

*Oral Comments*  
**AIPLA TESTIMONY BEFORE  
FEDERAL TRADE COMMISSION AND ANTITRUST DIVISION  
ON ANTITRUST AND INTELLECTUAL PROPERTY ISSUES  
April 10, 2002**

On behalf of the American Intellectual Property Law Association, we welcome this opportunity to provide our association's views on antitrust and intellectual property protection in promoting innovation and competition. We offer our views on several specific topics that pertain to the interface between these two sets of laws and about which the Agencies solicited comments: the roles of antitrust law and intellectual property law in fostering innovation; unilateral refusals to license intellectual property; settlement of intellectual property disputes; the role of the Federal Circuit in developing antitrust law in the intellectual property area; the scope of patents; the lack of market power of intellectual property; and the use of different types of licensing. While we have submitted our written views on all those topics, today I will focus on the fundamental one—the roles of antitrust law and intellectual property in fostering innovation.

**I. The AIPLA**

Initially, let me give you a little background on our organization so that you can better understand the basis for our comments. The AIPLA is a national bar association representing a cross-section of the intellectual

property bar in the United States. Our membership includes attorneys who are in-house, private, government, and academic, and who represent a wide range of clients involved in all aspects of intellectual property licensing and protection. Our members, who number over 13,000, regularly work with diverse issues involving patents, copyrights, trademarks, trade secrets, and unfair competition law, as well as other fields of law affecting intellectual property. They advise large corporations, small companies, individuals, institutions, and government agencies. Our members represent intellectual property owners seeking to enforce their intellectual property rights, as well as those sued for infringing intellectual property rights. And they represent parties that allege antitrust violations and misuse of intellectual property, as well as those who defend against those charges.

Our members' clients are among the most innovative companies in the world. They are vitally interested in continuing to promote innovation in the United States and increasing the number of new United States jobs based on new technologies without violating our antitrust laws.

As a result, we believe that we have a balanced view of the role of intellectual property protection in the innovation and competition processes.

We also believe that this balanced view extends to the respective roles of antitrust enforcement and intellectual property.

One of the stated purposes for which the AIPLA was formed is to aid in making improvements in the field of intellectual property, including the study of and commenting upon the laws protecting such property rights. It is in pursuit of this purpose that the AIPLA expresses its views today.

## **II. Roles of Intellectual Property and Antitrust Laws in Fostering Innovation**

Our members have learned that business competition spurs innovation and they seek to preserve it. But they do not want to stifle innovation by making it harder or less rewarding to innovate or compete in the United States. We believe that intellectual property protection is essential to promoting innovation and investment in new technologies and that licensing this property is procompetitive.

The core element of intellectual property rights is in the limited right to exclude others from carefully circumscribed areas. Patents and copyrights protect investments in innovations and expressions, respectively, for only limited, specific periods of time. Trademark rights protect marks from identical and confusingly similar uses by others. State common law trade secret rights protect proprietary information, such as know-how, only until the information is no longer secret. All are limited in scope to specific

inventions, expressions, or information, and only in the exceedingly rare case do they encompass an entire antitrust relevant market. And all protect against only limited types of infringing activities.

Contrary to the suggestion of one court recently,<sup>1</sup> an intellectual property right is not like a baseball bat, which its owner has the right to use. Intellectual property rights give their owner no right to make, use, sell, or copy the technology or expression that is protected by the rights. For example, inventions very often are improvements on earlier basic inventions made by others. If the owner of the intellectual property rights to the basic invention wants to exercise its exclusivity, that owner can stop the owner of the rights to the improvement from making, using, or selling the improved invention. Likewise, the owner of the rights to the improvement can stop the owner of the rights to the basic invention from making, using, or selling the improved invention. The intellectual property rights thus give only the right to exclude, not the right to use.

That exclusivity is the powerful driving force behind the incentives to innovate, to license, and to compete. Intellectual property protection encourages investment in development and use of innovations. Moreover, patents encourage public disclosure of inventions so that others can learn

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<sup>1</sup> *United States v. Microsoft Corp.*, 253 F. 3d 34, 62 (D.C. Cir. 2001).

from and expand upon them. By affording exclusivity and protection, intellectual property laws spur competitors to innovate around the protected property and to make advances in alternative and often superior technologies. Further promoting competition, intellectual property rights very often are licensed to others.

We view the antitrust laws as providing complementary protection of competition and fostering innovation. The antitrust laws, in our view, serve their proper role by stepping in to curb excesses in the marketplace only when restraints on competition exceed their reasonable bounds. In so doing, they allow existing and would-be competitors the freedom to develop and market innovations to better compete.

