have recognized that “the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are complementary, as both are aimed at encouraging innovation, industry, and competition.”<sup>6</sup>

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<sup>5</sup>Antitrust Guidelines for the Licensing of Intellectual Property (1995) [hereinafter IP Guidelines].

<sup>6</sup> *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1576, 14 U.S.P.Q.2d (BNA) 1034, 1037 (Fed. Cir. 1990).

If the goals of antitrust and intellectual property are in fact complementary, then why, you might ask, have we recently been paying so much attention to the antitrust/IP relationship? There are a few reasons. First, this is a continuation of an ongoing debate about the effects on innovation of intellectual property rights (IPRs) and the enforcement of antitrust laws. This debate has taken on particular significance in recent years as the number, scope and value of intellectual property rights have increased.<sup>7</sup> Some say that too many patents are issued, that they are issued too leniently,<sup>8</sup> that they are issued on inappropriate matter, and that the Federal Circuit is too “patent-friendly.” Antitrust practitioners and enforcement agencies also continue to grapple with a number of vexing issues concerning the exercise of IP rights, including limitations on an intellectual property holder’s right to exclude; whether and when the acquisition of intellectual property can be anticompetitive; permissible restraints incident to licensing arrangements; and when settlements of patent infringement litigation can be anticompetitive.

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<sup>7</sup>See James Langenfeld, *Intellectual Property and Antitrust: Steps Toward Striking a Balance*, 52 Case W. Res. L. Rev. 91, 106-7 (2001), citing PTO Ann. Rep. (1996-2000).

<sup>8</sup>See, e.g. Cecil D. Quillen, Jr., “The U.S. Patent System: Is It Broke? And Who Can Fix It If It Is?,” presented at the 2001 Spring Meeting of the Association of General Counsel, available at <<http://www.ftc.gov/os/comments/intelpropertycomments/quillenattachments/isitbrokewhocanfixit.pdf>>.

It was against this backdrop that we undertook the joint DOJ/FTC IP hearings. We examined a number of issues over the course of approximately six months. Hearing topics included:

- Background on the patent process;
- Patent pools and cross-licensing;
- Standard setting;
- Refusals to license intellectual property;
- Patent settlements;
- IP bundling/Extension of IP rights;
- The role of the Federal Circuit;
- Analyzing ambiguous IP rights; and,
- International comparative law perspectives.

The hearings concluded in November 2002, and we currently are hard at work on drafting a joint report on the hearings. My hope is that we will be in a position to issue that joint report at some point during this calendar year. Although much further work remains in arriving at a final joint report, I hope to provide at least a brief overview of some of the significant issues that were discussed. Before doing that, let me offer some background on the evolution of the antitrust/IP relationship, and discuss some of the key issues that we face as antitrust enforcers.

## **II. Historical Perspective**

At the turn of the 20th century, the rights of the intellectual property holder were paramount, and trumped even the most egregious of antitrust violations, such as price fixing. In

1902, the Supreme Court held that “The general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly. . .”<sup>9</sup>

During the 1950's and 60's, the pendulum swung back, so that IPRs were subject to stringent scrutiny under antitrust laws and were to be narrowly construed. Accompanying this development was the implementation of formalistic rules — christened the “Nine No No’s” by Antitrust Division officials in 1970 — that prohibited certain licensing arrangements and other agreements implicating IPRs without regard to the actual competitive effects of such conduct.<sup>10</sup>

They included per se prohibitions against:

- Mandatory package licensing (also known as patent pools);
- Tying of unpatented supplies;
- Compulsory payment of royalties in amounts not reasonably related to sales of the patented product;
- Mandatory grantbacks; and,
- Classical vertical distribution restraints such as post-sale restrictions on resale by purchasers of patented products, specifying the price licensees could charge upon resale of licensed products, and tie-outs.

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<sup>9</sup>*E. Bement & Sons. v. National Harrow Co.*, 186 U.S. 70 (1902).

<sup>10</sup>*See* Bruce B. Wilson, Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions, Address Before the Fourth New England Antitrust Conference (Nov. 6, 1970).

