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QUESTION, MR. YOSOWITZ: Thank you very much for the very informative commentaries. I have a couple of questions before we open it to the floor. I was wondering if you, Joe, could just mention something about what the states are doing in this area? And what about the provinces; is there anything involved there?

And the second thing is, the blocking statutes and the "clawback" legislation are from the 1980s. Crystal, I heard you say there has been a change in the tide. The landscape is changing. There is increasing cooperation between the United States and Canada. And I know that, in the developing countries, they have asked for U.S. antitrust lawyers to go over and help them develop antitrust laws and competition laws. All the countries in the former Soviet Union have U.S. lawyers over there writing competition laws for them. I am just wondering whether, when you look at the effects doctrine in the United States and you talk about cartel activity, which makes consumer prices likely to go up, or inhibits new development in products or new development in technology, is this not a universal problem, and will the U.S. view really prevail here?

ANSWER, MR. GRIFFIN: I will address the question about the states. Most of the state activity that is relevant internationally is in the context of mergers. You probably know of some of the more notorious cases where the federal government has either not objected to or cleared the merger, but the merger has been blocked by state authorities under state merger law. That is one of the wonders of our federal system.

It is also interesting to note that the *Hartford Fire* litigation was brought by states' attorneys general. That was another good example. Cities had complained that one of the types of insurance that the Brits were refusing to offer was liability insurance for public playgrounds because there had been some outrageous cases of people falling off swings and being awarded $20 million because the foreign insurance companies were willing to pay that amount. So the foreign insurance companies asked, why should we do that? Why should we let American juries award those kinds of damages against us? So they decided not to support that kind of insurance anymore. When that happened, at first, the state and local governments went to the federal government and asked to boycott antitrust violations and sue the Brits. The federal government looked at it and declined to bring any case. The case was

then brought by the states' attorneys general, who prosecuted it successfully all the way to the Supreme Court. So there is plenty of precedent for the states being active and it is a perfectly good point to say you should never forget our states, particularly the big ones, like New York and California, in your analysis of what problems you might run into in the United States.

ANSWER, MS. WITTERICK: Sure. Leave me the hard question. First of all, with respect to provinces, they have absolutely no jurisdiction with respect to competition law. So that was an easy answer. Whether the U.S. view will prevail, I am not so sure, because the Europeans are becoming more powerful as they integrate their markets. The competition laws of the Australians are much more close in line with those of the Europeans. And, in fact, Canada's laws are, in a lot of respects, similar to Europe's. I do not know who is going to win.

QUESTION, PROFESSOR KING: I had a question on administration of antitrust laws and legislation. It seems as though antitrust has suddenly become very much alive under Joel Klein. A lot of this activity has been done without benefit and change in legislation. Joe, I would like to have you comment on the new thrust of U.S. antitrust laws in terms of the current monarch in this area, the U.S. monarch. Do you want to comment on that? Please comment on the FTC, too.

ANSWER, MR. GRIFFIN: Without getting into the sort of debate that went on in the Reagan administration, the fundamental change for this point was in the Reagan and Bush administration's so-called Chicago School of Economists governing antitrust enforcement. The real issue there was consumer welfare defined as choice and innovation and so forth. There again is a little bit of trivia, but, in the international guidelines that were issued for enforcement purposes in 1988, there was a statement in one of the footnotes, now a famous Footnote 159, that basically said, if anticompetitive conduct does not have any affect on U.S. consumers, we will not prosecute them. That was a sort of a philosophical statement.

QUESTION, PROFESSOR KING: Would this have changed from the previous administrations?

ANSWER, MR. GRIFFIN: Yes. What happened was there was a change from 1977, when they said, we will prosecute it. And then in 1988, they said, we will not. When the late Bush and Klein administrations came in 1995 they made a big show of reversing, rescinding, repudiating, and disavowing Footnote 159. That is the point I was trying to make. Henry is perfectly right to point out that it does not make any difference to today's enforcers whether there is any injury to American consumers or not. That is precisely the market access point. The issue is that an American company is free to do whatever it wants in the United States. There is no issue about consumer injury in

the United States. Then they want access to the Canadian market, and the Canadians will not give it to them. They are going to sue because denial of access is defined to be an antitrust violation, even though there is no injury at all to American consumers. This is an important change.

QUESTION, PROFESSOR KING: Without legislation?

ANSWER, MR. GRIFFIN: Without legislation. Purely executive fiat.

QUESTION, PROFESSOR KING: So it is back to the good old days?

ANSWER, MR. GRIFFIN: Back to the good old days. That is right, days of unrestrained enforcement.

