DEPARTMENT OF JUSTICE

CONTEMPORARY ISSUES AT THE INTERSECTION OF INTELLECTUAL PROPERTY AND ANTITRUST

Address by

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I. Introduction

It is a pleasure to be here today, in your beautiful city of Shanghai, to talk with you about the intersection of antitrust and intellectual property law. I understand that China is making great strides in reforming and perfecting both bodies of law. Just recently, some Department officials were happy to spend some time in China advising on the development of your draft Anti-monopolization law. China has also been working in recent years to enhance protections for intellectual property owners, and it is a recent signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which guarantees national treatment to all intellectual property rights holders doing business in China.[1] Indeed, these initiatives are well worth the amount of work put into them. Both areas of law–antitrust and intellectual property–help local and global business and industry realize their full potential in our global economy.[2]

As in China, antitrust enforcers in the United States are dedicated to promoting a competitive marketplace for global business. Toward this end, experience has taught us that both the antitrust laws and the intellectual property laws work in tandem to maximize consumer welfare. We have moved beyond the misconception that these two bodies of law are conflicting. And we recognize that they are in fact complementary. Intellectual property laws improve consumer welfare by fostering innovation in the marketplace through reward incentives–the most obvious is the legal right to exclude others, but also the ability to exploit intellectual property

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[1] The text of the TRIPS Agreement is available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

[2] *See generally* R. Hewitt Pate, Promoting Economic Growth Through Competition and Innovation, Address Before the Chinese Academy of Social Sciences, Institute of Law, Beijing China (July 1, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/204931.htm.

efficiently through licensing its use. At the same time, the antitrust laws help maintain a competitive economy, which increases consumer welfare by creating incentives for technological advances and innovative new products by, for example, rewarding those who are the first to enter a market.

Critics of strong intellectual property rights assert that such rights create undeserved "monopolies" that, in turn, lead to anticompetitive conduct, including horizontal market allocations and naked price fixing. These critics urge that antitrust enforcement is an appropriate means to curb the so-called problems associated with strong intellectual property protections, such as the issuance of patents that, in hindsight, do not meet the standards of patentability. Some critics are of the view, for example, that the antitrust laws can, and should, be used to fix imperfections in our copyright laws or patent system, which they argue is outdated or overburdened. The US Department of Justice strongly disagrees with this application of the antitrust laws, for the antitrust laws are not the appropriate vehicle to generate reform in these areas.[3] To the contrary, antitrust laws, which protect competition, not competitors, best operate to correct anticompetitive conduct when necessary, and on a case-by-case basis.

In the Department's view, the antitrust laws do not serve their proper function if they are used to constrain the legitimate exercise of intellectual property rights or to stifle the innovation that is encouraged by a strong intellectual property regime. That is because, in the words of the distinguished Chinese intellectual property scholar, Gao Lulin, "[i]nnovation is the soul of a

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[3] *See, e.g.,* R. Hewitt Pate, Antitrust and Intellectual Property, Address Before the American Intellectual Property Law Association 17 (Jan. 24, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/200701.htm.

nation's advance and the eternal driving force for national prosperity."[4] Indeed, antitrust enforcers should also seek to eliminate, as much as possible, any unnecessary uncertainties created by unclear antitrust enforcement policies, which can undermine incentives to innovate. By contrast, clear rules based on sound economic theory can maximize these incentives.

I should explain that the Department's desire to preserve innovation incentives is really part of a much broader principle. That principle is that the over-enforcement of antitrust laws may chill many procompetitive activities, such as those associated with the exploitation of innovative new products and still other efficiency-enhancing business arrangements. Thus, our concern about innovation is really a special application of this broader, general, principle that guides all of our enforcement decisions. By way of example, the Department of Justice's ("DOJ") Intellectual Property Task Force issued a report just last month on how the Department can improve efforts to curtail intellectual property theft and enhance our intellectual property enforcement initiatives. One proposal is that the Department should "support the rights of intellectual property owners to decide independently whether to license their technology to others."[5] I will talk more about refusals to license intellectual property rights in greater detail in a moment, but an important point to take from the Task Force's recommendation is that aggressive antitrust enforcement strategies may force firms to share their intellectual property when there is no basis in the antitrust laws for requiring firms to do so. Such aggressive

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[4] Gao Lulin, China's Intellectual Property System in Progress, in CHINA IN THE WORLD TRADING SYSTEM DEFINING THE PRINCIPLES OF ENGAGEMENT (Frederick M. Abbott, ed. 1998).

