



DEPARTMENT OF JUSTICE

ANTITRUST POLICY FOR THE 21st CENTURY

Address by

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It is a great honor to speak here today and to be part of a program that includes so many of the current giants in the field of antitrust. All of us commend the Planning Committee for putting together a stellar program. Cas Hobbs, John Briggs, Eleanor Fox and Bob Pitofsky have done an absolutely tremendous job. Let me take this occasion to say how delighted I am that President Clinton has appointed Bob Pitofsky, the dean of the antitrust bar, to head the FTC. All of us at the Division look forward eagerly to his confirmation and swearing in, and to continuing a productive working relationship with the FTC. We also welcome Commissioner Christine Varney to the antitrust enforcement ranks. I understand that her shoulder is already to the wheel and she is making a tremendous contribution in her first weeks on the job.

My happiness at being here is tempered with sadness at the loss of Don Turner. Don will long be remembered as a towering figure in the development of antitrust theory. Just as important as his academic achievements was his singular contribution to the Antitrust Division during his tenure as Assistant Attorney General. As many of you know, he was one of the first to perceive the importance of economic analysis to sound antitrust enforcement policy, and he brought that then-innovative insight to the Division. He continually strove to infuse antitrust enforcement with the best of contemporary economic thought. In that respect, each of his successors as AAG has followed the trail that he blazed.

We can perhaps measure the importance of his legacy by noting how far along that trail we have traveled since he first started us on the journey. From his years as AAG, when he hired one young economist to serve as his special assistant, we now have come to the point of having a nationally known economist as Deputy Assistant Attorney General for Economic Analysis. That Deputy oversees three sections of the finest microeconomists in the country, a cadre of fifty-five professionals who are involved at all stages of litigation and policymaking. As the Division confronts the challenge of intelligently enforcing the antitrust laws in the complex economy of the 21st Century, it is due in large part to the insight and foresight of Don Turner that we are up to that challenge.

The title of this conference is "Antitrust Policy in the 90s." Although strictly speaking what we are doing these days in the Division is policy in the 90s, I would suggest that what we all need to think about -- and what we in the Antitrust Division are focusing on

-- is Antitrust Policy for the 21st Century. The new century is rushing toward us and the rate of change occurring all around us so staggers the imagination that we literally cannot describe it. The result is what I call metaphorical exhaustion -- we have a telecommunications revolution resulting in the construction of the information highway, which very quickly became the information superhighway, followed with little hesitation by countless spin-off metaphors -- road kill on the superhighway, the fast lane, the slow lane, the passing lane, the off ramp, toll booths. More quickly than these metaphors gain currency, they lose whatever descriptive power they may have. Polls show that, not surprisingly, most Americans have only a vague idea of what the information superhighway actually is.

Sometimes the metaphors get hopelessly confused and end up sounding positively frightening. One prominent newspaper, which I will not name, recently referred in an editorial to (and this is a direct quote) "a single wire [that] becomes a highway over which a flood of . . . services will flow into customers' homes." I guess that means that some of us may have to learn to dogpaddle in our living rooms. Before concluding the paragraph, the paper predicted that "a market now ruled by sometimes lazy monopolists would be turned into a competitive dogfight." Of course, a dogfight in the middle of a highway is dangerous for drivers and for dogs, even without the added problems of lazy rulers and floods.

I firmly believe that, amidst all of this change, dogfights and floods, the fundamental organizing principle of our economy remains sound: Free and open markets characterized by competition will stimulate innovation, promote prosperity and contribute to the international success of the U.S. economy and U.S. business. The central purpose of the antitrust laws, of course, is to promote that principle by protecting the competitive process. In this sense, vigorous, intelligent antitrust enforcement is as vital to the economic health of our nation in the 21st Century as it has been for the 20th Century.

