



DEPARTMENT OF JUSTICE

COMPETITION AND THE END OF GEOGRAPHY

Remarks by

R. HEWITT PATE
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Presented at

The Progress & Freedom Foundation
Aspen, Colorado

August 23, 2004

I. Introduction

Good morning. It is a pleasure to be here in such a beautiful place and to have an opportunity to talk about competition with such an interesting audience. Thank you to the Progress and Freedom Foundation for allowing me to take part in this excellent program on “The Future of the Internet.”

My title today, “Competition and the End of Geography,” refers to an observation about the Internet that became popular in the mid-1990s. Many folks appear to claim credit for the phrase. My best efforts at finding its source identify a 1995 quote at a University of Vienna symposium from First Amendment scholar Stephen Bates:

Proximity once circumscribed awareness But for how much longer? New information technologies – today’s Internet, tomorrow’s Global Information Infrastructure – trivialize geography As our loyalties shift to virtual communities, a problem arises ... law is rooted in geography.¹

Obviously there are many ways in which geography matters a great deal. Nevertheless, Stephen Bates’s prediction got one thing exactly right: law is still rooted in geography and national borders, while loyalties and constituencies on many topics—especially antitrust and intellectual property—are becoming global. This poses a significant problem for both the civil and the criminal laws.

For my purposes, the signal virtue of the title “Competition and the End of Geography” was that it allowed me to provide my hosts with a weighty-sounding title that left me free to

¹ Stephen Bates, *The End of Geography, Symposium: Theories and Metaphors of Cyberspace*, University of Vienna (May 1995), available at <http://pespmc1.vub.ac.be/Cybspasy/SBates.html>.

cover just about anything once I found time to write the speech. Having now done that, what I would like to do this morning is to briefly offer some comments on three topics. The first topic, which is what you probably expect, is how the Antitrust Division sees the rapid changes in the competitive landscape affecting our antitrust enforcement in telecommunications. Second, I'd like to talk briefly about the Internet and intellectual property rights. Finally, I want to talk briefly about something most of you probably have not thought about, which is the "end of geography" as it relates to the global proliferation of competition and antitrust law.

II. The Internet and National Security

Before turning to competition and the Internet, as one of the few Justice Department representatives at this event I feel compelled to mention an Internet-related topic that is, frankly, more important. I hope that you all will share my sense of the gravity of this problem and direct some of your creative talents toward solving it in cooperation with the federal government. I refer to the relationship of the Internet to national security, particularly its potential for abuse by terrorists.

We are all unfortunately familiar with the inhumane torture and beheading of hostages being published to the world on the Internet by terrorists. Threats of terrorism likewise have been distributed to the world through the Internet. It is well known that al-Qaeda uses the Internet daily to plan attacks, communicate among cells, and recruit members. One recent news report cited a survey which found that 76% of the top 25 terrorist Websites are actually based on American computer systems, perhaps by use of proxy servers.² My purpose today is not to

²Middle East Media Research Institute, *Report: Islamist Websites and Their Hosts Part I: Islamist Terror Organizations* (July 16, 2004), published online at <http://www.memri.org/bin/articles.cgi?Page=archives&Area=sr&ID=SR3104>.

review specific ideas on how to keep the Internet from becoming a facilitator of terrorism. But I firmly believe that we all have a duty to do what we can to address this problem. All of our wonderful discussions about Internet creativity and profitability are insignificant if we cannot provide our citizens with basic security in their homes and workplaces.

