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Remarks by

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Antitrust law and patent law are two sides of the same policy coin. Both legal regimes, properly applied, promote competition in innovation.

On one side of the coin, our patent system uses property rights to provide an incentive to incur the risks and costs of innovation, while (1) limiting the grant of a patent to inventions that are new, useful, and non-obvious, (2) requiring the patent holder to publicly disclose its discovery, and (3) limiting the term of the patent.

On the other side of the coin, federal antitrust law prohibits restraints of trade that unreasonably impede competition to innovate and endeavors to ensure that proprietary technologies and products are licensed, bought, and sold in competitive markets.[1]

When properly understood and applied, these two legal regimes do not conflict. Antitrust is not hostile to strong intellectual property rights. And several aspects of patent law – such as misuse, the patent exhaustion doctrine, and the standards used to determine whether an invention is patentable and whether to enjoin infringement – are designed at least in part to preserve and protect competition.

As stated in a joint report issued by the Justice Department and Federal Trade Commission last year,

> Modern understanding of these two disciplines is that intellectual property and antitrust laws work in tandem to bring new and better technologies, products, and services to consumers at lower prices.

This afternoon, I will talk about both sides of the coin. First, I will discuss the report and recommendations of the Antitrust Modernization Commission ("AMC" or "Commission") with respect to patent law reform. My comments with respect the AMC Report do not necessarily reflect the views of the U.S. Justice Department, which has not taken a position with respect to

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[1] *See generally* Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2007). Available at http://www.justice.gov/atr/public/hearings/ ip/222655.pdf.

any recommendation of the AMC. Then I will describe five general principles that guide Justice Department antitrust enforcement in the area of intellectual property rights and innovation.

Side 1: The Patent System

Our founding fathers considered a national patent system to be so critical to the economic growth of the country that it was embodied in the U.S. Constitution.[2] Section 8 of Article 1 gives Congress the power "[t]o promote the Progress and Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries; . . . ."

In Federalist Paper No. 42, James Madison predicted that "[t]he utility of this power [to grant patents] will scarcely be questioned. . . . The right to useful invention . . . seems to belong to the inventors. The public good fully coincides . . . with the claims of individuals." In other words, recognizing an inventor's property right in his or her useful inventions will encourage innovation that benefits the public.

As I alluded to at the beginning of my remarks, however, patents – like many other property rights – are limited in some respects. In particular, the U.S. patent system provides for a *balance* between what remains in the public domain and available for others to build on and what is protected by the right to exclude that is inherent in a patent. For example, an invention must be novel and non-obvious. It's exclusivity is limited in time. And the quid for property protection is public disclosure of the invention.

[2] U.S. Const., Art. 1, § 8, cl.8.

These conditions on the grant of a patent recognize that both incentive to innovate and a robust public domain of ideas are necessary for innovation to occur.[3] Achieving a correct balance between what is in the public domain and what may be excluded from it is essential to fulfilling the Constitutional objective of optimizing innovation. Significant imbalance can result in less innovation, less competition, and reduced economic prosperity and consumer welfare.

As the Supreme Court said almost 20 years ago in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the U.S. patent laws express

> a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to inventions itself and the very lifeblood of a competitive economy."[4]

It is thus important to recognize that *how* our patent system operates may affect whether innovation is actually optimized. Patents on obvious claims, for example, may prevent competition without the offsetting benefit of innovation.

That is why the Antitrust Modernization Commission considered issues relating to the patent law regime and reports by the Federal Trade Commission ("FTC") and National Academy of Sciences ("National Academy" or "NAS") calling for reform.[5]

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[3] *See* Hovenkamp, Herbert J., "Innovation and the Domain of Competition Policy" (Feb. 1, 2008), U Iowa Legal Studies Research Paper No. 08-07. Available at SSRN: http://ssrn.com/abstract=1091488 (Hereinafter, "Hovenkamp").

[4] 489 U.S. 141, 146 (1989).

[5] *See* Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law Policy (Sept. 2003); National Research Council of the National Academies of Science, Board of Science, Technology, and Economic Policies, Committee on Intellectual Property Rights in the Knowledge-Based Economy, A Patent System for the 21st Century (Stephen A. Merrill et al. eds., 2004).