There are those who suggest that antitrust enforcement is obsolete -- of no more relevance to the 21st Century economy than the rotary phone. Others go even further and suggest that antitrust enforcement will disadvantage American companies and will harm America's economic well-being. These suggestions are fundamentally wrong. As the role of innovation in the economy and the importance of international competitiveness grow, so

does the necessity for intelligent antitrust enforcement. Such enforcement promotes an environment in which competitors spur each other to faster innovation. Professor Michael Porter, in discussing his landmark study of international competitiveness, explained several years ago that "[a]ll we have learned about the innovation process suggests that a number of entities pursuing different avenues, watching each other to try to learn from the other's approach, is often the best structure. Diversity and multiple paths of innovation yield the most rapid progress." Intelligent antitrust enforcement in the 21st century will protect and promote competitive diversity, and the Antitrust Division and FTC will be here, on the job and on the beat.

To be sure, the dynamic economy implied by increasing globalization and accelerating technological change challenges antitrust enforcers to appreciate changing conditions in the marketplace. We must always be alert, for example, that we do not confuse protecting the competitive process with protecting a particular competitor. It is the nature of the competitive process that some competitors will fail; we cannot and should not try to prevent that outcome. What we must do -- what is critical to the nation's economic health -- is ensure that firms with market power do not distort the competitive process by imposing artificial restraints. What we strive for, in short, is fair competition on the merits -- a system that historically has benefited consumers by prodding competing firms to develop and deliver goods and services of the highest quality, at the lowest cost and has benefited American companies by preparing them to compete and succeed abroad.

As I have already suggested, the 21st Century economy will have at least two characteristics of particular concern to antitrust enforcement -- continuing globalization and the pervasive importance of intellectual property. In the past year, the Division has undertaken policy initiatives and enforcement action in both of these areas, which I would like briefly to discuss.

International Initiatives

As you know, one of my first steps as Assistant Attorney General was to seek and obtain approval from Congress to appoint the Division's first Deputy Assistant Attorney General for International Affairs. Establishing this position was critical to putting

international concerns at the top of the Division's agenda. And I cannot imagine being more fortunate than to have Diane Wood as the first international deputy. Diane is the single person most responsible for the accomplishments that I am about to describe.

Last fall, we began to reexamine carefully the Guidelines on International Operations that the Division issued in 1988. We concluded that, substantively, those Guidelines no longer accurately reflected Division policy in several important respects. For example, the 1992 Joint DOJ-FTC Horizontal Merger Guidelines superseded the merger analysis in the 1988 Guidelines. Likewise, my rescission of the 1985 Vertical Restraints Guidelines cast doubt on some portions of the 1988 Guidelines. Developments in the case law -- most notably the Supreme Court's decision in Hartford Fire Insurance -- suggested the need for reconsideration of other portions of the 1988 Guidelines.

In drafting new guidelines, we decided to limit their scope to issues unique to international enforcement, such as comity and jurisdiction. Substantive enforcement policies -- such as those regarding mergers and intellectual property licensing -- are addressed, where appropriate, in separate guidelines or other policy statements. The fundamental approach to those substantive issues does not vary merely because a particular case has an international aspect to it.

On October 19, after months of hard work by a task force of Division attorneys and economists and a series of meetings and exchanges with the FTC staff, we and the FTC published for public comment draft International Guidelines. Let me underscore that these Guidelines represent the views of both the Department of Justice and the FTC. Because our two agencies have concurrent jurisdiction in most areas of international antitrust enforcement, the joint nature of these Guidelines substantially enhances their utility to foreign enforcement agencies, the bar and businesses. The joint publication of the Guidelines says clearly that in international antitrust, the United States antitrust authorities speak with one voice.