Consequently, we view the two sets of laws as fully sharing common, not conflicting, goals and acting together in balance.

### **III. Unilateral Refusals to License Intellectual Property**

We recognize that the antitrust laws provide limits on what people can do with their property when restraints on competition in the marketplace exceed reasonable bounds. As I pointed out, however, the essence of the intellectual property right is the right to exclude others from using or copying the intellectual property. Without that exclusivity, the intellectual property right is essentially meaningless. Consequently, the

AIPLA does not believe that the unilateral act of simply refusing to license intellectual property should be the basis for imposing antitrust liability, as long as the competitive effect of the refusal is not extended beyond the scope of the statutory grant, and the refusal is not accompanied by fraud or sham litigation.

#### **IV. Settlement of Intellectual Property Disputes**

Obviously, settlements are a form of agreement. Depending on the terms of the settlement and the relationship of the parties in the marketplace, they could raise antitrust issues similar to those raised by any other form of agreement. At the same time, settlements are an efficient means of resolving litigation and eliminating risk for owners of intellectual property and their potential competitors. Moreover, litigation settlements serve other important public policies, including conservation of judicial resources. We believe that antitrust rules relating to settlements need to accommodate all of these policy considerations.

A few courts have recently held settlement agreements illegal under a *per se* rule. We believe that applying a *per se* rule to litigation settlements is unwise and inappropriate, absent fraud or sham litigation or settlements. *Per se* liability should be reserved for practices that “lack . . . any redeeming virtue.” The potential benefits to efficiency and innovation from

litigation settlements suggest that *bona fide* settlements should not be subject to a *per se* rule. Indeed, it would seem to be particularly inappropriate to apply a *per se* rule to conduct that the courts explicitly encourage.

## **V. Role of the Federal Circuit in the Intellectual Property / Antitrust Arena**

In reviewing antitrust issues in patent infringement cases, the Federal Circuit normally applies the antitrust precedent of the regional court of appeals for the circuit in which the district court rendering the judgment is located. However, for issues that the Federal Circuit believes “clearly involve [its] exclusive jurisdiction,” it applies its own precedent, rather than that of the regional circuit. In that latter category, the Federal Circuit includes “conduct in procuring or enforcing a patent” and determines the antitrust liability of such conduct under its own precedent.

The AIPLA believes that the Federal Circuit’s approach is correct. This approach can provide uniformity in application of the antitrust laws for patents that have nationwide scope and conduct that is not limited to one region of the country. By applying a uniform antitrust standard in the infringement cases, uncertainty is reduced for patent owners, which fosters innovation. Moreover, applying its own precedent does not insulate the

Federal Circuit from developments in antitrust law from other regional circuits.

## **VI. Scope of Patents**

In our view, the scope of patents raises competition issues, for it can affect the degree to which patents spur innovation. But we believe that the scope should be left to the courts to develop as a matter of patent law. Patents that are valid have a scope that covers only new, useful, and non-obvious inventions. That scope should not be artificially altered to meet concerns of other bodies of law, such as antitrust. Working within the scope of valid patents, we believe the courts can balance the two complementary goals when they interface in particular cases.

We do not view the procurement procedures for patents as having antitrust significance or needing correction for antitrust reasons. But we have substantial concerns about the diversion of funds from the Patent and Trademark Office, which affects its ability to conduct a rigorous review of all patent applications.

The PTO shoulders a tremendous responsibility in annually reviewing huge numbers of patent applications and deciding which deserve the patent reward. Over the years, the PTO has demonstrated its responsiveness to the changing needs of examining different types of

subject matter. Unfortunately, recent Executive and Legislative Branch actions have severely undermined the ability of the PTO to meet the growing challenges it faces. Since 1992, the President and the Congress have combined to divert over \$700 million of PTO fee revenues to other Federal programs. This diversion of revenue from the PTO has increasingly inhibited the PTO from routinely and promptly performing high quality search and examination of patent applications and establishing the electronic filing and processing of patent applications demanded by U.S. industry. Ensuring adequate support for the PTO to carry out its Constitutional mission could be one laudable outcome of these hearings. If it obtains proper funding, we believe it would have the ability to conduct a rigorous review of all patent applications..

## **VII. Lack of Market Power of Intellectual Property**

The AIPLA believes that no presumption of market power should exist for intellectual property, in accordance with the position the federal antitrust agencies have taken. A blanket presumption of market power for intellectual property bears no valid relationship to the real world. In all but the rarest of cases in our economy, products and methods compete with other products and methods that affect their market price.

## **VIII. Conclusion**

The AIPLA appreciates the opportunity to contribute to the FTC's and Antitrust Division's understanding of the dynamics of intellectual property and its benefits for promoting competition.