For those of you who may be unfamiliar with the Antitrust Modernization Commission, it was a bi-partisan commission created by Congress to study and report on "whether the need exists to examine the antitrust laws."[6] There were twelve commissioners (eleven lawyers and one economist). Four commissioners were appointed by the House of Representatives, four by the Senate, and four by the President. Appointments by the House and Senate were evenly split between the Democratic and Republican parties. The President could not appoint more than two commissioners associated with the same political party. Although the Commission was free to determine what issues it would study, Congressman F. James Sensenbrenner, Jr., who sponsored the AMC Act, highlighted issues at the intersection of antitrust and patent law.

You might ask why a commission charged with studying and making recommendations with respect to the *antitrust* laws decided to look at the *patent* law system. It is a good question that the Commissioners debated.

The short answer is that the patent laws and antitrust laws together are integral to a sound competition policy that protects and promotes the innovation that fuels our economy. Again, the patent laws and antitrust laws are two sides of the same coin. The Commission's recommendations are a type of competition advocacy recognizing that many of our nation's public policy choices and legal regimes affect competition and the competitive process. An overly circumscribed focus on operation of the Sherman and Clayton Acts alone may not fully address important competition issues. Another answer is that it is far preferable to address issues in the patent law system through the patent law regime than through antitrust enforcement.

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[6] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116 Stat. 1856 (2002), amended by the Antitrust Modernization Commission Extension Act of 2007, Pub. L. No. 110-6, 121 Stat. 61 (2007) [hereinafter "AMC Act"].

The Antitrust Modernization Commission made several recommendations regarding patent law.[7]

First, the Commission advised that Congress should seriously consider recommendations made by the FTC and National Academy for the purpose of encouraging innovation and avoiding abuses of the patent system that deter innovation and unreasonably restrain competition. In particular, the Commission recommended that Congress consider those recommendations by the FTC and National Academy that are specifically targeted at (1) ensuring the quality of patents, and (2) ensuring that the Patent and Trademark Office ("PTO") is sufficiently funded and staffed to handle the burden of adequately reviewing patent applications within a reasonable period of time. The Commission also recommended that the courts and PTO avoid overly lax application of the obviousness standard.[8]

The Commission did not specifically study or endorse each and every recommendation made by the FTC or NAS. And, importantly, it did not go down the road of suggesting that antitrust principles require altering the benefits of exclusivity inhering in a properly granted patent. Any discussion of improving the current patent law regime must recognize two indisputable propositions: First, that patent rights are critical to certain types of innovation; and, second, that there is a strong correlation between a country's level of commercial creativity and

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[7] My description of the AMC recommendations is not intended to express a position with respect to any legislative proposal and does not reflect any view of the Justice Department with respect to recommendations by the AMC, FTC, or NAS or with respect to any legislative proposals.

[8] Commissioners Donald G. Kempf, Jr. and Makan Delrahim did not join in the Commission's recommendations. Although they joined the rest of the Commission in urging Congress to consider taking actions that would help ensure the quality of patents, they believed that some of the specific recommendations made by the FTC may not achieve that end and may not be helpful in advancing innovation incentives.

economic strength and the strength of the protection it affords to intellectual property rights. Instead, the Commission advised Congress and the President that, in assessing the efficacy of competition policy on innovation, it is important to consider the patent law system as well as antitrust law.

Side 2: Antitrust Principles

Now, let me talk about antitrust. Over the past several decades, antitrust law has evolved significantly from viewing patent exclusivity as an inherent competitive problem to recognizing it as an important impetus for innovation as a critical dimension of competition.[9] Professor Herbert Hovenkamp recently described this process as "antitrust period in the wilderness.".[10] Current policy is guided by a number of principles, of which I will call out five.

1. A patent does not necessarily create market power. A patent is merely a property right that enables the patent owner to exclude others from using the patented invention for a limited period of time in exchange for the patent owner's public disclosure of its discovery. A patent confers no right on the owner to preclude others from competing with substitute technologies. For that reason, when analyzing an agreement to license or the acquisition of a patent, the Justice Department and FTC do not presume that the patent owner has market power. This issue was recently addressed in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, where the

[9] *See generally* Presentation by Thomas O. Barnett, Assistant Attorney General, U.S. Department of Justice Antitrust Division, to the George Mason University School of Law Symposium on Managing Antitrust Issues in a Global Marketplace (Washington, DC, Sept. 13, 2006).

[10] Hovenkamp, at 14.

