

INTELLECTUAL PROPERTY AND ANTITRUST IN THE CLINTON ADMINISTRATION

Address by

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Before the
Intellectual Property Conference
hosted by
Price Waterhouse

Phoenix, Arizona

February 25, 1994

(Following an introduction of Ms. Bingaman as having been born in Jerome, Arizona)

Anne Bingaman:

You folks should go to Jerome while you are here. You absolutely would not believe it. It is up on the side of a hill. The town went broke when I was five years old, in 1948, and everybody came to Phoenix. My Dad was born there. His grandfather immigrated there in 1882. Papa grew up there, ran a small grocery store there and in the Verde Valley, and had been happy there until he had to leave, at which time he was 35 years old. Once or twice we went back, but not very much. Now I look at this little town and wonder how different my life would have been if this copper body, or ore body, in Jerome, Arizona, had not run out and I had grown up there. Many odd things influence your fate, as all of us know.

I will tell you another odd thing that influenced my fate, and, in a way, yours as well. After getting married, while my husband was in the Army, I returned to Arizona and walked around Phoenix, knocking on doors, looking for a job. I was hired by Jack Brown when Brown and Bain consisted of seven people; I was the eighth. This was in 1968, and I had a

wonderful, wonderful time. I went to New Mexico eight months later, but I stayed in touch, remained good friends, litigated against them eight or ten years later, and ended up merging my small law firm in Santa Fe with theirs. My initial interest in intellectual property is attributable to Brown and Bain's and Jack's deep involvement in the subject matter.

I first learned of my appointment as Assistant Attorney General on April 28, 1993. I spent the next few weeks really thinking through what I wanted to do with the job. It was a wonderful, protected time. Nobody was calling me. I could not really do anything, could not make any decisions, could not read anything substantive, so I just stayed on the phone for about a month. I called everybody I could think of, 60 or 80 people, and asked, "what do you think I should do in this job?" As you would expect, I received a number of widely different suggestions. But I found it interesting that about six or seven of these people, all highly respected, knowledgeable, experienced people in the antitrust world, told me that I really ought to look at problems with competition in intellectual property. They seemed to feel that the pendulum may have swung too far away from antitrust enforcement, and that I really should review the area.

Several months later, I had the good fortune to hire Richard Gilbert as the Chief Economist for the Division. Hired is the wrong word. I induced, got on bended knee, begged, pleaded, and persuaded Rich to join us. It has been a tremendous ordeal for Rich because his family stayed in Berkeley and he has literally flown back and forth every week across country. Rich, as many of you may know, has an extensive background in intellectual property. Later, when Jack Brown asked me if I would give this speech, I accepted because it gave me the incentive to start thinking about the important and challenging area of intellectual property and antitrust.

We have no answers yet, and would not purport to have them, but I can tell you that we are extremely focused. We are keenly aware of the great need to protect intellectual property because of what it has done for this country. We have the greatest technology, the greatest innovation, the greatest inventions in the history of mankind. We have an incredible economy that creates jobs, exports products, and enhances all of our welfare. Every person in this room, every American citizen, is a beneficiary of innovation fostered by the protection of intellectual property. At the same time, I will tell you that there may be ways in which competition is being harmed by overly broad grants of patent and other types of intellectual property rights, and there may be things that we at the Division should be doing to bring about a better balance.

The Antitrust Division is in a unique position in the U.S. Government, and in the country, to monitor, review, and comment -- properly and responsibly -- to appropriate Executive, Legislative, and Judicial bodies on matters affecting competition in intellectual property.

What I would say, based on our initial review, is that we intend to file amicus briefs, and propose legislation after consultation with all other agencies of government. We have met with Bruce Lehman, the Commissioner of Patents, and we are working with people in his office, so we certainly are not doing this on our own. We are very much an integral part of the Clinton Administration. We, however, do view our mandate as fostering competition, not just filing antitrust suits, although the latter is certainly at the core of our mission.

If any of you are aware of cases, whether in the Court of Appeals for the Federal Circuit, other circuit courts of appeals, or the U. S. Supreme Court, that you believe raise important intellectual property competition issues, please bring these to our attention. We have underway right now an active program under which our Appellate Section is looking for such cases.

We have also talked to Bruce Lehman about possibly proposing legislation. We are not clear on what that might be, but there are possibilities out there, and, I tell you frankly, the reason is that Congressman Hughes and Senator DeConcini, the long-time Chairs of the relevant Subcommittees, the House and Senate Judiciary Committees, by sheer chance both are retiring this year. Since it may take some time for the new leadership to get up to speed, this year may present the best opportunity to pass "consensus" legislation. I refer to "consensus" legislation because you do not get a bill proposed as an Administration bill without broad support in the government, and generally you do not get it passed without broad support, period. Accordingly, I think it is clear that in the next month or so we need to focus on the legislative aspects of these issues.

