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IP Antitrust: Keeping the Free-Market Innovation Machine Working

William Kolasky*

*WilmerHale, amanda.nastari@wilmerhale.com

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Abstract

One of the most thoughtful books in recent years on how innovation drives economic growth is Professor William Baumol's The Free-Market Innovation Machine. In it, Professor Baumol shows that over the past 150 years, per capita incomes in a typical free market economy have risen at unprecedented levels. He argues that the engine driving this growth is the competitive pressure a well-functioning free market economy places on firms to invest in innovation and to share new technologies with the firms that can use it most efficiently.

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IP Antitrust: Keeping the Free-Market Innovation Machine Working

One of the most thoughtful books in recent years on how innovation drives economic growth is Professor William Baumol's The Free-Market Innovation Machine1. In it, Professor Baumol shows that over the past 150 years, per capita incomes in a typical free market economy have risen at unprecedented levels. He argues that the engine driving this growth is the competitive pressure a well-functioning free market economy places on firms to invest in innovation and to share new technologies with the firms that can use it most efficiently.

Intellectual property obviously plays a central role in driving economic growth through innovation. The protection of IP rights is essential so that companies and individuals can reap the rewards of their innovation, without which they would have no incentive to innovate. Protection of IP rights is also key to promoting the dissemination of technology; companies are unlikely to license others to use their technology unless they have confidence it will not be misappropriated.

For many years, it was widely believed that the intellectual property and antitrust laws had conflicting objectives: IPlaws sought to promote innovation by granting inventors a monopoly while the antitrust laws sought to prevent monopolies. Today we know better. We now understand that IPlaw and antitrust share a common objective and are mutually reinforcing: both seek to promote economic welfare and growth through the operation of free market forces. We now also understand that patents and copyrights, while differing in some important respects from other types of property,2 no more give their holder a monopoly than does a deed to a factory and that a free market cannot operate efficiently unless we protect property rights, be they intellectual or otherwise. Finally, we now understand that the antitrust laws do not seek to prevent monopolies, but only to prohibit conduct that allows a monopoly to be achieved or maintained through anticompetitive means rather than through "competition on the merits."

This paradigm shift has led antitrust enforcers in both the United States and Europe and in most other countries with well-developed competition law regimes to adopt to a more benign attitude toward intellectual property rights. The signal event in the United States was the publication in 1995 by the Justice Department and the Federal Trade Commission of their joint Antitrust Guidelines for the Licensing of Intellectual Property3("IP Guidelines"), the tenth anniversary of which we celebrate this year.

The IP Guidelines

The IP Guidelines explicitly recognize that "the intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare."4 In furtherance of these shared goals, the IP Guidelines articulate three general principles for the application of antitrust law to IP licensing. First, the Agencies regard IP as comparable to any other form of property for the purposes of antitrust analysis. Intellectual property, therefore, is "neither particularly free from scrutiny under antitrust laws, nor particularly suspect under them."

Second, the IP Guidelines reject the approach taken in the early case law and state that, notwithstanding that case law, the Agencies will not presume that intellectual property creates market power in the antitrust context. Even when IP rights grant the power to exclude competitors with respect to a specific product, the existence of substitutes may prevent the exercise of market power.

Third, the IP Guidelines recognize that IP licensing is generally procompetitive because it provides a means for integrating intellectual property with complementary factors of production. Licensing permits more efficient exploitation of IP rights and benefits consumers through lower costs and better products.5 In addition, licensing can increase the incentives for innovation by making it easier to commercialize.

The IP Guidelines recognize, of course, that licensing arrangements can sometimes harm competition. This is most likely when the entities involved are actual or potential competitors and the licensing agreements facilitate market division or price fixing among those firms. Licensing agreements may also harm competition

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if they condition access to needed intellectual property on the licensee agreeing not to deal with competitors of the licensee, thereby cutting off access to needed inputs or channels of distribution.