[5] Report of the Department of Justice's Task Force on Intellectual Property (October 2004), available at http://www.usdoj.gov/ag/speeches/2004/ip_task_force_report.pdf [hereinafter "Task Force Report"].

strategies may impede the efficient use of intellectual property assets and ultimately undermine competition. The Department of Justice believes it is important to limit antitrust enforcement to situations in which the holders of intellectual property rights go beyond the legitimate exercise of these rights. But one of the major challenges antitrust enforcers encounter is, of course, to distinguish the legitimate exercise of intellectual property rights from anticompetitive conduct or conduct that goes too far in constraining competition. Our analysis is guided by a principle most recently articulated by the US Supreme Court: "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."[6] Consider the Department's enforcement action against Microsoft Corporation. It is a clear example of when antitrust laws are properly utilized to correct anticompetitive behavior. Microsoft, through an intricate web of exclusive dealing contracts with original equipment manufactures and internet application providers, used its monopoly power in the market for the Windows Operating System to constrain competition in the market for internet web browsers. Although Microsoft's platform software was protected by copyright law, copyright protection provided no defense to an antitrust challenge when Microsoft's conduct went beyond the legitimate exercise of those rights or beyond the exercise of monopoly power that it possessed by virtue of a superior product. Indeed, when Microsoft sought to rely on US copyright laws for protection, the court of appeals said Microsoft's defense "border[ed] upon the frivolous."[7]

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[6] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP.*, 124 S. Ct. 872, 879 (2004).

[7] *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001).

II. Guiding Principles at the IP/Antitrust Interface

One key to a competitive marketplace is striking the right balance between antitrust enforcement and permitting the robust exercise of intellectual property rights. The Department of Justice has found this balance in a flexible, effects-based antitrust analysis, which enables us to respect the legitimate exercise of intellectual rights, preserve innovation incentives, and most significantly, protect consumers. In the intellectual property licensing context, for example, this flexible analysis asks whether competition under a particular agreement would be less than that which would occur in the absence of any licensing agreement at all. The Department's analysis allows us to assess an agreement's overall competitive significance, taking into account its procompetitive efficiencies weighed against any anticompetitive effects. That is what we call a "rule of reason" analysis.[8]

The Department of Justice also recognizes that intellectual property rights do not necessarily confer market power upon their owners.[9] While an intellectual property right does confer the right to exclude others with respect to the work or invention within the scope of that right, it does not immediately confer upon the holder the ability to seek a monopoly rent. Close substitutes in the marketplace may foreclose the new product or technology from realizing any meaningful return, let alone gaining a monopoly position. In this respect, intellectual property assets are comparable to other kinds of property, and therefore, the Department applies the same general antitrust principles when assessing the market power held by an intellectual property

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[8] *See* United States Department of Justice & Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property § 3.4 (Apr. 6, 1995), *available at* http://www.usdoj.gov/atr/public/guidelines/ipguide.htm [hereinafter "Antitrust-IP Guidelines"].

[9] *See* Antitrust-IP Guidelines § 2.2.

owner as it would if the asset at issue were any other form of tangible or intangible property.[10]

Of course, intellectual property rights will sometimes create market power. The fact that an intellectual property owner gains market power is acceptable from the Department's standpoint. Not only is the acquisition of market power acceptable, we believe it can be desirable. The intellectual property laws purposefully hold out the possibility of market power as an incentive to create new innovative products–this incentive is totally consistent with principled competition in the marketplace. A well-known American judge and antitrust scholar, Richard Posner, conveyed this idea quite eloquently, stating that a firm which is the "[t]he first to come up with an essential component of a new-economy product or service will have a lucrative monopoly, and this prospect should accelerate the rate of innovation, in just the same way that, other things being equal, the more valuable a horde of buried treasure is, the more rapidly it will be recovered."[11] Thus, if a patent monopoly is legally obtained, through, for example, creating an innovative new technology, then the Department considers the market power associated with that monopoly to be merely "a consequence of a superior product," "business acumen" or even "historic accident," and not a violation of the antitrust laws.[12] By contrast, when market power is acquired by means other than competition on the merits, or is not simply inherent in the intellectual property right itself, the Department will respond, as we did in *Microsoft*.

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[10] Antitrust-IP Guidelines §§ 2.1, 2.2.

[11] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 929 (2001).

[12] Antitrust-IP Guidelines § 2.2 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)).