Many of you are familiar with two key statutes that allow the government to work cooperatively with private industry in combating terrorism: The USA PATRIOT Act, which allows communications providers voluntarily to turn over information in emergencies involving a risk of death or serious injury without fear of civil liability, and the Communication Assistance for Law Enforcement Act (CALEA), which requires that “telecommunications carriers” engineer their systems to allow for law enforcement to intercept communications pursuant to court order and subject to comprehensive Constitutional, statutory and regulatory protections. The FCC recently issued a Notice of Proposed Rulemaking tentatively concluding that both broadband access and many forms of broadband telephony (VoIP) are subject to CALEA and, therefore, must be capable of implementing court orders for surveillance. The Department has noted that the determination that a service provider is subject to CALEA does not mean that the carrier must then be subject to economic regulation traditionally applied to common carriers under the Communications Act of 1934, as amended.³

The Department believes that for purposes of CALEA, Voice over Internet Protocol (“VoIP”) should not be defined as an exempt “information service,” and that such a finding under CALEA does not preclude deregulation under the Communications Act. While there is

³Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, to The Honorable Chris Cannon, Chairman of the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives at 8 n. 1 (July 23, 2004).

widespread support for stripping burdensome economic regulation from VoIP, we must draw a line at regulations aimed at protecting and preserving public safety and national security. To do any less, or demand any less, would be irresponsible. Public safety and national security will be compromised unless court orders for electronic surveillance can be implemented in a timely fashion by providers. If any particular technology is singled out for a special exemption from these requirements, that technology will quickly attract criminals and create a hole in law enforcement's ability to protect the public and the national security.

III. Telecommunications Competition

I would now like to turn to antitrust enforcement in the Telecom industry – how the successes and failures of technological and regulatory innovations affect our approach to mergers and other types of conduct under the antitrust laws. Winston Churchill said that “success is proceeding from failure to failure without losing enthusiasm.” I know that many of you could think of ways in which this definition applies to success in the telecommunications field. At any rate, the propensity of technology industries to keep moving the ball forward (with enthusiasm) means that we in the Antitrust Division have to work with equal enthusiasm to keep up with new developments in the field. We need to do that not only to be sure that we protect evolving competition, but also to be sure that misinformed government intervention does not harm competition.

Given the continuous and dynamic changes that characterize the telecom industry, analyzing mergers and conduct under the antitrust laws can be challenging. New technology, like VoIP, is gaining wider acceptance. There continues to be ever more convergence in services and providers—some traditional cable companies now offer telephone services, and in their quest

to improve financial performance, companies have made significant changes in how services are being marketed. Consumers are being offered bundles of local and long distance services that include high speed Internet and sometimes mobile wireless services. All of this is changing how consumers use and think about telecom services. Although the percentage is still relatively small, more and more Americans now rely solely on their mobile wireless phones and wireless constitutes an ever-growing share of local calls.

The antitrust laws are flexible enough to take account of changes through fact-based analysis. I do think that we need to do as much as possible to reach decisions faster. Our analysis also needs to be realistic in recognizing emerging trends and technological innovation and the impact these are having, or may soon have, on the existing providers. On the other hand, the legal standards of antitrust do not turn on what new gadgets capture the imagination of the public and the press. The antitrust laws protect everyone and not just the early adopters or cutting-edge consumers.

With the passage of the Telecommunications Act of 1996, the general consensus was that the stage was set for competition to develop between the incumbent telephone providers and the cable companies. Despite these high hopes, the Regional Bell Operating Companies' initial forays into video were abandoned. Cable companies upgraded their plants to offer more advanced services, such as digital video and high speed Internet, but few found offering traditional telephone services to be a viable business. At the end of 2003, the FCC reported that only 2% of local telephone lines were served by cable companies. These companies are of course very significant competitors in offering high speed Internet access to consumers – together

they serve almost all residential broadband customers, but as yet are not generally challenging each other in their traditional areas of domination.

More than 8 years have passed since the passage of the 1996 Act, and there are some hopeful signs that competition between the Bell Companies and cable companies may spread to video and telephony services. The economics of VoIP has convinced many cable companies that telephone services should be part of the bundle they offer subscribers. For example, Time Warner Cable has announced that it plans to offer VoIP services to the majority of its 10.9 million customers in 27 states by the end of this year. Just last week, AT&T announced it would continue its rollout of residential VoIP, providing service to consumers in 21 additional markets. RBOCs have entered into deals to offer their customers satellite TV, and some are planning to upgrade their local plants to deploy fiber optics closer to homes, thus allowing for higher speed services to be offered to consumers.