The draft Guidelines have as their foundation two principles. First, the Department and the FTC will protect consumers by vigorously enforcing the antitrust laws to the full extent of the jurisdiction conferred by Congress, while remaining sensitive to the sovereignty concerns and the legal and economic policies of foreign governments. Any other approach

would amount to providing a safe haven overseas for companies imposing restraints that hurt American consumers or impede American exports. Second, we must develop strong, cooperative enforcement relationships with foreign antitrust enforcement officials, in order to improve our mutual ability to enforce the competition policies of our respective nations. The experience of the past year has demonstrated the importance of such cooperation. Cooperation between countries -- each enforcing the law in their respective jurisdictions -- enhances the efficiency of our efforts, ensures for each nation the most effective enforcement possible and promotes for consumers in the global economy a freer market in goods and services.

Several recent cases illustrate the importance of cooperation with other countries' enforcement agencies. For example, we worked closely with Directorate General IV -- DG-IV -- of the European Commission in negotiating a settlement and consent decree in the Microsoft case. Without the cooperation between our two agencies -- which allowed a complete, consistent settlement of the charges against Microsoft -- the outcome would not have been as quick and as efficient as it was. Our cooperation in sharing materials, however, was possible only because Microsoft itself requested a cooperative procedure and waived its rights to confidentiality under both U.S. and European law. The result of that cooperation was an undertaking by Microsoft with DG-IV and a proposed consent decree with the Department that will ensure a level playing field to companies that seek to compete with Microsoft in the market for personal computer operating systems.

In two other cases, cooperation with Canadian authorities pursuant to a mutual legal assistance treaty between our countries was essential to the Department's success in breaking up criminal price-fixing conspiracies that were hurting consumers in both countries. In July, the Department announced that it and the Canadian Bureau of Competition Policy -- after two years of cooperative investigation -- had uncovered an international cartel that was inflating prices in the \$120 million thermal fax paper market. Each agency prosecuted the cartel under its respective law, with the U.S. prosecution resulting in guilty pleas and some \$8 million in fines. Similarly, the assistance of Canadian authorities was instrumental in gathering the evidence used to charge three corporations and seven executives with conspiring to drive up the price of plastic dinnerware products, a \$100 million market. To

date, two corporate defendants have agreed to pay a total of \$8.36 million in fines, and we expect additional fines and possible jail sentences as the prosecution continues.

Without the invaluable cooperation of the Canadian Bureau of Competition Policy and other Canadian agencies, the Department would not have been able to prosecute these illegal conspiracies effectively, because crucial evidence was located in Canada and beyond our investigative reach. Similarly, in the fax paper case, important and confidential evidence in the hands of the Department was vital to the Canadians' case. As these examples demonstrate, international cooperation in antitrust enforcement is a win-win situation: By promoting each country's antitrust enforcement efforts, it benefits each country's consumers. International price-fixing conspiracies hurt American consumers in the same way as domestic conspiracies, but they obviously pose special challenges to enforcement authorities. Often, only cooperation with authorities in other countries makes prosecution in the United States possible, and the absence of such cooperation may effectively offer a license to pick the pockets of American consumers.

Our determination not to allow these pickpockets to enjoy a safe haven outside our borders made it a priority for us to seek legislative authority to facilitate the exchange of critical information with foreign antitrust enforcement agencies. We therefore worked with members of Congress in both parties, the bar and the business community to draft the International Antitrust Enforcement Assistance Act of 1994 -- the International Cooperation Act. Attorney General Reno enthusiastically supported our proposal; it also received the unqualified support of a bipartisan coalition of lawmakers. In the House, the legislation was sponsored by Congressman Brooks, Chairman of the Judiciary Committee, and Congressman Fish, the Committee's ranking Republican. In the Senate, the bill was sponsored by Senators Metzenbaum and Thurmond, with co-sponsorship by Senators Biden, Kennedy, Leahy, Simon, Hatch, Simpson, Grassley and Specter. In the legal community, the bill enjoyed the strong and active support of former Assistant Attorney General Jim Rill, former Acting Assistant Attorney General Charles James, as well as Alan Silberman and many others in the Antitrust and International Law Sections. A number of major United States corporations -- including American Airlines, Apple Computer, Bethlehem Steel, Chrysler, Inland Steel, USX, Viacom and Xerox -- also supported the legislation. In large part due to this broad-

based and completely bipartisan support, Congress passed the bill unanimously -- 435 to 0 in the House and 100 to 0 in the Senate -- ten weeks after it was first introduced, possibly a record for antitrust legislation. President Clinton signed it into law two weeks ago.

