



MEMORANDUM

From: New Economy Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: May 4, 2005
Re: New Economy Study Plan

Issues Adopted by the Commission for Study

- A. Are there features of the modern (or “new”) economy that warrant different treatment — whether harsher or more lenient — of single-firm or vertical conduct in “new economy” industries?
- B. Should industries involving significant technological innovation be treated differently under the antitrust laws?
- C. How does the current intellectual property regime affect competition?

Questions for Public Comment

Antitrust analysis of industries in which innovation, intellectual property, and technological change are central features

1. Does antitrust doctrine focus on static analysis, and does this affect its application to dynamic industries?
2. What features, if any, of dynamic, innovation-driven industries pose distinctive problems for antitrust analysis, and what impact, if any, should those features have on the application of antitrust analysis to these industries?
3. Are different standards or benchmarks for market definition or market power appropriate when addressing dynamic, innovation-driven industries, for example, to reflect the fact that firms in such industries may depend on the opportunity to set prices above marginal costs to earn returns? Or, are existing antitrust principles sufficiently flexible to accommodate the facts relevant to dynamic industries?

Specific issues at the interface of intellectual property, innovation, and antitrust

1. Should there be a presumption of market power in tying cases when there is a patent or copyright? What significance should be attached to the existence of a patent or copyright in assessing market power in tying cases and in other contexts?

2. In what circumstances, if any, should the two-year time horizon used in the *Horizontal Merger Guidelines* to assess the timeliness of entry be adjusted? For example, should the time period be lengthened to include newly developed products when the introduction of those products is likely to erode market power? Should it matter if the newly developed products will not erode market power within two years? Is there a length of time for which the possession of market power should not be viewed as raising antitrust concerns?
3. Should antitrust law be concerned with “innovation markets”? If so, how should antitrust enforcers analyze innovation markets? How often are “innovation markets” analyzed in antitrust enforcement?

Examination of the reports on the patent system by the National Academies Board on Science, Technology, and Economic Policy and the Federal Trade Commission

The National Academies Board on Science, Technology, and Economic Policy and the Federal Trade Commission have both recently conducted extensive studies of patent-related activity and the operation of the patent system, and issued reports including recommendations for reform. See STEPHEN A. MERRILL, RICHARD C. LEVIN & MARK B. MYERS, *A PATENT SYSTEM FOR THE 21ST CENTURY* (2004); Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003).

1. Do the reports fully capture the role of patents and developments in patent-related activity (e.g., applications, grants, licensing, and litigation) over the past 25 years?
2. Are the concerns or problems regarding the operation of the patent system identified in the two reports well-founded?
3. Which, if any, of the recommendations for changes to the patent system made in those two reports should be adopted?
4. Are there other issues regarding the operation of the patent system not addressed in either report that should be considered by the Antitrust Modernization Commission? Please be specific in identifying any issue and the reasons for its importance.

Hearings

- Three panels of approximately three to four hours each.
1. Antitrust analysis of industries in which innovation, intellectual property, and technological change are central features
 - Representative(s) of business community
 - Scholar(s) and/or economist(s)
 - Practitioner(s)
 - Former enforcement official
 2. Specific issues at the interface of intellectual property, innovation, and antitrust
 - Representative(s) of business community
 - Scholar(s) and/or economist(s)
 - Practitioner(s)
 - FTC and/or DOJ representative(s)

3. Reforming the patent system: The FTC and National Academies/STEP reports
- FTC representative
 - National Academies/STEP Representative
 - PTO representative
 - Scholar
 - Representative of high-tech business sectors
 - Representative of IP owners and/or inventors
 - Representative(s) of American Intellectual Property Law Association or ABA IP Section