In the time I have, I'd like to briefly address two issues. First, I'd like to discuss how rapidly changing industries, like telecom, are analyzed in the context of the antitrust laws. Relevant changes can include the introduction of new technology, changes that occur in the way services are offered or the entry by companies that were operating in adjacent markets. Next, I will talk a little about some of the challenges faced by the antitrust agencies in dealing with new technology. Given the difficulty in predicting which ones will succeed in the marketplace, I'd like to generally describe which facts we look at in deciding whether the anticipated introduction of less expensive, faster or better featured services that take advantage of the latest technological developments or advanced networks will be sufficient to alleviate the harm from a merger between companies using older technology.

The introduction of new technology, convergence of services and providers and substantial shifts in how services are offered, purchased and used need to be taken into account in analyzing mergers and other potentially anticompetitive conduct. As most of you are aware, antitrust analysis starts with defining relevant markets and identifying participants in those markets. The antitrust agencies, as detailed in the agencies' Merger Guidelines, utilize a demand-side substitution analysis which evaluates consumers' likely reaction to small but significant price increases. "A market is defined as [service] or group of [services] and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm . . . in that area likely would impose at least a small but significant and nontransitory increase in price . . ." New technology or convergence can influence a customer's likely reaction to a price increase by broadening or narrowing the list of services that are likely to be viewed as substitutes. In some cases, the technology may be too new and untested to be included in a market or it may be unclear whether consumers will accept the new provider as an alternative to the incumbents. In these cases, the Department may decide that it is premature to alter traditional market determinations.

For example, in analyzing the WorldCom/MCI proposed acquisition of Sprint, the Department defined one market of concern as "domestic long distance services for mass market customers." At the time in 2000, the parties alleged that there was an "all distance" market based upon the offering of bundles of minutes that would be used for all calls regardless of distance by some providers. The Department disagreed, based in part upon the difference in how local and long distance services were regulated, priced and sold, and the limited overlap of providers. Few applications by RBOCs under Section 271 of the 1996 Act to provide long

distance service in region had been approved at the time, and it was not clear how long the process would take to be completed—in fact it took three more years. The Department ultimately sued to block the transaction, alleging a substantial likelihood of harm in the domestic long distance market as well as in eight other markets, and the parties abandoned the deal.

In the four years since this case was filed, the long distance market has undergone considerable change. The RBOCs have received 271 authority in all states and are offering long distance services in their own regions capturing substantial shares of business. More consumers are purchasing local and long distance services as a bundle and companies believe that customers want the simplicity of dealing with a single provider and that customers who purchase bundles are “stickier” or less likely to switch. In addition, one major traditional long distance company has announced that it will withdraw from active competition for residential customers. The Department would have to evaluate whether these changes dictate that alternative or additional markets need to be considered if another merger involving long distance companies is proposed.

In the past, members of the press or business community have alleged that we do not pay enough attention to market realities and how competition really occurs in defining markets. The Department does spend enormous time and resources to develop and maintain its expertise in telecom. The marketing strategies used by the companies do provide information about how providers perceive customers’ demand for the service and can offer some useful information for defining relevant markets, both product and geographic. But this is just one of many facts that come into play.

In our review of the merger of Echostar and DirecTV, the parties urged the Department to define a national market for the multichannel video programming distribution (MVPD) services.

In support, they pointed to, among other things, the fact that the companies employ a nationwide marketing strategy. Much of their advertising is done on a national basis, they sell through national retailers, the packages of programming and monthly programming prices, excluding local channels, they offer new customers is virtually the same everywhere. The parties alleged these strategies made business sense and were unlikely to change after the merger.

The Department conducted a thorough investigation and in the end concluded that the relevant geographic markets were local. Consumers can only select MVPD services from those companies that offer such services directly to their home. The fact that a cable company offers great service in another state would have little impact on a consumer's decision about which of the providers in their area to choose. The Department also concluded that Echostar and DirecTV compete on a broad array of price and quality characteristics, and not just the monthly programming prices, and that consumers have benefitted from this competition. Competition occurs on equipment and installation pricing, retailer compensation, acquisition of programming, provision of local channels and in other aspects. In addition, the Department found that the companies are capable of targeting promotions to particular customers or geographic locations and that they had done so in the past. All of which led to the conclusion that the impact of the merger needed to be evaluated at the local level.