We also plan to have a seminar this Fall, probably in October in the Silicon Valley, of a day or a day and a half, where we will invite expert speakers, academics, people from industry, and practitioners to address us -- and the Nation -- on intellectual property issues. We will try to get this on C-Span, because I really think the country at large should be aware of these issues and should better understand how very valuable intellectual property is for this Nation.

Rich Gilbert is heading up an internal Antitrust Division Task Force to review our policies in a proactive sense. I do not mean to suggest that I contemplate major changes in enforcement policies. Rather, the issues are so crucial to the economy and so vital to the competitiveness of the American economy that we simply cannot stand back and let events take their course. We need to internally think through these issues and be proactively looking for the kinds of cases that we think will shape the law in a socially beneficial fashion. We also want to let people know our antitrust enforcement intentions with respect to intellectual property usage. It is for that reason, as much as anything, that we have formed the Task Force. It is to educate all of us at the Division.

It is no secret to the people in this audience that the Division for years, during the 1960's and 1970's, and up until 1985, had an Intellectual Property Section. It was extremely active, filing 16 major cases in 12 years, and making a lot of law. That Section was folded into what is now our Professions and Intellectual Property Section, but the reality is that we have only two intellectual property lawyers left at the Division. We recently hired two more, and we are actively looking for intellectual property litigators, preferably with antitrust background. I would like to reinstitute an intellectual property task force in the Division. I do not know how large it will be, but probably no more than eight to ten lawyers, and maybe not that large, initially. I think that unless we charge a group with the responsibility of looking for these intellectual property cases and focussing on appropriate legislative changes, we will miss the opportunity to enhance our national well being.

We have a major emphasis on international antitrust in general, and on intellectual property in particular. Diane Wood clerked for Justice Blackmun in 1975 and was an Associate Dean at the University of Chicago Law School until she accepted the job as first International Deputy of the Antitrust Division; Diane is very knowledgeable about these issues. She will work closely with Rich Gilbert on intellectual property issues because the international aspect of these matters is obviously critical.

As a final matter, we have underway three major investigations involving intellectual property. In fact, in preparing for this speech I read an address by Richard Stern at the Patent Section of the ABA last August; some of you may have been there. He was talking about what the Clinton Administration might or might not do, and he said he would be surprised if anyone mounted a renewed effort on intellectual property in antitrust cases because such cases were so huge and the resources were simply not there. I read that and thought, "it's lucky for me, or maybe unlucky for me, that I didn't read it earlier." He is right. It is daunting. These cases are huge and complex. But actually, that is exactly why we should be doing them, because they are so huge and complex. Some of them are almost beyond the litigation ability of private parties.

I am acutely aware that antitrust and intellectual property enforcement is done primarily by the people in this room, and others like you all over the country. I would tell you today exactly what the Division's enforcement policy will be, but I simply do not know it yet. We started, with an open mind, only about a month ago. I hope that we will be able to publish our views soon. At the moment, however, the message is not that there is some drastic change in the offing; it's more that we are aware of how important this area is to the economy, and of the need to review our policies to make sure that we've reached an appropriate balance. Now, let me answer any and all questions.

Q. You have hired a number of new people on your staff. I do not want to sound like Bryant Gumbel, but why? In other words, what are they going to do?

A. They are going to litigate -- that's our primary function. They are going to litigate. That is the core mission of the Antitrust Division, as I understand it, along with competition advocacy. The Antitrust Division has the most wonderful litigation history. Starting in 1905 with the Standard Oil case, which resulted in breaking up Standard Oil, there were five lawyers in the Antitrust Division. I said this to a group of in-house general counsel in October of last year and a fellow raised his hand and asked whether I knew how many lawyers worked for Standard Oil in 1905. I said, "no," and he said, "three." Things have changed on all fronts, but the Division began with major, groundbreaking litigation, which was the right thing to do. The Standard Oil case stands as a landmark case today. The most recent AT&T case also has changed the economy, and I think most of us now would say absolutely for the better. Twelve years ago, you couldn't find many defenders.