COMMENT, MS. VERDUN: I am with the Canadian Department of Industry. The competition tribunal is part of that. One of the things that my department is doing is working on electronic commerce. Canada will be hosting an OECD conference in electronic commerce in October, so we have a bunch of officials busily working on that agenda, and part of that includes looking at the legal framework that is necessary for electronic commerce.

I would be very interested in views from both panelists on how you see electronic commerce affecting the law and enforcement of antitrust and competition law, and whether you see particular problems arising over the next, say, five years? You talked about computer searches and presumably that will be exacerbated and become more of an issue with electronic commerce. I would be interested in your views on this.

COMMENT, MS. WITTERICK: There are several members of my department whose job it is to study electronic commerce and to think about what is being done over the Internet. We do have some common attempts on enforcing the Internet as an international supervisory network of antitrust officials around the world. We get together and exchange ideas, discuss issues, and do sweeps of the Internet. But the real problem is jurisdiction. If you have someone who is disseminating information from Japan, perfectly in accordance with their laws, but it breaches U.S. or Canadian laws, how do you address that? Do you take jurisdiction? I know what the U.S. answer is. But the Canadian answer is not so clear.

The other problem, and it is not really an antitrust problem, is with encryption. If you encrypt the data that you send over the Internet, how do you get access to the keys to open up that data, especially if the company is located, as I said, in Japan? You could carry on a full-fledged price fixing agreement over the Internet and, if it is all encrypted, there is no way of detecting that or getting the relevant information.

COMMENT, MR. GRIFFIN: Let me tell you about a wonderful case. This is just too good to pass up. I do not know if you are aware of this in your studies, if not you should get a copy of it. It goes by the wonderful title *Playboy v. Playman.* In the early 1980s, long before anybody ever heard of

the Internet, there was an Italian knock-off publication of *Playboy Magazine* called *Playman*. It was published in Italy, and they produced an English language edition for distribution in Europe. It was basically a copy of *Playboy Magazine*.

Playboy brought trademark, copyright, and all sorts of infringement actions against this company. The case was settled in New York in the early 1980s by a decree that said, you may do what you want to do in Italy, but you cannot distribute anything in the United States that in any way infringes upon any of *Playboy*'s rights. That was in 1981, I think.

Fast forward to last year when *Playman* opened a site on the Internet. It was available to anybody. People in the United States started calling up and getting pictures and articles off of the Web site. *Playboy* brought a contempt action again *Playman*, saying that what they were doing was in violation of the consent decree. Not unreasonably, *Playman* defended by saying it could not possibly be a violation of the consent decree because the Internet did not exist at the time of the consent decree, so no one could have contemplated that the decree was meant to apply to the Internet. And, by the way, even if you put that issue aside, they are sitting in Italy minding their own business. How could they possibly be infringing on *Playboy's* trademarks and copyrights in the United States? Anybody want to guess on the result in the United States court? Guilty. The court held that there was an infringement, that the making available of the address so that you could call up and get the information was distribution within the words of the consent decree, and therefore, was a violation of the decree.

QUESTION, MR. FITZ-JAMES: Did they advertise their address in the United States?

ANSWER, MR. GRIFFIN: I think you can get it through a search engine. They did not advertise in that sense. It was available through a search engine. If you call up say, pictures of naked women, one of the things you got was *Playman* in Italy. That kind of thing.

QUESTION, MR. WENDLANDT: Just a question. In that judgment, was there discussion as to the distributing cities of the Web site, per se?

ANSWER, MR. GRIFFIN: Yes.

QUESTION, MR. WENDLANDT: What did the court conclude?

ANSWER, MR. GRIFFIN: Well, the court sidestepped. It was a very interesting opinion by the judge. But what I understand is, somebody sitting in New York can do something that calls up these pictures on a screen in New York. That sounds like distribution in New York to me. I do not understand where cyberspace is. It is a layman's view, that if you can look at it in New York, that constitutes distribution in New York.

COMMENT, MS. WITTERICK: I have a response, because I disagree with that approach. That means if I am a company and I advertise in Canada on the Internet, and I am really directing my advertising to Canadians, and I comply with Canadian advertising laws, and I engage in comparative advertising, for example, not that comparative advertising is not legal in Canada and the United States, but there are jurisdictions in which it is not legal. Am I supposed to comb every single jurisdiction where people might have a computer and ensure that I comply with their laws? There has to be some kind of defense to that.

COMMENT, MR. GRIFFIN: I have got a case right on point.

QUESTION, MS. WITTERICK: What if you include a waiver, or what if you include appropriate disclaimer language? What is the United States going to do?

ANSWER, MR. GRIFFIN: Let me give you the other side of this. This is a real case, it has not been reported, but it is a case that I was involved in. There is no decision. But I can tell you the facts, just to show that we are not the only people who do this.

