



Presentation of Robert P. Taylor

FTC and DOJ Joint Hearings on Intellectual Property

Fundamental Principles

- **Reward is essential to attract capital and effort to undertake risk**
- **Patents and copyrights offer a proven method for measuring reward with value**
- **High profitability for success often reflects high failure rates for others**
- **Marriage of capital and entrepreneurial zeal has been primary engine of growth**

Historical Perspective

- **Early domination of IP by Sherman Act**
- **Many license restrictions were unlawful**
- **Efforts to capture value outside the patent were unsuccessful**
- **Misuse doctrine created odd defense to infringement**
- **Supreme Court showed intense hostility toward intellectual property**

Changing Times in 1980s

- Rising concerns over success of foreign competitors
- Application of economics to antitrust
- Market power screens became common
- Use of “per se” rules narrowed
- Focus shifted from protection of competitors to consumer welfare

Upheaval in treatment of IP

- *SCM v. Xerox* case was harbinger, emphasizing commercial necessity
- *Dawson v. Rohm & Haas* places emphasis on need to attract investment
- Reagan administration shifts DOJ policy
- Creation of Federal Circuit
- Report of President's Commission on Industrial Competitiveness

Reconciling Antitrust and IP

- **Consumer welfare analysis uses different timelines for IP and traditional antitrust**
- **Arrangements in which patent owners share profits with potential competitors**
- **Cross licenses and pooling arrangements**
- **Use of innovation markets implicates IP**

Patents and Copyrights Are Defined by Competition

- U.S. Constitution assumes competition
- Competition as backdrop in copyright for protectability, fair use, functionality
- Competitive concerns underlie much of patent law on claim construction, Section 112, and doctrine of equivalents
- Agencies often are heard on these issues