I therefore see it as the primary mission of the Division to enforce the antitrust laws, and to take on the hard cases as well as the relatively simple ones. When I speak of the "hard" cases, I'm not referring solely to those cases that seem difficult on theoretical grounds, but also to those that will engender complex, difficult, major pieces of litigation that private parties cannot take on. To do that you need highly skilled litigators. The people who will be defending these cases are highly skilled litigators, and we need the same. The Division lost 250 lawyers between 1980 and 1988. You may not know that. I did not know it before I came in, but it is a fact. The number went from 486 to 220 lawyers in that eight-year period. The Division lost a lot of litigating talent. Jim Rill hired back about 80, but they were largely younger people. We still need, and we are now hiring, experienced litigators in the 10-20 year experience range. A lot of you may know that Max Gillam has joined us, and we are thrilled about that. We are looking for the best talent we can find with stand-up, serious, big-case, courtroom litigation experience.

Q. Do you suppose that adding litigation-experienced lawyers will make any changes in the Department?

A. Actually, yes. I will give you a little overview of what we are doing at the Division, if that is of interest to you. One of Max Blecher's partners, Ann Jones, started calling me in March when there was a rumor that I might get this job. I said, "I'm not talking to you, I would have to be out of my mind to talk to anybody about a job. Don't call, I can't talk to you." But I did, in fact, get appointed. Thereafter, she called back, and continued calling back. After about six calls I said to myself, "I like this woman. I don't know her, but she's got what it takes. I am going to hire her." Ann Jones came to Washington and formed our New Case Unit. She works with a young man named Max Stier who has the same just-break-down-the-walls

spirit. They have hired a few more people and they have, in about a six-month period, generated 50 new civil P.I.'s, many of them potential Section 2 cases. A few of these new civil initiatives involve intellectual property.

These new civil initiatives are part of a reorientation of the Division back to what I view to be its historic mission -- a balance of criminal, merger, and civil non-merger cases. We are aiming to devote equal amounts of resources to these three areas. By contrast, in the last few years the resource allocation has been about 50 percent criminal, 38 percent merger, and 12 percent civil.

We will try to focus our resources on the major criminal cases, the national and international grand juries that we are uniquely capable of handling. I am hiring a person from the National Association of State Attorneys General to work with us on an ongoing basis to persuade the states to do more of the local, criminal antitrust work. Many of these cases are very significant but they are local, and there is no inherent reason we should be doing them, if others can and will. We have limited resources in the current budget era and that's not likely to change drastically. We have been very lucky so far in the budget world, and we are only able to hire these people because we got some extra money, but it's not endless, we know. So our effort will be to focus our criminal work on national and international cases. To obtain the balance we seek we have created a new Civil Task Force that ultimately will have 25 to 30 lawyers, and we've converted three other sections to civil non-merger sections. As a result, in Washington we now have four civil non-merger sections and two merger sections. The seven field offices do primarily criminal work. We have changed the deputy structure so that we have deputies associated with each of these lines of activity.

It was difficult for me when I first arrived to figure out how the Division functioned; everybody has his or her own logic in how to approach the world. Under the organization in effect prior to last Fall, everybody did everything, each deputy looked at every section, and every section did everything -- civil, merger, criminal, and, in some cases, competition advocacy, as well. I felt that in an age of specialization in the world, and in a time of limited resources, we simply could not afford that. The lawyers might like it -- it is a lot of fun to get a bunch of different cases and to be able to turn your hand to a grand jury here and a merger there, but I really did feel that we had to specialize. We have, accordingly, instituted civil, merger, and criminal deputies to supervise each of these functions; the cases now go to those deputies by function. I think it has improved our record tremendously.

We have had 14 mergers abandoned or settled by consent decree in the eight months since we took office in July, 1993. That is the highest since they have kept a record. I give full credit to Steve Sunshine, who came to me via Bill Baxter. He was about to be made a

partner at Sherman and Stearling, and Bill very kindly induced him to come take this job. He has done a wonderful job in the merger area. He has done some very innovative things. Some of you may be aware of our innovation market argument in the GM/Zed F matter; that was Steve Sunshine's doing.

In a general sense, we are trying to enhance significantly the Division's litigation capacity. We are hiring paralegals in numbers far exceeding the Division's past practices. That is because I've made my career on paralegals. I'm where I am because of brilliant 24- year old young people. When I became Assistant Attorney General, I said, "why don't you folks have more paralegals?" They said, "Aw, they won't come to the government." I said, "are you kidding? These kids get out of college, don't know what to do with themselves, and are desperate. They would love to do this for a couple of years." So with a little bit of this and that, we found a program that already existed, and utilized it. We hire only college graduates who have a grade point average of 3.5 or better. We have over 50 on board right now, headed toward 60, and I am aiming for 120 a year from now. These people have terrific resumes. They are brilliant, brilliant individuals, and they are just running through brick walls. To them, a box of merger documents is the most exciting thing in the world. It's great. We give them \$22,000 base pay, and they love it. That's the free market at work. All in all, then, we have hired 55 new lawyers and shortly will have hired 60 paralegals, and restructured the Division by reallocating functions.