Supreme Court unanimously held that "a patent does not necessarily confer market power on the patentee."[11]

2. Even when a patented technology or product does enjoy market power, that fact alone does not give rise to an antitrust violation. The Supreme Court has made clear that "[t]o safeguard the incentive to innovate," the "mere possession of monopoly power *and* [ ] concomitant charging of monopoly prices" is not unlawful "unless it is accompanied by an element of anticompetitive conduct."[12] It follows that, for antitrust to apply, a patent owner must have engaged in some conduct, other than the creative process of invention or conduct authorized by the Patent Act, to unreasonably restrain trade or create or maintain a monopoly in a relevant market. Attempting to enforce a patent obtained through fraud on the PTO, for example, might constitute a violation of section 2 of the Sherman Act, provided all other elements of a monopolization claim are satisfied, including the existence of monopoly power. Similarly, under certain circumstances, the acquisition of a patent could violate Section 7 of the Clayton Act, or patent licensing terms might constitute illegal tying or price-fixing.

3. Patent licensing agreements should be analyzed applying the same antitrust rules that apply to agreements involving other types of property. That does not mean that specific aspects of intellectual property – such as the ease of misappropriation – are ignored. All factors are considered as appropriate in any antitrust analysis. Rather, it means that a firm's use of its

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[11] 547 U.S. 28, 44 (2006). The AMC also recommended that "[m]arket power should not be presumed from a patent, copyright, or trademark in antitrust tying cases," having decided to study and report on the issue before the Supreme Court ruled.

[12] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) [hereinafter *Trinko*].

patent rights are subject to the same restrictions as generally apply to its use of other assets. It is neither subject to special suspicion, nor free from scrutiny.

4. Antitrust liability for refusal to assist competitors – whether by licensing patents or otherwise – is a rare exception to the ordinary rules of antitrust. A firm is generally free to exercise its independent judgment as to with whom it will deal and not deal.[13] The Supreme Court recently observed that requiring firms to share the source of a competitive advantage with rivals is "in some tension with the underlying purpose of antitrust law."[14] First, such a general policy could reduce the incentive that all firms have to invest in developing a competitive advantage. On the one hand, a firm forced to license its invention for free or on terms that do not allow it to appropriate the full value of the invention may have less incentive to invest in innovation in the first place; on the other hand, firms that can count on getting access to rivals' inventions on such terms also may have less incentive to invest in innovation. Second, such a general policy could involve enforcers and the courts in a highly regulatory and undesirable process of determining the price and other terms on which the patentee must license its patent. And, third, compelling competitors to negotiate to assist each other could actually facilitate the kind of competitor collusion that we typically regard to be the "supreme evil" of antitrust.

For these reasons, as stated in the DOJ-FTC Report on Promoting Competition and Innovation issued in April 2007, "liability for mere unconditional, unilateral refusals to license

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[13] S*ee, e.g., United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (noting that the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise [its] own independent discretion as to parties with whom [it] will deal"); *Trinko,* 540 U.S. at 408 (highlighting the "uncertain virtue of forced sharing").

[14] *Trinko,* 540 U.S. at 407-8.

will not play a meaningful part in the interface between patent rights and antitrust protections."[15] On the flip side, depending on the facts, applying the general rules of antitrust to conduct that goes beyond a mere unilateral, unconditional refusal to license a patent could give rise to antitrust liability.

5. Because patent licensing is generally efficient and pro-competitive, it should be assessed under a flexible rule of reason analysis that condemns only practices that are likely to have a net anticompetitive effect. The way in which the Justice Department and FTC apply rule of reason analysis is set forth in two documents: (1) the agencies' jointly issued Antitrust Guidelines for the Licensing of Intellectual Property (issued in 1995), and (2) their jointly issued Report on Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (issued in April 2007). Both documents are available on the Antitrust Division and FTC websites.

Conclusion

There is a role for antitrust enforcers to play in regard to the acquisition and exploitation of patent rights. But antitrust is not about picking winners and losers, ensuring that no firm has a competitive advantage over another, or designing optimal business arrangements. It is not about protecting competitors *per se*, but about protecting the competitive process, so that unfettered market forces drive resources to their most efficient uses for the benefit of consumers. In the

[15] Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition, issued by the U.S. Department of Justice and the Federal Trade Commission (Apr. 2007), at 6. Available at http://www.justice.gov/atr/public/hearings /ip/222655.pdf.

area of patents, the proper focus of antitrust law is to ensure that neither private restraints of trade nor government policies unreasonably distort or diminish incentive to innovate.

I thank you for inviting me to address you today and for your kind attention.