The Department is currently reviewing the proposed acquisition of AT&T Wireless by Cingular Wireless. Although these are very different services from the ones presented by the Echostar/DirecTV merger, similar issues have been raised about the appropriate geographic market. The parties are pointing to the proliferation of plans that provide nationwide coverage, uniform pricing nationwide and national advertising to support their view that markets are no

longer as localized as the Department has alleged in previous cases challenging wireless mergers. Given that this is an ongoing investigation, I cannot say much about our findings to date. As the Department acknowledged in its recent filing supporting a modification to the decree entered when the Department challenged the formation of the Cingular joint venture, competition has flourished in many parts of the country over the past few years as more providers build out their networks. In reviewing this transaction, we would want to ensure that enough competition will remain after the acquisition so that consumers will not lose the benefits they are currently enjoying. Competition has resulted in lower prices, more attractive plans, higher quality services, smaller handsets with longer lasting batteries, and the introduction of advanced services.

The fact that an industry is undergoing technological and structural changes can also affect other aspects of antitrust analysis beside market definition. It may increase or lower the entry barriers for new competitors. Entry by new providers is significant because it may deter the exercise of market power by incumbent firms. As an example, if new wireless services emerge that are viable replacements for cable modem or DSL for residential customers, the start-up cost of providing these services may be substantially less than constructing new wireline facilities. making it easier for new providers to enter. On the other hand, if the appropriate market becomes a bundle of what were traditionally viewed as separate services, it may be more difficult for new providers who would have to bear the cost associated with providing multiple services rather than individual ones in order to enter the market.

About now you are probably wondering if I am going to tell you the Department's views on VoIP, Wi-MAX or any of the other new technologies that newspapers and trade press have predicted will revolutionize the industry. I cannot predict in the abstract how the Department is

likely to view these new technologies in the context of a specific investigation, but I can give you a guide to the factors we look at in determining how likely a technology is to impact market conditions. The Department will first look at where the technology is in its development stage. It is important to recognize the competitive potential of new technologies that are still in the early phase of the process; however, we are unlikely to give these projects the same weight as we would established competitors. The road from development through technical and market testing to deployment and adoption by the market can be long and filled with land mines. It is too difficult to predict whether technology at this early stage will produce the quality of service consumers demand, whether customers will purchase the new service, whether the service will be widely available in an acceptable time frame, or even whether the companies involved will choose to continue making the necessary investments to complete the service and turn it into a commercial offering.

Even technology that is in marketing trials can pose difficult issues about whether it will be sufficiently attractive to consumers. There may be uncertainty about whether it can be provided at a price point that will generate sufficient demand or whether the service will be good enough to entice customers to switch from the providers they are currently using. For example, there have been a lot of recent articles about broadband over power lines (“BPL”). It has been hailed for its potential in increasing competition in the provision of high speed Internet access; the “third wire” into peoples’ homes which will break up the duopoly consisting of cable modem and DSL service. The service has the advantage of using existing power lines, thus decreasing startup costs that have been a barrier to other providers. In addition, press reports have indicated that previous technical problems have been resolved. However, some reports still raise questions about whether the data

speeds offered or likely price of the service will be attractive enough to win customers away from cable modem or DSL services or whether utilities are going to make the investment needed to create a commercial service. There are also suggestions that the service may be offered initially or exclusively in rural areas where high speed Internet access is not available.

Questions about the impact of BPL will be answered over time, but if the Department were required in the context of a merger to assess the significance of this technology today we would request significant documents and information to make a determination as to the likelihood that these services will be deployed, the time frame in which they will be viable offerings and the geographic areas that are likely to be served in the near term. For example, we would scrutinize business and development plans of utility companies, results of technical and marketing trials and other internal documents that discuss the companies' expectations for BPL. We also would conduct extensive interviews of experienced industry people.