Q. What are you doing in the appellate area?

A. Diane Wood is the International and Appellate Deputy. I didn't originally conceive of it that way. I thought of just an international deputy. Diane arrived and started doing appellate work because I did not have a policy deputy. (Under the old structure, the policy deputy did appellate work.) Diane, however, had been a Supreme Court clerk and a law professor, and had taught antitrust for almost 15 years. She came to me in August and said, "I love this stuff, let me be the Appellate Deputy, too." I said, "great." Under the direction of Cathy O'Sullivan, the experienced Chief of our Appellate Section, we are looking actively for cases in which we might intervene to influence the development of competition policy. We have targeted various legal issues and are actively scanning cases for appropriate amicus vehicles. If you have cases you think we would be interested in on an amicus level, we are most interested in hearing from you. That is what we have going in the Appellate Section of the Division. It is actually going very well, and I have got to tell you, it is due to Diane. We are incredibly lucky she is there. What else? What else do you folks have, nothing? I used to teach law school, and I'd say, "come on, ask me some questions," and a student said to me one day, "Anne, you do this all wrong. Everybody else asks us questions, but we ask you questions." So I got used to it. I don't mind people asking me questions.

Q. Is there anything about your job that surprised you?

A. What surprised me is how incredibly interesting it is and the incredible scope of the job. It is 10-20-30 times better than I could have ever imagined in that it is a challenge on every level. Analysis of cases, management, politics, thinking through how to approach other people in government and on Capitol Hill, how to deal with the Division, public relations, setting policy -- these aspects of the job have all been fascinating. There is no end to the challenges of the job; it is just phenomenally interesting. The jury is still out on whether I can do it, but I will tell you, I am awfully lucky to have a chance to try. It is a wonderful opportunity. We are doing our best and people are really having a good time. It just feels good, that's all I can tell you. Anyway, our door is open -- you folks come in and talk to us anytime.

Q. Besides the revision of the international guidelines, and you are thinking about the intellectual property revision in the Fall, are there any other guidelines being offered beside vertical guidelines?

A. We released health care policy statements in September. Some of you may be aware of that. We took such action in a very deliberate effort to forestall antitrust exemptions on Capitol Hill. It worked for a while. These people are now beating the door with the same refrain -- "the law is too vague, we don't understand it." I don't have a lot of sympathy for this position because we did put out, and have lived by, a commitment to give a business review on any area covered in the guidelines within 90 days, and on any health care antitrust matter within 120 days. Moreover, we have only had eight requests in six months. So my answer to all these health care folks is "ask us what you want to know and we will tell you." In the meantime, we are revising the health care guidelines at the request of the American Hospital Association and others because there is a desire for a policy statement on our treatment for physician hospital organizations, or PHO's. These PHO's are forming the vertically integrated network that is the newest thing in health care. We are in the process of meeting with them and with the FTC. Other than that, as far as major areas, we don't conceive it as our business to expound on the law. The courts tell us what the law is and we are there to enforce it.

Q. The concept of relevant markets is so important in so many areas of antitrust. Are you making any efforts or polling the Task Force to try to reevaluate what the concept of "relevant market" ought to be in this global market?

A. No, but I've had the question asked in a different way. We analyze global markets every time we analyze a market. We frequently are engaged in that, and clearly there are global markets for some products and services and not for others. It depends on what the

particular product is. There is no question in my mind that there are lots of global markets and then there are other markets that are not global. So, I don't know what a study would accomplish. Certainly there are some global markets. It really all depends on what product or service you are talking about.

Q. Just one parallel . . . and that you are trying to find antitrust violations there's a great temptation to get the markets falling. If you can get the markets falling out there is more than likely some activity you thought to be wrongful, so I am suggesting there are some things that have to be looked at very carefully and you are looking.

A. I don't disagree with you. That's clearly right. I have trouble seeing how it can be anything but a case by case determination, but I may be missing something. To tell you the truth, I have a little instinctive reaction against the idea of us opining on the law in a whole variety of areas. I don't know if I think it is presumptuous or if it just doesn't strike me as our job. There are areas like health care where there is a definite need to do that, and I have no question we did the right thing, but that was very unusual. It was prompted by the combination of the President's plan and this national outcry for exemptions, based on the assertion that the law was so unclear that there had to be a sweeping antitrust exemption. In the intellectual property area the guidelines have been out there, and that's an historical fact. I don't know that I would have written them as an initial matter, but that doesn't matter, now. They are written, and people rely on them and look to them for guidance. The same is true with the international guidelines. But I don't view it as our responsibility generally to tell courts what we think the law is. Courts tell us what the law is, and we are supposed to do our best to apply it and enforce it.