Key Outstanding Issues in U.S. IP Antitrust

Over the ten years since they were published, the IP Guidelines have played an important role in promoting more sensible antitrust treatment of IP licensing agreements. The guidelines have become an increasingly influential source of guidance, not only to the Agency and antitrust counselors, but also to the courts and to other competition authorities worldwide. Despite the progress that has been made, many key issues remain unresolved. This article will look at the five issues that are currently keeping the IP Antitrust community awake at night.

Refusals to License

As the IP Guidelines explicitly recognize, owners of IP have no general duty to license their protected property.6 The federal courts of appeal, however, continue to disagree as to the application of this general principle. In 1997, the Ninth Circuit held in Image Technical Services, Inc. v. Eastman Kodak Co. that an IP right is a presumptively valid justification for a refusal to share IP with others, but that the presumption could be rebutted by evidence of an anticompetitive purpose for the refusal. 7

In a 2000 decision, In re Independent Services Organization Antitrust Litigation, the Federal Circuit rejected the Ninth Circuit's reasoning, holding that subjective motivation is immaterial in assessing the validity of a refusal to license. 8 The court held that "in the absence of any indication of illegal tying, fraud in the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws," regardless of motivation.

Though the Supreme Court has yet to address this circuit split directly, its recent decision in Verizon Communications, Inc. v.Law Offices of Curtis V.Trinko,9 suggests that its approach will be closer to the Federal Circuit's than the Ninth Circuit's. In Trinko the Court reaffirmed the general right of a business to refuse to aid its competitors. The court held that any exception to this general right should be carefully limited. The Court described its prior decision in Aspen Skiing Co. v. Aspen Highlands Skiing Corp.10 as setting the "outer boundaries" of antitrust liability for a refusal to deal. The Court identified two limiting principles in Aspen: first, in Aspen, the defendant had discontinued a voluntary and therefore presumably profitable cooperative arrangement; and, second, in Aspen, the defendant had refused to sell its competitors a product (ski tickets) that it sold to the public generally even though its rival had offered to pay the full retail price, suggesting that it expected to be able to raise prices once its rival was excluded from the market. The Court also declined in Trinko to endorse the so-called "essential facilities" doctrine developed by some lower courts, which imposes "liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain to compete with the first." Although the issue of refusals to license is not fully resolved, the risk of compulsory licensing has reduced by the Court's decision in Trinko.

Applying Article 82, European courts and agencies have been less reluctant than their U.S. counterparts to use the antitrust laws to require compulsory licensing of IP rights

Presumption of Market Power

One way is which a IP holder may extend its patent monopoly is by conditioning a license to a needed patent on the licensee agreeing to purchase other unpatented products from its, a practice the antitrust laws refer to as "tying."

Among the elements required to prove an antitrust "tying" violation is that the defendant must have sufficient market power in the market for the tying product to enable it to force the licensee to take the tied product. For many years, courts applied a presumption that patents and copyrights granted market power, a rule first articulated by the Supreme Court in United States v. Loew's, Inc.11 This presumption has since been challenged by lower courts,12 four justices of the Supreme Court,13 the IP Guidelines,14 and numerous academic commentators.15 These critics argue that while IP rights grant the power to exclude competitors with respect to a specific product, the existence of substitutes may prevent the exercise of market power.16 Earlier this year the Federal Circuit in Independent Inkv. Illinois Tool Works,17held that it was bound by Supreme Court precedent to adhere to the traditional view that patents create a rebuttable presumption of monopoly power.18 Because the defendant had not provided any evidence to rebut the presumption, the court found the defendant liable for violating antitrust laws.19 In June, the Supreme Court granted certiorari to review the Federal Circuit's decision and to decide whether these earlier cases should be overruled in light of the new economic learning.