Products that are actually being marketed provide a lot more certainty to our analysis. The actual characteristics of the service are better known and some information is available as to its success in the marketplace. VoIP has been anticipated for some time, but recent press reports now tout it as "ready for prime time" and the "greatest risk to local telephone companies." Although this technology has been used for a number of years and offers a low-cost alternative to traditional local and long distance services, most companies shied away from widespread deployment due to concerns about the quality of calls. The systems also lack certain 911 capabilities and an independent source of power, rendering handsets useless during black outs.

These concerns appear to have been addressed as every day more companies have announced they are now offering such services or plan to offer them in the near future. Cablevision,

Time Warner and Charter are all offering VoIP services in their service areas and other major cable companies have announced plans to roll out this service. Questions still remain about how quickly customers will move from traditional services and whether VoIP services will replace customers' primary lines or be used solely for second and third lines. In addition, it is not clear how many people will have access to VoIP services as potential customers are limited to those who are subscribers to broadband services or whose cable company offers this service. An FCC official recently estimated that 80% of homes in the country have access to broadband services, but only 20% of these consumers actually subscribe. Estimates for the adoption of VoIP vary, with business usage far exceeding adoption by consumers. SBC's chief technology officer was quoted in the Wall Street Journal, in May 2003, as saying that "it could take a decade or 20 years" for VoIP to replace circuit switching in the consumer market.

How to analyze the potential of VoIP will be an issue likely to be raised in any proposed merger between an IXC and an RBOC. The parties are likely to allege that VoIP makes entry by cable companies and others into providing local and long distance service more likely, thus limiting concerns with the proposed merger. There has been a lot of speculation about such a merger with MCI's emergence from bankruptcy and AT&T's recent announcements that it will concentrate on serving business customers. Potential RBOC/IXC combinations seem to engender a lot of concern from those individuals who view this as a recreation of the Bell System that was dismantled as a result of the case brought by the Department. I cannot say whether these mergers will pass muster under the antitrust laws, but it is clear that times have changed since the Bell System dominated the U.S. telecom marketplace. We would of course need to take a careful look at the serious potential issues such a transaction might raise.

I wouldn't want to leave you with the impression that the Department does not place great value on innovation. In fact, we believe that innovation is very important to the country's economy and that part of our role as a competition agency is to protect and encourage the development of new technology. We look carefully at mergers involving dominant firms that seek to acquire promising new technology that could threaten its market position and agreements between companies that limit the availability of improved products and services. In the telecom area, the Department has labored long and hard to encourage competition, especially alternatives to the local loop that connects consumers' homes to the telecommunications network. Some of the provide great potential for real, facilities-based competition in telecom with less need for regulation. The news of VoIP, BPL, WiMax and other technologies is encouraging. We look forward to that result and we expect to take action against any anticompetitive conduct that would prevent these technologies from reaching their full competitive potential.

IV. Competition and Intellectual Property

My next topic is the Internet and intellectual property. It would be an understatement to say that the Internet has changed the way people think about intellectual property rights. For some people, the Internet—with all of its apparent freedom and anonymity—is seen as providing a basis to challenge or rethink the appropriate level of protection for IP rights. Of course, there are legitimate judicial and legislative controversies ongoing as to the proper scope and interpretation of IP laws. The Ninth Circuit's *Grokster* decision late last week and numerous legislative copyright proposals that will be discussed here are examples. But the fact remains that—however the problem is best handled—the Internet has become a mechanism that facilitates outright theft of music, movies, and other intellectual property.