III. Intellectual Property Licensing

I return now to intellectual property licensing, which the Department believes can be critical to the market success of many new products and technologies in the modern global marketplace.[13] The 1995 *Antitrust Guidelines for the Licensing of Intellectual Property* recognize that many intellectual property licensing practices are procompetitive.[14] Intellectual property licensing is efficient for most firms because it enables them to combine complementary factors of production, reduce transaction and production costs, and reduce free-riding by others. A portfolio cross-license, for example, permits intellectual property owners to mutually license many or all of their intellectual rights in one portfolio. Other potentially efficient arrangements include grantback provisions, which entitle a licensor to receive automatic rights to use any improvements the licensee makes to its own technology and exclusive licenses, which can provide the sole licensee incentives to develop a technology without the fear of free-riding by third party licensees. The Department generally applies the flexible framework I described a moment ago when assessing these various arrangements. Consequently, most of these practices will not be condemned outright, without regard to their efficiencies, unless they are clearly sham agreements that are plainly anticompetitive, such as those designed to fix prices or allocate markets among competitors. Some factors relevant to our flexible analysis include: (1) whether the licensing practice encourages unlawful coordination among competitors; (2) whether the

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[13] *See, e.g.*, Makan Delrahim, The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property, Remarks Before the George Mason Law Review Symposium 2-3 (Oct. 6, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205712.pdf [hereinafter "Delrahim, The Long and Winding Road"]

[14] *Id.* § 2.3.

licensing practice unnecessarily forecloses market entry; and (3) whether the licensing practice reduces the incentive to innovate in the future.

IV. Procompetitive Benefits of Intellectual Property Pooling

As intellectual property licensing becomes more and more widespread in the global marketplace, far more firms are seeking to acquire and enforce intellectual property rights than ever before. Often what is described as a dense "thicket" of intellectual property rights may form around a technology, which could prevent the new technology, or the products that it creates, from ever going to market, especially if the intellectual property is held by multiple owners.[15] Industry standards, for example, that enable the interoperability of services or products, such as the telecommunications network or your mobile telephone, are often based on a plethora of intellectual property rights. These intellectual property rights may pose a problem if manufacturers cannot readily access them. Certain licensing practices such as portfolio licenses, which I mentioned earlier, or collective licensing arrangements, such as pool licenses, can mitigate the "thicket" problem by offering several intellectual property inputs in one package. The Department recognizes the procompetitive benefits of these agreements and has suggested a number of ways that they may be employed without unduly restricting competition.[16]

Let's take pool licenses, for example. Pool licenses are one way to simplify access to

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[15] *See generally* Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting, in* 1 INNOVATION POLICY AND THE ECONOMY (Adam B. Jaffe, John Lerner, Scott Stern eds., 2001).

[16] *See, e.g.*, Antitrust-IP Guidelines § 5.5.

intellectual property rights that are necessary to make a product according to industry standard. Pools offer what we call "one-stop" shopping, whereby a manufacturer can obtain all IP rights in one place, which reduces its transaction costs and will often keep prices down for consumers. As I have stated, pools have other practical aspects as well. They can not only integrate complementary aspects of a technology and eliminate blocking positions, but they also allow licensees to avoid costly infringement litigation. But, as with any other intellectual property licensing agreement, pools can also raise competitive concerns. Pools can, for example, be used as a forum for price fixing, or other forms of downstream collusion. They can also reduce competition between technologies outside the pool by including substitute technologies inside the pool.

The Department of Justice has a "Business Review Letter" process that permits private parties to describe a business plan and request a statement of the Department's enforcement intentions. Several multinational corporations have used that process to come to the Department proposing efficient ways to minimize concerns about proposed pool licenses.[17] For example, the Department has approved several pooling arrangements where the pool members chose to limit the pool to complementary technologies, limit access to each others' competitively sensitive

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[17] *See* Letter from Joel I. Klein, Acting Assistant Attorney General, U.S. Dep't of Justice, to G[a]rrard R. Beeney, Esq. (June 26, 1997), *at* http://www.usdoj.gov/atr/public/busreview/1170.pdf (video compression technology proposal); Letter from Joel I. Klein, Assistant Attorney General, U.S. Dep't of Justice, to Garrard R. Beeney, Esq. (Dec. 16, 1998), *at* http://www.usdoj.gov/atr/public/busreview/2121.pdf (3 company DVD proposal); Letter from Joel I. Klein, Assistant Attorney General, U.S. Dep't of Justice, to Carey R. Ramos, Esq. (June 10, 1999), *at* http://www.usdoj.gov/atr/public/busreview/2485.pdf (6 company DVD proposal); *see also* Letter from Charles A. James, Assistant Attorney General, U.S. Dep't of Justice, to Ky P. Ewing, Esq. (Nov. 12, 2002), *at* http://www.usdoj.gov/atr/public/busreview/200455.pdf (3G Patent Platform Partnership).