Standards Ambush

Participants in standard setting organizations (SSOs) may be liable under the antitrust laws when they unilaterally abuse the standard setting process in a way that harms competition – a practice sometimes referred to as "standards ambush." In a 1996 consent order, Dell Computer Corp., the Federal Trade Commission accused Dell of violating antitrust laws when it participated in a standard-setting process and twice certified that it had no intellectual property rights to the proposed standard, only to disclose after the standard had been adopted that it held a patent on the design.20 As relief, Dell agreed to refrain from enforcing the patents at issue. 21 The FTC was careful to limit its discussion in Dell to the facts of the case – where there is evidence that the standard setting body would have implemented a different non-proprietary design had it been informed of the patent conflict and the participant had failed to act in good faith to identify and disclose patent conflicts.22 It did not impose a general duty on participants to search for and disclose relevant patents in a standard setting process, nor did it impose liability for an inadvertent failure to disclose patent rights.23

The FTC has sought to apply this notion of standards ambush in two recent cases. In In the Matter of Union Oil Company of California,24 the FTC staff alleged that Unocal violated antitrust laws when it used information gained from participating in the government-sponsored development of cleaner-burning gasoline guidelines to secretly patent the blending process for clean-burning gasoline.

An administrative law judge dismissed the staff complaint, but Unocal subsequently agreed to a consent order requiring it to stop enforcing the relevant reformulated gasoline patents and release all relevant gasoline patents to the public.25 In a second case, In the Matter of Rambus Inc.,26 the FTC staff alleged that Rambus had engaged in anticompetitive conduct by failing to disclose relevant patents and patent applications to fellow members of a SSO. Following an administrative trial, an administrative law judge ruled that the FTC had failed to show that Rambus violated the SSO's rules or the antitrust laws, and the case is now pending on appeal before the full Commission.

The key issue in the case is whether the qualified requirement of disclosure articulated in Dell should apply to situations where the defendant did not have an actual patent, but only a pending patent application. Although the primary policy justification for disclosure of existing patents – the desire to provide SSOs with information required to weigh the costs and benefits of the adoption of proprietary technology as a standard – also applies to future patent interests, it may be weaker in the latter case. As one commentator has noted, in the case of future IP interests, the probabilistic nature of the information provided is less likely to prove useful for SSO decisions-making and the cost of disclosure of future patent interests is significantly greater to the disclosing entity.27

"Reverse payments" in Patent Litigation Settlement

Another important and unresolved issue in IP Antitrust concerns whether a patent holder violates the antitrust laws by making "reverse payments" to an alleged infringer in order to settle an infringement action. The issue has arisen prominently in the pharmaceuticals industry where pioneer drug manufacturers have been accused of making settlement payments to generic manufacturers in exchange for delayed market entry of generic drugs. The FTC has been extremely skeptical of reverse payments, viewing them as a "red flag"28 and objective indicia of intent to illegally share monopoly profits by delaying generic entry. The Sixth Circuit took an even more skeptical stance with respect to the reverse payments in In re Cardizem CD Antitrust Litigation,29 a case concerning an interim settlement agreement that included reverse payments and a commitment by the generic manufacturer not to market its generic product. The court found that the agreement was a per se violation of antitrust laws because it allocated the drug market between competitors.30

The Eleventh Circuit has adopted a more benign view of reverse payments. In overturning the FTC's decision in Schering-Plough Corp, the court sided with an administrative law judge's factual finding that the reverse payment made by the pioneer manufacturer was not a quid pro quo for the generic manufacturer's delayed market entry, but rather a bona fide royalty for licenses that the pioneer manufacturer had obtained from the generic manufacturer. 31 Moreover, the court noted that the exclusionary effect of a settlement agreement must be viewed in the broader context of patents, which "by their nature . . . create an environment of exclusion."32 In this case, the settlement agreement was less exclusionary than the patent because it allowed entry of generic versions of the drug substantially before the patent's expiration, suggesting that the settlement agreement did not violate antitrust laws.33 The Eleventh Circuit recently denied an FTC petition for rehearing and it remains to be seen whether the FTC will seek Supreme Court review.

Package Licensing as Patent Misuse

"Package licensing" describes the licensing of multiple items of intellectual property in a single license. While it is conceivable that there may be circumstances in which such licenses may be anticompetitive, they also may serve the procompetitive purpose of facilitating the commercialization of new technologies by assuring licensees that they will have the right of use whatever patents they may need to manufacture products embodying that technology.