In 2001, for example, copyrighted intellectual property accounted for \$535 billion—that’s 5.2%—of U.S. GDP.⁴ This sector is one of the top two GDP producers in the country (along with defense), and from 1977 to 2001, its share of the GDP grew twice as fast as the rest of the economy (7% vs. 3%).⁵ During that period, IP-related domestic employment was an estimated 8 million workers—almost 6% of total U.S. employment.⁶ IP jobs were growing three times faster than the remainder of the U.S. economy.⁷

In recognition of the important role of IP in our economy, in March of this year the Department of Justice established an Intellectual Property Task Force, which is chaired by David Israelite, Deputy Chief of Staff and Counselor to the Attorney General. The mission of the IP Task Force is to examine all aspects of the DOJ’s activities in connection with the enforcement of IP rights and report to the Attorney General with findings and recommendations regarding how the DOJ can improve its performance. The creation of the task force was driven by the recognition that “organized criminal enterprises have recently begun to increase the scale, scope, and sophistication of international piracy and counterfeiting. Given the simplicity of disseminating millions of copies of stolen software, music, video, as well as other products and programs around the globe with a single computer click, and given the inconsistent enforcement of existing laws worldwide, it is

⁴International Intellectual Property Alliance, *Copyright Industries in the United States Economy 2002 Report* at 3.

⁵*Id.* at 4.

⁶*Id.*

⁷*Id.* at 15.

imperative that intellectual property rights be reaffirmed and vigorously protected.”⁸

Of course, the theft of intellectual property is a federal crime, and our job at the Department of Justice is to enforce federal law. The widespread theft of intellectual property by America’s youth may seem harmless to some. But it is not. According to one estimate, 36% of all software programs are pirated each year worldwide, and 23% in the U.S. and Canada.⁹ The Motion Picture Association of America reports that piracy costs the U.S. motion picture industry an estimated \$3 billion annually in worldwide revenue, and the Recording Industry Association of America states that the recording industry loses about \$4.2 billion to piracy worldwide each year.¹⁰ The problem is not, however, limited to music, software, and movies. It extends to counterfeit products—such as automotive parts and pharmaceuticals—as well. Although it is difficult to estimate the worldwide volume of counterfeit drugs, the FDA has estimated that counterfeits may comprise 50% of all drugs in under-developed countries.¹¹ Needless to say, these counterfeit products are not only illegal, they can also pose a risk to public safety.

The Department’s IP Task Force is designed to help tackle this problem and improve the Department’s IP-related law enforcement efforts by focusing on four substantive areas: criminal law, civil law, international treaties and obligations, and legislative and regulatory proposals. The plan calls for the Task Force to present its report and recommendations to the Attorney General

⁸Department of Justice Press Release, Attorney General Ashcroft Announces Creation of Intellectual Property Task Force (March 31, 2004).

⁹Interactive Data Corp., *Piracy Study 2004* at 2.

¹⁰MPAA/MPA, *Piracy Study* (2003); RIAA, *Anti-Piracy*.

¹¹Paul Rudolf, United States Food & Drug Admin., *Combating Counterfeit Drugs* (Feb. 18, 2004).

later this year. I would encourage those of you who have information or views you believe are relevant to this work to contact relevant Task Force members.

Moving beyond the problem of IP theft, we are now in the midst of a broader debate about IP rights that involves the Internet. The Internet is often identified as the home of a “free” culture characterized by hostility to property rights. A recent informative article by Neil Munro in the NATIONAL JOURNAL described the current debate in these terms: the traditional view of intellectual property is held by what Munro calls the *asset faction*, meaning people who believe that IP is generally the same as physical property and that owners’ rights to use it, and to exclude others from using it, should be largely unrestricted. This view is under attack by two growing constituencies. The first is an *access faction*, which believes that if IP protections were removed, there would be a sudden rush of creativity based on mixing and recombining old properties into new properties. The access faction focuses most of its attention on opposing copyright law, with an eye to making it easier to copy music, art, and computer programs, but the attack is larger than just these topics. The second constituency is the *redistribution faction*, which focuses on a few industries such as pharmaceuticals and argues that society should never tolerate pricing power when it comes to drugs, food, medical technology, or a list of other products related to health. This group focuses most of its attention on opposing the patent system, and it believes that society could achieve better results through a system where government sponsors research and makes the fruits of that research free to all comers.