Fortunately, the introduction of economic rigor into antitrust analysis in the late 1970's and 1980's led to the abandonment of almost all of these per se rules and to a more consistent inquiry into the likely competitive effects of certain conduct or business arrangements. During the same period, patent law itself afforded more valuable rights to holders of intellectual property. This trend was reflected in the work of the newly-created Federal Circuit.<sup>11</sup>

Application of rigorous economic analysis thus caused the realization that the Nine No No's could condemn potentially procompetitive conduct. Most of these practices now are analyzed under the rule of reason, which requires a careful examination of the likely competitive effects of the arrangement in question. A brief update on where we stand with respect to the Nine No No's might help illuminate how much the antitrust thought process has evolved over the past 30 years:

- **Mandatory package licensing:** Also known as patent pools, we now recognize that they may provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. At the same time, we recognize that some patent pools can restrict competition, whether among intellectual property rights within the pool, downstream products incorporating the pooled patents, or in innovation among parties to the pool.
- **Tying of unpatented supplies:** This sort of tying could minimize the risks associated with the uncertainty that a patent owner may have regarding the value of his/her patented technology. And without a showing that the patent actually conveys market power, antitrust concerns do not arise.

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<sup>11</sup>Moreover, in 1998 the Federal Circuit held that all appeals of antitrust cases involving patents should be heard by the Federal Circuit. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1067-68 (Fed. Cir. 1998).

- **Compulsory payment of royalties in amounts not reasonably related to sales of the patented product:** It might be far more efficient, for example, to base royalties upon the total units *produced* by the licensee. Again, any antitrust concern depends upon the presence of market power.
- **Mandatory Grantbacks:** The IP Guidelines recognize that grantbacks can have procompetitive effects, and will be evaluated under the rule of reason. On the other hand, grantbacks may adversely affect competition if they substantially reduce the licensee’s incentives to engage in research and development and thereby limit rivalry in innovation markets. Again, an important factor in the agencies’ analysis of a grantback will be whether the licensor has market power in a relevant market. A non-exclusive grantback is less likely to produce anticompetitive effects because the licensee remains free to license its improvements to others.
- **Licensee veto power over the licensor’s grant of further licenses:** Absent any showing of market power or foreclosure, such a restriction may have a net procompetitive effect.
- **Restrictions on sales of unpatented products made by a patented process:** Such a restriction is unlikely to raise concerns to the extent that the licensee and licensor would not be actual or potential competitors absent the licensing relationship, or that the licensor does not have market power.<sup>12</sup>
- **Vertical Restraints: Post-sale restrictions on resale by purchasers of patented products; Specifying price licensee could charge upon resale of licensed products; Tie-outs (Tie-outs are restrictions on a licensee’s ability to sell products that compete with the patented product):** With respect to tie-outs, at least, anticompetitive concerns are unlikely to arise unless the patentee has “market power in the relevant market for the patent or patented product” under the patent misuse statute.<sup>13</sup>

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<sup>12</sup>Compare *Mercoird Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944) (striking down price restraints on unpatented products produced containing patented parts) with *General Talking Pictures Corp. v. Western Electric Co.*, 305 U.S. 124 (1938) (upholding field of use restrictions on unpatented products containing patented components).

<sup>13</sup>35 U.S.C. § 271(d)(5) (Supp. 1989).

### III. Significant Topics at the Intersection of Antitrust and IP

**Horizontal or Vertical?** In reviewing horizontal licensing arrangements, a fundamental issue we frequently encounter is whether the licensing arrangement is in fact horizontal or vertical. Section 3.1 of the IP Guidelines provides that the relevant inquiry is whether firms would have been actual or likely potential competitors in the relevant market absent the license. A more nettlesome question is: what if both parties compete in the current product market, but neither could produce an improved product without cross-licensing?

**Cross-licensing.** With respect to cross-licensing, potential concerns may arise with agreements among IPR holders not to challenge one another's IPR claims through either innovation or litigation; conduct that excludes competitors; or sham licensing arrangements that facilitate product-market collusion. There are, however, many potential benefits to cross-licensing. Cross-licensing encourages product design by engineers rather than lawyers. It avoids wasteful infringement determinations, including litigation. And it allows products to come to market on a more timely basis at lower cost.