The Act is modelled after legislation enacted in 1988 and 1990 to help the Securities and Exchange Commission obtain evidence abroad. It authorizes the Department and the FTC to negotiate with foreign antitrust agencies written reciprocal assistance agreements, which will be subject to public notice and comment in the United States. These agreements will enable the Department and the FTC to obtain evidence already in the files of foreign antitrust enforcement agencies or in the possession of persons in their territory by permitting the U.S. agencies to offer reciprocal assistance to foreign antitrust investigators.

Specifically, the Act permits the Department and the FTC to exchange otherwise confidential investigative information with foreign antitrust authorities, provided that the exchange is in the public interest of the United States and that we have determined that the foreign agency will provide appropriate confidentiality requirements and other specified safeguards. In addition, the Act authorizes the Department and the FTC to obtain information from firms or individuals in the U.S. on behalf of foreign antitrust authorities, either by using their civil investigative powers or, in the case of the DOJ, by going to court and seeking an order compelling the production of evidence.

We have taken large strides in the past decade toward more antitrust cooperation with other countries through a series of bilateral agreements. But it is evident that greater convergence in antitrust enforcement requires continued progress in the areas of mutual assistance and procedural reciprocity, progress that the International Cooperation Act will promote. To that end, we already have begun to work actively with a number of countries on negotiating mutual assistance agreements.

Intellectual Property Initiatives

A second major area that will define antitrust policy in the 21st Century is the interaction between antitrust enforcement and intellectual property rights. No one can gainsay the pervasive importance of intellectual property to the 21st Century economy. Whether one looks to the things we buy or the way we pay our bills, to where we work or

how we play, to how we travel or how we communicate across the globe without leaving our desks -- "high technology" is transforming our lives. And the building blocks of this technology are intellectual property.

When I first took office as Assistant Attorney General, many experienced practitioners -- many of you in this room, in fact -- suggested that the relationship between the antitrust laws and the intellectual property laws is so important to our national well-being that the Antitrust Division should provide the business community with clearer guidance on that relationship and should devote more of its resources to intellectual property issues. After careful consideration, I agreed that our economic future demanded as much. To develop intelligent antitrust policy in the intellectual property area -- that is, a policy that protects the competitive process and provides guidance and certainty to the business community -- we formed a Division Task Force chaired by Deputy Assistant Attorney General Rich Gilbert. As you no doubt know, the fruits of the Task Force's labor were draft Guidelines for the Acquisition and Licensing of Intellectual Property, which we published for public comment in August. We are now reviewing the comments that we received and expect to publish the Guidelines in final form before too long.

I can safely say, however, that the foundation of those Guidelines will not change, and that foundation is that antitrust enforcement and the protection of intellectual property rights are complementary means to a common end -- creating an environment that promotes the innovation necessary for economic success in an era characterized by rapid technological change. Intellectual property rights contribute to such an environment by assuring innovators that they can appropriate the value of their innovations once those innovations are introduced. Intellectual property protection adds, in Lincoln's words, "the fuel of interest to the fire of genius."

Similarly, effective antitrust enforcement assures the innovator that he will not be unfairly excluded from the market. By prohibiting private restraints that impede entry or mute rivalry, antitrust enforcement creates the conditions in which entrepreneurial initiative can flourish and in which opportunities for bringing innovations to market can continue to be exploited by the multitude of private actors in this most free of market economies. The task of antitrust enforcement is not to pick winners, but to make sure that private restraints

do not narrow the potential sources of innovation. By promoting an economic climate that rewards efficient sources of innovation, be they small or large, antitrust enforcement preserves the fundamental values of freedom and opportunity that are and always have been central to American economic success.