business information, and allow pool licensors to retain the right to license non-exclusively outside the pool. By employing such safeguards, pool members were successfully able to structure their pool licenses in a manner consistent with the antitrust laws, thereby enabling the efficient exploitation of their intellectual property rights in the global marketplace. Notably, all of the pooling arrangements that the Department reviewed now generate products or services according to industry standards that touch the lives of consumers around the globe, such as video compression technology (involving the M-PEG-2 standard which allows video to be stored or transmitted) or digital video disks (DVDs) or DVD products, which provide a place to store these compressed video files, and also allow the consumer to store and play music and personal files as well. When intellectual property licensing agreements, such as these pooling arrangements, are structured correctly they maximize social welfare by providing benefits to intellectual property owners as well as consumers. Moreover, by allowing market participants to devise their own "competition-friendly" solutions, antitrust enforcers can avoid the problems associated with over-enforcement that I mentioned earlier.

V. Refusals to License

Finally, I will more fully address the Department's enforcement policy with respect to refusals to license, which really boils down to a simple premise: in the United States we do not require IP owners to create competition in their own technology.[18] The legitimate exercise of the right to exclude competitors by an IP owner, without more, will not violate the antitrust laws. The recent report of the Department of Justice's Intellectual Property Task Force, which I

[18] Antitrust-IP Guidelines § 3.1.

discussed earlier, summarizes these principles, stating that the Department should support efforts by intellectual property owners to independently decide whether it is in their individual best interest to license their intellectual property.[19] The Department's position is supported by a line of judicial opinions, the most recent of which is a US Supreme Court decision that called into question an application of the antitrust laws that would force firms to share their intellectual property assets.[20] The reason for concern is two-fold: imposing liability for a refusal to license an intellectual property right may lessen investment incentives if firms believe they may ultimately be made to share their intellectual property assets with competitors. Moreover, structuring a remedy for such refusals to license can, in itself, have anticompetitive consequences–such as collusion on price or output–if, for example, a compulsory license is not properly monitored and enforced. Thus, the Department is extremely cautious whenever considering forced sharing as a viable remedy, even in those cases outside of the refusals to license context.[21]

That said, intellectual property owners do not have a "free pass" to violate US antitrust laws. As I have said, our antitrust laws will operate to correct behavior that goes beyond the legitimate exercise of an intellectual property right.[22] A licensor that grants the right to use its IP

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[19] Task Force Report at 41-42.

[20] *See* Task Force Report at 42.

[21] *See generally* Makan Delrahim, Forcing Firms to Share the Sandbox: Compulsory Licencing of Intellectual Property and Antitrust, Remarks Presented at the British Institute of International and Comparative Law, London, England (May 10, 2004) (noting the exception for the compulsory license imposed in *Microsoft*).

[22] *See infra* Part I; *see also United States v. Microsoft*, 253 F.3d at 63 (copyright protection does not provide antitrust immunity).

only on some condition that has the effect of improperly extending the licensor's monopoly in the licensed IP is one such example.

VI. Conclusion

In closing, I emphasize that principled antitrust enforcement based on sound economic theory is vital to maintaining the health of our global marketplace, particularly when enforcement action lies at the intersection of antitrust and intellectual property. It has been the Department's experience that, while the over-enforcement of stark antitrust rules can constrain innovative conduct, flexible effects-based enforcement will cause it to flourish. We have learned that, by giving firms some degree of control on how and when to license their intellectual property, we can maximize consumer welfare and promote efficient business. The DOJ Task Force Report on Intellectual Property also recommends that the Department should continue to promote principled international convergence on how antitrust laws should be applied to intellectual property, just as I am doing today.[23] I appreciate your warm invitation to be here today, and I am happy now to take any questions. Thank you.

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[23] *See* Task Force Report at 43; *see also* Makan Delrahim, International Antitrust and Intellectual Property: Challenges on the Road to Convergence, Remarks Before the American Bar Association, Section of Antitrust Law Conference on Antitrust & Intellectual Property, San Francisco, California (May 21, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205629.wpd.; Delrahim, The Long and Winding Road, at 1, 7.