These two factions basically tell members of the public that they should *expect* access and redistribution, guaranteed by the government; they should see this as their *right*. And indeed these factions have made some inroads in their effort to change public attitudes. In colleges and law

schools, students often hear from academic voices hostile to the current intellectual property system. Holders of this view—though often careful to disclaim support for commercial piracy—reinforce the growing perception among students that if something is available on the Internet, they are “entitled” to have it free, and that only evil special interests could think otherwise. Part of this pitch seems to be that if we just get rid of those pesky copyright laws and other aspects of IP, we would witness a vast creative flowering of new products and services made by eager 27-year-olds sitting at their computers. Of course, these 27-year-olds would not be motivated by money because, in the absence of IP laws, their own work could then be copied by a group of 26-year-olds a few moments later.

In my view, this hostility to IP rights flies in the face of some basic considerations. The first is comparative economics: Lots of countries in the third world lack an enforceable IP system at all, yet they do not seem to be the powerhouse IP-driven economies of today’s global world. Quite the opposite: The U.S. is recognized to be the leader in research, and we also have one of the strongest systems for protecting IP. As for basic economic principles: The simple fact is that incentives work. Centuries of experiments with utopian social visions have taught us, often at serious cost, that any system not based on incentives will eventually clash with what we know about human nature. Finally, I have a hard time understanding why an anti-IP utopia would be a utopia. To exchange a culture that emphasizes pioneering achievements for a knock-off culture seems to me a bad trade.

In my own field, an anti-IP view sometimes manifests itself in the antitrust sphere with calls for antitrust enforcement to be used to curtail IP rights. Many observers in fact believe that this represents one of the greatest current potential divergences between the U.S. and Europe. One key

question is whether European antitrust law will impose duties on IP holders to grant compulsory licenses to assist their competitors. In the U.S., given a long line of IP cases—and also a Supreme Court decision earlier this year known as the *Trinko* case—U.S. antitrust law will not require firms to assist their competitors in this way, thereby placing courts in the position of refereeing the terms of forced sharing. There are some hopeful signs in a recent case called *IMS Health* that Europe also rejects a general requirement that “essential” IP must be shared with competitors. International advocacy of sound IP and antitrust enforcement will continue to be a priority for the Department of Justice.

Again, there is certainly legitimate room for debate about the appropriate place to strike the balance between initial and sequential innovation. But I do not think there is any reason to believe that case-by-case antitrust litigation is the best forum for the debate. Reforms decided upon by the IP community are in my view likely to be better vehicles to address any problems in the system than proposals to “ratchet up” antitrust enforcement in order to limit IP rights. The fundamental questions about the IP regime involve setting the right degree of appropriability to optimize both initial and sequential innovation. Antitrust’s tools of factual and economic analysis of specific transactions are not very well suited to this task. This is particularly true in the context of private treble damages litigation before juries, and even more so if judges allow the issue of “intent” to substitute for objective economic analysis. But if there are in fact problems in the IP system that go unaddressed, do not be surprised if this leads to antitrust law being applied—however imperfectly—as a means to restore the competitive balance. As an antitrust enforcer who happens to be supportive of IP rights, I suggest that the better course is for the IP and antitrust communities to work together to improve the system in more sensible ways.

V. Proliferation of Competition Enforcement

My final topic is one about which most of you probably have never thought, but which is of great and growing importance for the world economy. That is the ever-growing proliferation of antitrust enforcement. Of course, there was a time when few countries had antitrust laws and fewer still enforced them. But during the past decade or so, with the general embrace of principles, deregulation, and respect for competitive forces, many countries have created antitrust laws and agencies to enforce them. Over 100 countries now have antitrust laws of some sort, and antitrust is no longer limited to a handful of developed countries. The Internet has in many ways added to this internationalization of antitrust, making the antitrust activities and materials of more established jurisdictions readily available to new ones.

Of course, in a fundamental sense this is a great development because it demonstrates that countries all over the world are realizing that competition—not central planning—is the best way to increase efficiency, decrease prices, improve quality, and promote innovation. But the proliferation of antitrust regimes presents many challenges to enforcers and the business community alike. In particular, there is a serious risk that inconsistent legal standards and enforcement priorities will lead to inconsistent decisions. One jurisdiction may allow a merger to proceed while another—looking at the very same relevant market—blocks it. Unilateral conduct by large firms is viewed more suspiciously by some jurisdictions than others—also presenting the risk of inconsistent decisions or conflicting obligations on the same parties.

