



**ANTITRUST MODERNIZATION COMMISSION
REQUEST FOR PUBLIC COMMENT – NEW ECONOMY**

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A. *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?

Because of the need, under antitrust doctrine, to show actual damage, the application of antitrust within the information technology industry (“IT”) has proven to be a fruitless exercise. An IT market participant charged with violating antitrust laws may simply move the same practices from one narrow market segment to another, thus constantly outrunning the reach of antitrust laws and leaving antitrust enforcers looking like dogs chasing their tails. In the most well publicized case in the IT sector, the accused market participant moved from tying browser, to tying media player software, to now tying accounting and other software. That participant's practice has been to drag out the litigation as long as possible while simultaneously carrying the offending practices to new markets. The speed of development within the IT industry is far outstripping the ability of antitrust regulators / enforcers to respond. The typical lifespan for software between major versions is 2-3 years. If antitrust enforcers take 5-6 years to reach a settlement or judgment, the accused will be 2-3 generations of software removed from that which was the focus of the initial charges. When an high-ranking representative of a market participant found guilty of violating federal antitrust laws states that his company is not concerned about antitrust enforcement because “we can out-spend and out-wait any government on earth,” it makes manifest the shortcomings of U.S. antitrust policy and practice.

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?

See response to Question 1. If antitrust law is to be effective, it must be able to address the systemic practices producing harm, not just the actual harm done. That is, having identified a practice for which a prima facie case of antitrust can be made, antitrust remedies need to include the ability to enjoin similar practices, particularly in the area of tying, in markets other than the market that is immediately at issue even if no harm has yet been experienced in those additional markets.

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?**

See responses to Questions 1 and 2. The issue is not one of price setting, rather it is an issue of being able to replicate practices that have been found abusive in one market to other markets, even though such markets carry many common characteristics. For example, in the IT industry is the market for word processing software a distinct market? The market for spreadsheet software? The market for browser software? The market for media player software? The market for accounting/financial management software? The market for forms production? Or do all of these become a single market tied to the operating system because all of the software had been so closely integrated and because the dominant vendor has carried out practices to assure that new market entries cannot effectively compete through lack of interoperability, common formats, etc.? Current antitrust principles seem to be unable to cope with these dynamics.

B. *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?**

In the IT industry one would certainly not believe this should be the case where there is a single patent or a single copyright, for the presumption then vitiates the entire value of the limited monopoly granted with respect to the patent or copyright. However, particularly in the case of patents, where the issue is not one but a multitude of patents, many, if not most, of which are being used by their holder to deny technological approaches to others that the holder itself is not using, the issue is far more problematic. If it can be demonstrated that a market participant is using a sizable patent portfolio in a manner that attempts to extract a tax on other market participants while refusing to disclose the existence or degree of infringement, such a practice should be considered in determining antitrust practices. However, the mere existence of a patent or copyright alone would typically not be evidence of market power in the IT industry.

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?**

As addressed previously, the typical time horizon in the software segment of the IT industry is 2-3 years. That is, given 2-3 years, a market participant, absent patent or copyright restraints, would be able to introduce competing technologies. Consequently, utilizing the two-year time horizon and, in fact, extending it to three years, would be entirely appropriate within the software segment of the IT industry.

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?**

For the reasons set forth in all prior responses, antitrust law needs to be capable of matching the speed of innovation within “innovation markets”, such as the IT industry, or antitrust law becomes irrelevant to those markets. Such consideration appears to be absent in current practices.

C. ***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?**

No. Although both reports do an admirable job of addressing broad-ranging shortcomings in the current patent system and recommend needed changes, they fail to address all shortcomings. With respect to the FTC report this is in part due to the fact that the report adopts the common assumption that patents lead to innovation or that patents are necessary for innovation. Numerous empirical studies have been done, notably those by James

Bessen, that challenge this long-standing belief. Moreover, it is increasingly evident that the patent system does not produce consistent effects in all industries and for all technologies. It is quite evident that patents are, for the most part, critical to the formation and spending of financial capital necessary to sustain the extended process of pharmaceutical development. It is equally evident that patents tend not to be used as competitive weapons in industries such as the telecom industry where interoperability is fundamental to the entire industry. However, the approval and use of patents in the pure software industry lacks either of these characteristics, i.e., the need for substantial capital in long-term development programs or inventions that must interoperate. Useful competitive software is built all of the time without reliance on patent protection. Prime examples include the concepts and software behind the world wide web, the basic word processor, the basic spreadsheet, the basic presentation graphics program, operating systems, the web server, and the list goes on. The application of patent law to software in the U.S. was not the product of reasoned analysis as to whether such application was either necessary, appropriate, or desirable to the development of the software industry. It was the product of a series of court decisions. True reform of the patent system must consider, for the first time, whether patent law is necessary, appropriate or desirable to software innovation and development and whether all fields of technology and all industries should be treated in an identical manner under patent law.

2. Are the concerns or problems regarding the operation of the patent system identified in the two reports well-founded.

To the extent of the issues addressed in the reports, they are well-founded. As pointed out in response to Question 1, the reports fall short of addressing all relevant issues.

3. Which, if any, of the recommendations for changes to the patent system made in those two reports should be adopted?

None of the recommendations made in the reports are without merit, and all should receive consideration.

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.

Our responses to all of the questions above support our contention that all of the issues regarding the operation of the patent system are not being addressed and that the fundamental shortcomings of antitrust doctrine and practice exacerbate these shortcomings.