For this reason, IP Guidelines provide that such licenses should be evaluated under the antitrust rule of reason, which requires an evaluation of both the potential procompetitive and anticompetitive effects in order to determine whether, on balance, the license is anticompetitive. In its recent decision In the Matter of Certain Recordable Compact Discs and Rewritable Compact Discs34 the ITC refused to follow the IP Guidelines and apply the rule of reason, but instead held that a package licenses that includes both "essential" and "non-essential" patents constitutes per se patent misuse. The case is now pending on appeal before the Federal Circuit.

IP Licensing in the European Union

Competition law has been one of the successes of the European Union. The key provisions of EU competition law are Articles 81 and 82 of the Treaty of Rome, which are the EU analogues to sections 1 and 2 of the Sherman Act. Article 81 prohibits agreement that harm competition and Article 82 makes it unlawful to abuse a dominant position. Like U.S. law, EU competition law was initially hostile to IP licensing, but has been following the U.S. in moving toward a more flexible approach that recognizes the procompetitive benefits flowing from such licenses.

A potentially even larger problem looms in China, which is preparing to adopt an Anti-Monopoly Law. These provisions would grant Chinese regulators extensive power to pursue compulsory licensing. The draft law also proposes treating excessive pricing as an abuse of dominance, which may open the door to regulating royalties in IP licenses.

Technology Transfer Block Exemption Regulations

In May 2004, the European Commission published a revised Technology Transfer Block Exemption Regulation (TTBER)35 and new explanatory Technology Transfer Guidelines36 ("EC Guidelines"). Much like the 1995 U.S. IP Guidelines, the TTBER and the EC Guidelines should create a more favorable climate for IP licensing by moving from a highly formalistic to a more market-based framework for regulating technology licenses.

The TTBER creates a safe harbor for bilateral licensing agreements in which the parties' combined market share does not exceed 20 percent (if the parties are competitors) or the individual market shares do not exceed 30 percent (if the parties are not competitors). The safe harbor, however, excludes agreements that contain certain "hardcore" restrictions such as allocation of markets or customers, limitation of output, or restrictions on pricing. It also excludes agreements among more than two parties, agreements creating technology pools, patent disputes settlement agreements and non-assertion agreements.

Agreements that fall outside the TTBER's safe harbor must be assessed individually under Article 81 of the EC Treaty. The EC Guidelines provide a general framework for assessing the legality of licenses that fall outside TBBER's safe harbor. Agreements containing "hardcore" restrictions are presumptively illegal. All other agreements falling outside the safe harbor will be evaluated using an approach that is very similar to the U.S. rule of reason and requiring weighing the procompetitive benefits of the licensing arrangement against any anticompetitive effects to determine whether, on balance, the licensing provisions should be found unlawful

Compulsory Licensing

Applying Article 82, European courts and agencies have been less reluctant than their U.S. counterparts to use the antitrust laws to require compulsory licensing of IP rights. Less than four months after the U.S. Supreme Court in Trinko37 declined to endorse the "essential facilities" doctrine, the European Court of Justice applied that doctrine in IMS Health Inc. v. NDC Health Corporation38 to compel the licensing of IP rights. In the ECJ case, IMS Health Inc. had copyrighted a geographical breakdown called a "brick structure" for processing data received from pharmaceutical wholesalers. When a competitor, NDC, tried using a similar structure to provide data collection services, IMS sued for copyright infringement. NDC, responded by accusing IMS of violating EU competition law by refusing to license its proprietary brick structure to NDC. Following a line of cases that includes Magill39 and Bronner,40 the ECJ held that if the brick structure is "indispensable" to such data collection services, it is a violation of EU law to refuse to license the brick structure, if the following conditions are met: the prospective licensee intends to offer new products or services not offered by the copyright owner and for which there is a potential consumer demand; the refusal is not justified by objective considerations; and the refusal is such as to reserve to the copyright owner the entire market (in this case the supply of data on sales of pharmaceutical products in the Germany) by eliminating all competition in that market.