**Vertical Licensing.** Vertical licenses are another type of conduct subject to antitrust scrutiny. Exclusive dealing arrangements involving IPRs are analyzed under traditional antitrust principles. This involves a consideration of the percentage of the market likely to be foreclosed by an exclusive arrangement. Absent a high rate of foreclosure, or if exclusivity is easily terminated, anticompetitive effects are unlikely. Exclusive dealing frequently is justified as a device to minimize free-riding.

**Tying.** Because patents do not necessarily confer market power, there is no presumption that tying arrangements involving patented products necessarily are illegal.<sup>14</sup> Whether firms can sell or license patented goods on the condition that the purchaser buy unpatented products also is analyzed under traditional antitrust principles: Does the arrangement involve two separate products or services? Is the seller conditioning availability of one product on the purchase of another? Does the seller have market power in the tying product? Does foreclosure in the tied product market adversely affect consumers? Do the anticompetitive effects outweigh efficiencies?<sup>15</sup>

**Resale Price Maintenance.** Another vertical restraint, resale price maintenance, perhaps represents the last vestige of the Nine No No's. The Supreme Court held in *United States v. General Electric Co.* that GE did not violate Section 1 of the Sherman Act by fixing the resale price of patented lamps made and sold by Westinghouse under license from GE.<sup>16</sup> But the agencies' IP Guidelines take the traditional position that it is per se illegal for a patentee to fix the minimum resale price for a good that has been fully sold to dealers.<sup>17</sup>

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<sup>14</sup>See Section 5.3 of the IP Guidelines.

<sup>15</sup>See *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340 (Fed. Cir. 1998) (split panel affirms attempted monopolization verdict based on a technological tying claims that Bard changed the design of its patented biopsy gun to foreclose M3 and other firms from competing in the market for replacement biopsy needles).

<sup>16</sup>272 U.S. 476 (1926).

<sup>17</sup>See Section 5.2 of the IP Guidelines.

**Patent Pools.** In examining patent pools, some of the key analytical issues include: are the patents substitutes or complements? Are essential or optional rights included? Does the pooling of complementary blocking patents tend to lower prices to consumers? The Division's enforcement stance regarding patent pools is reflected in the IP Guidelines, as well as a series of business review letters.<sup>18</sup> The Guidelines note that these patent pools may provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation.<sup>19</sup> By promoting the dissemination of technology, cross-licensing and pooling arrangements are often procompetitive. Pooling arrangements, however, can have anticompetitive effects in certain circumstances. For example, collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions, may be deemed unlawful if they do not contribute to an efficiency-enhancing integration of economic activity among the participants. Some safety mechanisms that tend to minimize antitrust concern about patent pools may involve: including only essential patent mechanisms in the pool; using an independent expert to determine which patents are essential; and retaining independent patent availability.

**Patent Settlements.** The FTC, in particular, has been active in the area of patent

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<sup>18</sup>Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Garrard R. Beeney, Esq. (June 26, 1997); Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Department of Justice, to Garrard R. Beeney, Esq. (Dec. 16, 1998); letter from Charles A. James, Assistant Attorney General, Antitrust Division, Department of Justice, to Ky P. Ewing, Esq. (November 12, 2002).

<sup>19</sup>Section 5.5. of the IP Guidelines.

settlements, especially in the pharmaceutical industry. In some situations, the agencies are concerned that agreements labeled as “settlements” of patent disputes can be a vehicle for market allocation agreements or other anticompetitive conduct. In the generic drug area, this situation is exacerbated by the provisions of the Hatch-Waxman statute, which allow a single would-be generic entrant to block entry by all other competitors.

These cases present especially tough problems for enforcers. First, these cases occur in the context of conduct the law generally favors — the settlement of litigation. Second, assessing the competitive significance of settlements often depends on an evaluation of the underlying strength of patent rights. If a patent is valid and infringed, then any competitive entry allowed by a settlement is up to the patent holder. If a patent is invalid or not infringed, then there should be no impediment to competitive entry whatsoever. The problem is that we have no way definitively to know which situation applies without evaluating the underlying IP rights, a task that is outside our core expertise as antitrust enforcers.

