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Introduction: Antitrust Law and Innovation

*Sanford Yosowitz**

The subject matter of this year's conference is most appropriate from an antitrust standpoint. Just two weeks ago, I was in Washington along with our speakers here at the antitrust section spring meeting when the Antitrust Division and the Federal Trade Commission released the 1995 antitrust guidelines for the licensing of intellectual property, hot off the press. They prepared it so it was ready for the spring meeting, and so we could discuss it there.

They also, by the way, just recently released the revised guidelines for international operations, which also should be consulted in the intellectual property area. The 1995 intellectual property guidelines are the product of an Antitrust Division task force led by Richard Gilbert who was appointed by Assistant Attorney General Anne K. Bingaman in Erie, 1994, to formulate the government's policy, and to draft these new intellectual property guidelines. The guidelines about which I know you will hear more today from our speakers are available from the Department of Justice or from many different legal services, and they are based on three core principals which they announced.

Number one, intellectual property licensing arrangements generally are pro competitive. Number two, there is no presumption that intellectual property necessarily creates market power in the antitrust context. And number three, the agencies will apply the same general antitrust approach to the analysis of conduct involving intellectual property that they do to studying other forms of tangible or intangible property. It follows that licensing arrangements should involve a rule of reason analysis rather than the *per se* proscriptions.

Now, as I turn the program over to our speakers, I just want you to know that Anne Bingaman, the Assistant Attorney General for antitrust, has all year — in fact, for the past two years in office — been giving a lot of talks in the area of intellectual property. I have heard her a number of times address the subject of antitrust innovation of intellectual property. She will be here in Cleveland, in fact, on Wednesday, May 10th, [1995], to give another address on the subject.

But her basic conclusions, that she expresses in her remarks in all of these talks, are that, number one, the U.S. economy is the most dynamic, creates the most jobs, and produces the highest level of innovation precisely because the United States as a nation committed long

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ago to a policy of vigorous, but sound law enforcement which is just as essential to innovation and economic growth in the 21st century, as it has been in the 20th century. Number two, that intelligent antitrust enforcement is a critical component of the fight to keep America competitive in high-tech markets, and that the accelerating pace of technological innovation makes it continually more important to sustain the right balance between reward and competitive rivalry. The fear of being left behind is more likely to spur innovation than is complacency bred of stable market power.

Now, I would like to first introduce Joe Kattan, who is of Counsel to Morgan, Lewis & Bockius in his Washington, D.C. office where he specializes in antitrust and trade regulation law. He formally worked for the Federal Trade Commission where he headed the Bureau of Competitions Office of Policy and Evaluation. He is active in the American Bar Association's section of antitrust law and serves as the Development's Editor for the Section's Antitrust Magazine. Mr. Kattan is published extensively on antitrust issues in both scholarly and trade journals. He also has lectured widely on a broad array of antitrust issues in the United States and abroad. He graduated Cum Laude from Northwest University School of Law and holds a Master's degree in public policy from the University of Chicago and a Bachelor's degree in political science from Case Western Reserve University.

I must say that he and Cal have both prepared very good papers for this conference.