Ill-conceived enforcement has the potential to harm the core values that antitrust is meant to protect. Indeed, we have already seen a number of instances where countries enacted antitrust laws before acquiring a solid understanding of their underpinnings, and the result was that the laws did

more harm than good. Some agencies became no more than price control agencies, while others engaged in permitting processes that regulated – and limited – entry by new firms into the economy. Still others spent far too much time scrutinizing unilateral conduct and analyzing pro-competitive, vertical business arrangements.

In today’s world of overlapping antitrust jurisdiction, inconsistent standards are especially troublesome. Even if a larger number of enforcers conclude that a multijurisdictional transaction does not harm competition, only one contrary conclusion from a jurisdiction with a significant economic connection to the transaction is needed to block it. That is what one of your speakers from last year, former FTC Chairman Tim Muris, calls the “most restrictive enforcer” problem.¹² In the absence of convergence, the most restrictive enforcer’s view may not reflect sound antitrust policy, meaning that the action of just one significant enforcer could deprive consumers worldwide of the benefits that competition has to offer. We can also expect firms to “game” the most restrictive enforcer, using antitrust enforcement as a weapon against their competitors.

Antitrust officials have worked hard to achieve a substantial degree of worldwide convergence on substance and process, based on the core value of protecting competition and promoting economic efficiency. It would be foolish to follow a “mixing bowl” approach for convergence that blends together a hodgepodge of different standards and processes without any regard for whether some might be more effective or appropriate than others. Many countries, for example, are transitioning from a state-managed economy to a competitive one, and seek to use aggressive competition rules that can displace former state monopolies. Yet, applying such aggressive rules to companies that have achieved success without government assistance in a

¹²Timothy J. Muris, “Merger Enforcement in a World of Multiple Arbiters,” Brookings Institution Roundtable on Trade and Investment Policy (Dec. 21, 2001).

competitive framework hardly makes sense. Some who lament the introduction of economic rigor into American antitrust doctrine and would prefer to turn back the clock toward populism would embrace international convergence as a way to water down modern American antitrust theory. Developing an “international competition law” on this basis is not a step forward.

Fortunately, I can conclude by suggesting that the Internet has been material to current efforts toward sound international convergence. In October 2001, we and the Federal Trade Commission – along with agencies from 13 other jurisdictions around the world – joined forces to create the “International Competition Network.” The concept behind ICN was to form a global network of competition authorities focused solely on competition. The goal was to provide support for new competition agencies and to promote greater convergence among authorities toward sound competition principles by working together to develop best practice recommendations that could be implemented voluntarily. Because the risks of globalization were especially apparent in the merger area, where multinational transactions often involve contemporaneous reviews by multiple antitrust authorities, ICN focused much of its initial efforts on merger review issues. Over the past three years, the Merger Working Group, which is chaired by the Antitrust Division and involves significant involvement from over 20 antitrust agencies worldwide, has examined the procedural aspects of merger notifications, including issues of jurisdiction, the scope of merger filings, and the timing of merger reviews.

The Internet can contribute to preventing wasteful international duplication and conflict. Numerous agencies use websites to increase the transparency of their actions, and promoting transparency is a key goal of ICN. Unlike more old-style international organizations, the ICN is a virtual network, flexibly organized around geographically diverse working groups. The groups can

“meet” frequently throughout the year – sometimes in person, but more often by teleconference and over the Internet. This allows members across multiple time zones to engage in a back-and-forth dialogue and exchange ideas informally. This permits frequent, informal and low-cost interactions that can produce concrete results far more quickly than the periodic formal meetings that have characterized the work of more traditional antitrust organizations. My point is simply that the decline of geography in competition law, as in other areas, can present substantial dangers. The hope is that the much richer ability to share information and build relationships across borders that the Internet has created will help us avoid them.

* * *

Thank you for allowing me to discuss these antitrust and competition-related topics with you this morning.