**Refusals to License.** The antitrust treatment of refusals to license has generated a great deal of comment. A key question is whether an owner of a lawfully acquired patent can ever violate Section 2 of the Sherman Act by refusing to license others to make, use, or sell a patented invention. Where an unconditional, unilateral refusal to license is at issue, only the Ninth Circuit has found a potential violation, based on a so-called “pretext” analysis. Other appeals courts, most notably the Federal Circuit, strongly disagree.

In *CSU, L.L.C. v. Xerox Corp.*,<sup>20</sup> the Federal Circuit held that a patent holder’s mere

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<sup>20</sup>203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001).

unilateral refusal to license a valid, enforceable, and lawfully obtained patent, or to sell items covered by such a patent, is not actionable under the antitrust laws, regardless of the patent owner's reason or motivation for the refusal. The Court noted that absent "illegal tying, fraud . . ., or sham litigation, the patent holder may enforce the statutory right to exclude . . . free from liability under the antitrust laws."<sup>21</sup> The Court explicitly rejected the Ninth Circuit's adoption of a "pretext" standard, set out in *Image Technical Services Inc. v. Eastman Kodak Co.*,<sup>22</sup> which permits inquiry into the intellectual property holder's subjective intent in refusing to deal with a competitor seeking intellectual property or products embodying it.

Critics have argued that the Federal Circuit's decision places dangerous limitations on the application of antitrust law principles to intellectual property rights. Former FTC Chairman Robert Pitofsky has described the decision as:

leap[ing] from the undeniable premise that an intellectual property holder does not have to license anyone in the first instance to the unjustifiable conclusions that it can select among licensees to achieve an anticompetitive purpose or can condition a license (for example, you receive a license only if you agree not to do business with my competitor) to achieve an anticompetitive effect.<sup>23</sup>

Such criticisms are based upon an overly expansive reading of *CSU*. The decision does not represent an expansion of the intellectual property holder's right at the expense of antitrust enforcement. Rather, the opinion more appropriately takes into account the complementary

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<sup>21</sup>*Id.* at 1327.

<sup>22</sup>125 F.3d 1195 (9th Cir. 1997), cert. denied, 523 U.S. 1094 (1998).

<sup>23</sup>Pitofsky, *supra* note 3; *see also* Robert Pitofsky, Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property, Remarks Before the American Antitrust Institute Conference: An Agenda for Antitrust in the 21st Century (June 15, 2000) (transcript available at <<http://www.ftc.gov/speeches/pitofsky/000615speech.htm>>).

goals of the antitrust and intellectual property legal regimes than does the Ninth Circuit's *Kodak* decision.<sup>24</sup> Even outside the intellectual property context, the monopolist's general right unilaterally to refuse to deal is a fundamental and well-recognized part of antitrust law. Likewise, the right not to license is a fundamental aspect of patent law. Using antitrust to permit subjective inquiry into the intellectual property holder's motivations for refusing to deal cuts at the very heart of the intellectual property right — the right to exclude.

#### IV. Concluding Observations

The joint DOJ-FTC hearings covered a number of issues, including patent pools and cross-licensing; standard setting; refusals to license intellectual property; patent settlements; and international comparative law perspectives, to name a few. The expression of official agency views on the subjects of the hearings must await the joint report drafting process. But I can offer a few observations about some of the issues that were discussed.

Participants disagreed over:

- whether economics ever justify unilateral duties to license or scrutiny of conditional licensing (“one monopoly rent”).

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<sup>24</sup>For example, the *CSU* court noted that a:

patentee's right to exclude is further supported by section 271(d) of the Patent Act which states, in pertinent part, that "[n]o patent owner otherwise entitled to relief ... shall be denied relief or deemed guilty of misuse or *illegal extension of the patent right* by reason of his having ... (4) refused to license or use any rights to the patent ..." 35 U.S.C. §271(d) (1999) (emphasis added).

203 F.3d 1322 at 1326. The *Kodak* court, in contrast, held that §271(d) only bars a misuse defense to an infringement claim. Holding that "misuse or illegal extension of the patent right" applies only to misuse defenses would appear to make part of the statutory language redundant.

- whether IP is different from other forms of property.
- the extent to which antitrust enforcers should engage in post-grant attacks on the validity of patents, and whether such endeavors were most appropriately left to the PTO, the agency with patent expertise.
- whether there has been an inappropriate proliferation of patents.