You are absolutely right and your example is apropos. Comparative advertising is illegal in Germany. One of the largest American computer companies was challenged by the German government when they advertised in German magazines and German technical magazines. They showed a picture of their computer, presented some stuff about their computer, and said if you would like more information about our computer, here's our Web site. There was the address of the Web site at the bottom of the page. If you called up the Web site, what you got was comparative advertising; our computer versus all the other computers. The German government took the position that that was a violation of German law, even though the American computer company happened to be sitting in the state of Washington, if that gives you any clues. The argument by the German government was, why did you put the Web site in the advertisement? If you had not put the Web site in the advertisement, then maybe it would have been different. So it is not just the United States who notices this.

QUESTION, MR. LADD: I have a question about the Canadian impact of the fax paper decision. Once the United States had uncovered this heinous price-fixing conspiracy, was this ignored in Canada? Seemingly, this distribution also occurred north of the border in North America, and there must have been an opportunity for an official enforcement? Or does Canada have a private cause of action, and perhaps even treble damages? Where are the private plaintiffs in this action?

ANSWER, MS. WITTERICK: We actually convicted a number of people in that case in Canada. There were no private actions. There really are no

private actions in Canada. We are very quiet and calm, and we do not like to sue people. We like to cooperate with the government, you know. We now recently have enacted a class action proceeding. We have had a couple of class actions, Bryax was number one. There is very, very little private litigation under our competition law, probably because mergers are not actionable on the civil side. Only the director can challenge a merger, so the place where you probably see the most is not available.

QUESTION, PROFESSOR KING: I have one other question, since Crystal raised the question about who is going to prevail, the Europeans or the Americans, I might ask Joe the question, what are the differences between the U.S. approach and the European approach? It seems to me that, and if I remember correctly and I think I do, the Europeans have exercised some extraterritoriality against Japanese firms where the effects were felt in Europe. Now what is the difference, Joe?

ANSWER, MR. GRIFFIN: I do not know if that was intended to softball or not, but I have written two articles on exactly that point. It has been a personal hobbyhorse of mine because I opened and ran our Brussels office for two years, so thank you for asking me. The leading precedent in Europe is the *Wood Pulp Cartel* case in 1988. There, the court said any conspiracy that is implemented, and that is the word, *implemented*, in the European Union is actionable, no matter where the parties are, no matter whether they are E.U. companies or not, or whether they have offices in the E.U. or not.

That case involved a worldwide cartel for wood pulp that involved a number of people who were outside the European Union; had no facilities in the European Union, and in one case, had no sales in the European Union. But they were part of the cartel that agreed to allocations of territories and so forth.

That still remains the verbiage today by the court. The court uses the word *implement* in the community or in the union. The European commission position is virtually indistinguishable from the American position. It is more interesting that the commission and the court do not agree on this point. The commission asserts a broader jurisdiction which is American-like. The Americans talk about effect. What is the difference? The best example I can give you is a boycott outside the country where you would see a difference in the result. Assume for the sake of argument, some Canadian and Japanese companies get together and say let's agree we will not sell our product to America and to the European Union, for whatever reason. Under American law you would say, there is an effect here, the effect is the boycott, either prevention or diminution or elimination of sales, whatever the facts are. There is clearly an effect here. We clearly have jurisdiction and, in fact, there are cases, most of them against the Japanese reflecting exactly those facts,

cartels organized outside the United States refusing to sell. When I talked to at least three different judges of the European Court of Justice about those facts, they said that is not implementation. I have not given you any facts about implementation in the European Union. So that presumably when that case got — although I think the Europe Commission would bring a case and would find those cartels in violation, I think when it got to the court, unless the court changes its mind, it would say, there is no implementation.

But that is a very, very narrow range of cases when you are down in the one, two, three-percent difference in cases. So some people have argued it is not a significant difference. I think that on the broader issue of who wins, one of the two issues is the time frame, over what period of time.

Frankly, I do not think it is a political issue or a party issue. I would not expect whoever the next president is and the next attorney general and the next chairman of the FTC would make any difference at all on this issue.

The closest press I could think of, Henry, is the U.N. exercises in the late 1970s and early 1980s on the model antitrust law, the model law on transfer of technologies. The model law on transfer of technologies was aborted precisely because the Americans would not go along with what the views of the less-developed world regarding transfers of technology. The U.N. code is an example of the lowest common denominator where the Americans signed up for a bunch of wonderfully nebulous principles, and it has never had any affect at all in U.S. commerce. I think that the Americans will participate in these negotiations. But I think, frankly, in today's environment, if everybody else in the world had one definition of extraterritoriality, and we had another, we would pursue ours. It is precisely because, as somebody else mentioned a little earlier today, we are the big guy on the street. The real question is, can you do business with us; not, can we do business with you?