Q. Might there be any further examination of jurisdictional issues and perhaps any intense or greater look at foreign cartel activity insofar as the effects of exportation of American goods and services?

A. We have had that underway since August of 1993. It's not new. That's a part of Diane Wood's mission and mandate. I will be glad to discuss with you generally what we are doing. It may well be of interest to this group. When Diane arrived, there actually were a number of major international grand juries, that is, grand juries focusing on international price-fixing cartels operating in the United States, with one or two U.S. firms among the participants, and usually in highly concentrated industries. We have instituted one of two more, but the effort has been ongoing. We have continued our efforts and heightened them since August. There also is an effort to look at export barring practices, boycotts, Section 1 violations abroad, because we see that also as part of our law enforcement mission. It is certainly not the only part of our mission, but it is absolutely a part of our mission. So we

have had a group tasked with that since August, and we have a number of things that we are looking at. However, I can't predict whether or when any particular cases might be filed.

I should tell you one other thing that has influenced my desire to improve our ability to obtain documents from foreign nationals. New Mexico used to have half of the uranium production in the United States, and I began my antitrust career with the uranium cartel litigation in Santa Fe, New Mexico in the 1970's. As a result, I became acutely aware of foreign nonproduction of documents since that was a major issue upon which those cases eventually turned. When I became Assistant Attorney General I was told, "forget it, we can't get these documents," and I said, "I refuse to take that for an answer, that's just not the right answer, what can we do, let's get some legislation." Then somebody said, "all right, here's some legislation that the SEC got passed in 1988." Now we are about to introduce similar legislation. The SEC had Congress pass a statute authorizing it to enter into agreements with sister enforcement agencies abroad. They have entered into approximately 19 agreements since the statute was passed. They are now allowed to exchange confidential documents with foreign enforcement agencies on a case-by-case basis. We are using that precedent to try to get similar authority from the Congress. If we get that authority, another big part of Diane Wood's job will be to negotiate and implement such agreements. Until we get such authority, we can't exchange information with the EC even if we both are investigating the same international cartel. Under current law, once the documents are returned to us under grand jury subpoena, and if we know facts from witnesses before a grand jury, that's it. We can't say a word about it, and the EC, similarly, can't tell us anything. This is an unhappy situation, to say the least. We have a world characterized by increased international trade, and law enforcement agencies absolutely hobbled by blocking statutes. The legislation that we are about to introduce will be a major step forward in rectifying this situation.

Q. Can you talk a little more about the Silicon Valley conference, what its purpose is?

A. The main purpose is to allow, for the benefit of a broad audience, an exchange of views on intellectual property. I am sure I will make a speech giving our views, probably at the end of it, or I might put it out in the paper. We haven't decided. The purpose is to hear views in a public forum from knowledgeable, expert people, publish the proceedings, have it on C-Span, if we can, to inform ourselves and the public at large about the issues of competition and intellectual property.

Q. I've heard about people who were at the recent hearing (by the Patent Office) in Silicon Valley and I am aware of legislation relating to patents which is now pending in Congress. I'm just curious as to what role, if any, your Division had behind that legislation, and if you can comment on it from the antitrust perspective?

A. We had no role, but we may testify. I think the hearings Senator DeConcini has called are on March 7 or 9. Without having studied it closely, and we really have not, I think that we have a favorable impression. That is not an official administration position, however, because I'm in no way, shape, or form authorized to give one. It is not even an official Division position. I can tell you, however, that we have talked about it, we are aware of it, we have read it, and the preliminary impression that we have is that it would probably be helpful for competition, generally. If we are wrong about that, by all means, tell us. We would like to know if you believe that's incorrect.

Q. During the Bush Administration, the number of second request and Hart-Scott-Rodino filings doubled for some people like, three percent during the Reagan Administration to six percent. Do you have a sense for how the percentage may be running for this Administration?

A. I don't know the percentage. It happened by sheer chance that we had to do a report to the Attorney General last week, and I saw the report and the number. I think it was in a comparable period in the last year of the Bush Administration, so that may or may not be representative. In any event, I believe we have handed out 56 second requests. Steve Sunshine has really ginned up our merger enforcement program. He is everything Bill Baxter said, and more. He is absolutely brilliant, and has sound judgment. He understands exactly what issues are involved, and we are very lucky to have him. Obviously, Rich Gilbert and the economists play a huge role in this, as well.

I've talked you folks into the ground. Thank you all very much.

*The preceding is a transcript of the taped speech, modified to correct grammar and eliminate redundancy.