There is significant ambiguity in the standard adopted by the ECJ. For example, it is unclear what kind of proof is required to show intent that alicensee "intends" to offer a product. Likewise, the level of novelty required to satisfy the "new product" standard is ambiguous. Interpretation of such terms by agencies and courts will determine whether the frequency of compulsory licensing actually increases in the wake of the IMS decision. The court's decision does, however, leave open the door to compulsory licensing, especially where de facto industry standards are present. Ultimately, IMS demonstrates that despite the movement toward a climate more favorable to IP licensing and convergence with U.S. IP Antitrust, European competition law is still decidedly less favorable to the rights of IP owners than U.S. antitrust law.

IP Licensing in Developing Countries

A key to economic growth in developing countries is access to technology. Adoption of new technology increases economic productivity, facilitates the growth of new industries, and increases the standard of living. A primary conduit for this valuable technology transfer is IP licensing. In the early 1990s, inadequate protection of IP rights and the associated risk of piracy, risked slowing down licensing by making the holders of IPrights reluctant to license to licensees in developing countries. To assuage the fear of IP holders and encourage technology transfer, the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) was reached in 1994. TRIPS, which applies to all members of the WTO, sets out minimum standards of protection that each country must provide to IP rights. Under the agreement, patent rights are enforced regardless of whether the products are foreign or domestic. TRIPS also expands IP rights to areas previously unprotected in most developing countries, such as computer programs and pharmaceuticals.

Despite TRIPS, dangers still remain for IP holders. One risk is that developing countries may misuse their newly enacted competition laws to compel licensing on terms that favor local industry. A recent example is a July 2004 decision of the Taiwanese Intellectual Property Office (TIPO) in which the Taiwanese government forced Philips to license CD-R technology to Taiwanese competitors at lower than market price.41 TIPO based its decision on a provision of Taiwan's Patent Law that permits compulsory licensing where the applicant is unable "to reach a licensing agreement with the patentee concerned under reasonable commercial terms and conditions within a reasonable period of time."42

A potentially even larger problem looms in China, which is preparing to adopt an Anti-Monopoly Law. The most recent draft of the law released in April 2005 contains a strong essential facilities provision,43 as well as an article providing that a business in a dominant market position may not, "without valid reasons," refuse to sell its products.44 Together, these provisions would grant Chinese regulators extensive power to pursue compulsory licensing. The draft law also proposes treating excessive pricing as an abuse of dominance, which may open the door to regulating royalties in IP licenses. As the ABA recently concluded, in its current form China's Anti-Monopoly law has the potential to "discourage investment and innovation by undertakings and therefore could harm competition and consumers."45

Faced with these risks, the IP Antitrust community needs to look for creative ways to promote convergence in the application of competition laws to intellectual property along the lines of the U.S. IP Guidelines and the EU TTBER. One possible path forwardinvolves the International Competition Network ("ICN"), an informal network for competition authorities worldwide that promotes effective antitrust regulation. Since its inception in 2002, the ICN has played an important role in promoting international cooperation and convergence in antitrust enforcement through working groups in such critical areas as cartels and merger control. Given the central importance of IP licensing to international economic development, the ICN should seriously consider creating an IP working group. An ICN IP working group could help assure that competition laws are enforced by all countries in a way that properly respects the critical role intellectual property rights and licensing play in keeping the free market innovation machine working. ❑

1 WILLIAM BAUMOL, THE FREE-MARKET INNOVATION MACHINE (2002).

2 Although the tension between antitrust and IP is not as great as was once believed, one should not presume that intellectual property should always be treated as any other property for antitrust purposes. Intellectual property differs from other types of property in two primary respects. First, intellectual property rights are more uncertain than other property rights. Even for a lawfully issued patent, we often do not know whether the patent is valid, the enforceable scope of its claims, or whether it has been infringed. Secondly, intellectual property rights are more easily misappropriated than other types of property. For example, it is easier to pirate musical CDs than to steal the factory that produces them. These differences must be taken into account in evaluating conduct involving IP rights under antitrust laws.

3 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY

(1995) ["IP GUIDELINES"], *reprinted* in 4 Trade Reg. Rep. (CCH) ∂ 13,132, *available* at http://www.usdoj.gov/atr/public/ guidelines/ipguide.htm.