The Division long ago, and correctly, left behind the idea that antitrust and intellectual property protection are of necessity at loggerheads with each other. Both policies seek to promote the well-being of consumers by spurring efficiency, innovation and investment. I believe that our Intellectual Property Guidelines, when released in final form, will provide increased understanding and clarity as to how the two policies interrelate in achieving that common goal.

I mentioned earlier our view that commercial rivalry is the best spur to innovation. That is not to denigrate the role of research and development joint ventures in facilitating both innovation and the transference of innovation to the marketplace. We certainly recognize that often there are efficiencies that can best -- or only -- be exploited by research joint ventures. Moreover, in many cases the rivalry that spurs innovation may be between individual firms and joint ventures or, where significant economies of scale and risk exist, between different joint ventures. The National Cooperative Research and Production Act reflects a congressional judgment that consumer welfare is enhanced by dispelling unwarranted antitrust concerns about joint R&D activities. In fact, we have never instituted antitrust enforcement action against a joint venture filed under the NCRPA. Moreover, we continue to review notification filings under the NCRPA in a manner that recognizes the potential competitive benefits of joint R&D activities. In that respect, our policies are the same as those of our predecessors.

Quite simply, nothing in the Intellectual Property Guidelines or our enthusiasm for rivalry and the competitive process as the best spurs for innovation should be taken as evidence of a "new hostility" toward R&D joint ventures. In every joint venture case, as in intellectual property licensing in general, our focus is on the competitive effects of the particular arrangement. The vast majority of both joint R&D ventures and intellectual property licensing arrangements are procompetitive and do not present antitrust concerns. In order to ensure that our evaluation of intellectual property licensing arrangements is

appropriately sophisticated, we have added five lawyers with a background in intellectual property and intend to hire more.

The Interaction of Globalization and Technological Change

The significance of globalization and intellectual property to antitrust enforcement is already evident. I mentioned the Microsoft case, an intellectual property licensing case the resolution of which was speeded by close cooperation between the Division and DG-IV. Similarly, the Division received invaluable assistance from foreign authorities in investigating two mergers with significant technological aspects. We worked with the U.K. antitrust authorities on the investigation that concluded in a complaint and consent decree arising out of the partial acquisition and joint venture between British Telecommunications, Plc., and MCI Communications Corp. The terms of the consent decree resolved the Division's concerns that the transaction could harm competition in the market for telecommunications services between the U.S. and the U.K. and in the market for global telecommunications services generally.

We also received invaluable assistance from our sister enforcement agency in Germany in our investigation of and ultimate challenge to the proposed acquisition of General Motor's Allison Transmission Division by ZF Friedrichshafen, a German firm. The merger was investigated by the German Cartel Office as well. This merger presented the first in which the Division alleged concerns over the effects of the proposed transaction on competition in an innovation market and signals the Division's commitment to protect competition in research and development, which is vitally important in the global, high-tech marketplace.

A major enforcement action involving intellectual property that had international implications was the case against Pilkington. We challenged that British company's use of unreasonably restrictive intellectual property licensing arrangements to prevent U.S. companies from competing internationally for the construction of glass manufacturing plants. The proposed consent decree will prohibit Pilkington from improperly using its intellectual property rights and would allow U.S. firms to compete for over 50 glass plants that are expected to be built around the world. We estimate that this could result in an

increase in U.S. export revenues of anywhere from \$150 million to \$1.25 billion over the next six years.

These enforcement actions represent the type of cases that more and more will occupy the enforcement attention of the Division and of the FTC. Antitrust policy for the 21st Century must cope with the challenges that accompany a global, high-tech economy. The new International Guidelines, the International Cooperation Act, the new Intellectual Property Guidelines, and our experience in investigating and successfully resolving these important cases, are important first steps toward meeting those challenges. I am immensely proud of these steps. I have tremendous faith that when the 21st Century officially arrives, just a little over five years from now, it will be nothing new to the professional women and men of the Antitrust Division.