There seemed to be a general consensus that:

- the role of patents varies greatly by industry. The electronics industry, for example, is characterized by multiple patents covering every commercial product, and frequent cross-licensing. The pharmaceutical industry, in contrast, sees “single-patent” products and less cross-licensing.
- unilateral duties to deal should be quite limited in all contexts, not just IP.
- legitimate standard setting activities are generally pro-competitive and should be treated favorably under the antitrust laws.
- the “pretext” approach of the Ninth Circuit to examining refusals to deal is unsound.

Many participants, regardless of their views on the tension (or lack thereof) between antitrust and IP, appealed to the antitrust agencies to support the PTO in its efforts to obtain the funding levels required to operate efficiently and effectively. Many participants also noted the globalization of intellectual property and antitrust law regimes, and urged the agencies to work cooperatively and seek greater consensus on fundamental antitrust and IP issues with our foreign counterparts. Significant differences remain between jurisdictions on antitrust approaches to IP. We believe that working toward convergence in these areas is very important in a global economy. For example, we have in place an Antitrust/IP working group with our colleagues at the European Commission to discuss these issues.

Let me conclude with some broader observations about the antitrust-IP interface. There

is no question that we heard testimony from members of the business community and elsewhere that there are concerns about our patent system. Some said that the Federal Circuit has relaxed standards of patentability and that this is a key reason for the explosion in the number of patents. The availability of continuing applications and ability to avoid final patentability determinations also come in for criticism on this score. This, in turn, is said to have resulted in other firms seeking more patents to use “defensively” to maintain their freedom to compete.

To the extent there is validity to these complaints — and I know this is a contentious issue as far as AIPLA and the IP bar are concerned — my message is that the IP community should take seriously the opportunity to address these matters within the IP context. The romantic notion that abolishing or curtailing IP rights will somehow produce a wonderful and costless flowering of creativity and productivity is in my view naive, and difficult to reconcile with the period of extraordinary economic growth that has coincided with the strengthening of intellectual property rights. But if there really are areas where IP law is in need of reform, then leaving them unaddressed will only strengthen the hand of those who are hostile to IP rights.

Interestingly, there seems to be much common ground within the IP community about possible reforms, even among those who are at odds on basic issues. Adequate funding for the PTO, for example, has broad support. And while some of his proposals are controversial, surely Undersecretary Rogan is to be commended for his efforts to modernize and improve the PTO’s operations.

I reread last night the hearing testimony of Ron Myrick<sup>25</sup> — who strongly disagrees with

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<sup>25</sup>*Supra* note 4.

the view that there is a “crisis” of too many patents too easily granted — and the submitted comments of Cecil Quillen<sup>26</sup> — who is a strong proponent of that view. They disagree over whether the standard for patentability is too low. But they both agreed on a number of points: the need to move toward publication of all applications and a mandate to issue or deny patents within 18 months; the desirability of a first to file system; and expansion of a prior use right to all patents. Ron also mentioned the possibility of allowing the antitrust agencies an avenue for post-grant review in the PTO, which could address the vexing issue of determining the strength of IP rights in the context of IP settlement disputes. And both discussed other avenues for increasing certainty and predictability in the system.

My point in mentioning all these issues relating to the IP system is that patent reforms decided upon by the IP community are in my view likely to be better vehicles to address any problems in the system than proposals to “ratchet up” antitrust enforcement in order to limit IP rights. The fundamental questions about the IP regime involve setting the right degree of appropriability to optimize both initial and sequential innovation. Antitrust’s tools of factual and economic analysis of specific transactions are not very well suited to this task. This is particularly true in the context of private treble damages litigation before juries, and even more so if judges allow the issue of “intent” to substitute for objective economic analysis. But if there are in fact problems in the patent system that go unaddressed, do not be surprised if this leads to antitrust law being applied — however imperfectly — as a means to restore the competitive balance. As an antitrust enforcer who happens to be supportive of IP rights, I suggest that the

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<sup>26</sup>Available at <<http://www.ftc.gov/os/comments/intelpropertycomments/index.htm>>.

better course is for the IP and antitrust communities to work together to improve the system in more sensible ways. Thank you.