4 *Id.* at ß 1.0

5 *Id.*

6 *Id.* at ß 2.2

7 Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1218-19 (9th Cir. 1997)

8 In re Independent Services Organization Antitrust Litigation, 203 F.3d 1322, 1327 (Fed. Cir. 2000), cert denied, 121 S.Ct. 1077 (2001).

9 540 U.S. 398 (2004).

10 472 U.S. 585 (1985)

11 371 U.S. 38, 45 (1962) ("The requisite economic power is presumed when the tying product is patented or copyrighted.)"

12 *See, e.g.,* A.I. Root Co. v.Computer/Dynamics, Inc., 806 F.2d 673, 676 (6th Cir. 1986) (holding that a copyright did not confer a presumption of market power for tying purposes).

13 Jefferson Parish, 466 U.S. at 37 n. 7 (O'Connor, J., concurring) ("a patent holder has no market power in any relevant sense if there are close substitutes for the patented product").

14 at ß 2.2 ("The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner").

15 *See, e.g.,* PHILLIP E. AREEDA, EINER ELHAUGE & HERBERT HOVENKAMP, 10 ANTITRUST LAW ∂ 1737c (2d ed. 2004).

16 IP GUIDELINES at ß 2.2.

17 396 F.3d 1342 (Fed. Cir. 2005).

18 *Id.* at 1351.

19 *Id.* at 1344.

20 In the Matter of Dell Computer Corp., 121 F.T.C. 616, 617-618 (1996) (consent order)

21 *Id.* at 620-21.

22 *Id.* at 624.

23 *Id.* at 625-26.

24 FTC Dkt. No. 9305.

25 Docket No.9305 (June 10, 2005) (consent order), *available* at http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf

26 FTC Dkt. No. 9302.

27 A. Douglas Melamed, *Myths and Realities at the Intersection of Antitrust and Intellectual Property Law,* September 9, 2004 (manuscript on file with author).

28 FTC Docket No. 9297 (Dec. 18, 2003) (Commission Opinion), *available* at http://www.ftc/gov/os/adjpro/d9297/031218commissionopinion.pdf.

29 In re Cardizem, 332 F.3d 896.

30 *Id.* at 900.

31 Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005).

32 *Id.* at 1065-1066.

33 *Id.* at 1068.

34 No. 337-TA-474 (notice of commission determination of no violation of section 337), *available* at http:// www.usitc.gov/secretary/fed_reg_notices/337/ I0425AA2.PDF. Databases

35 Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty toocategories of technology transfer agreements, *available* at http://europea.eu.int/eur-lex/pri/en/oj/dat/2004/ l_123/l_12320040427en00110017.pdf

36 Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements, 2004/C 101/02, *available* at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_101/c_10120040427en00020042.pdf.

37 Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)

38 Case C-418/01 IMS Health v. NDC Health.

39 Joined Cases C-241/91 P and C-242/91 P, RTE and ITP v. Commission, [1995] ECR I-743 ("Magill").

40 Case C-7/97, Bronner, [1998] ECR I-7991.

41 Group Report from The Recognized Group of Taiwan (August 27, 2003 to August 31, 2004) to the Asian Patent Attorneys Association, *available* at http://www.apaaonline.org/data/images/committee_reports/130405/3/APAA%20Taiwan%20Group%20(2).doc

42 Taiwan Patent Act, Article 76, *available* at http://www.tipo.gov.tw/eng/laws/patlaw-e.as

[43] Unofficial translation of Draft Anti-Monopoly Law of April 2005, Article 22.

[44] *Id.* at Article 19.

[45] Joint Submission of the American Bar Associations' Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China (May 19, 2005) (*available* eat http://www.abanet.org/antitrust/jt-pdf/joint-comments/abaprcat2005finalcombowapp.pdf).

William Kolasky is a Partner of Wilmer Cutler Pickering Hale and Dorr LLP in Washington, D.C., and is co-chair of the firm's Antitrust and Competition Practice. Gregory Wierzynski, a summer associate at the firm, assisted in the research and drafting of the article.