IV. Department of Justice and Federal Trade Commission's Joint Hearings on Competition and IP Law Policy and the Ensuing Innovation Reports: Paving the Way for a Sustainable Balance

In accordance with the new economic approach[229] and in order to examine the current balance between antitrust and patent law, as well as common intellectual property licensing practices, including patent pools, and the implications of those activities to the benefit of innovation and consumer welfare, the Federal Trade Commission and the Department of Justice held joint hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy", which took place in 2002 and involved more than 300 panellists: participation included business representatives from firms and the independent inventor community; major patent and antitrust organizations; leading antitrust and patent practitioners; and leading scholars in economics, antitrust and patent law. In addition, the Federal Trade Commission received about 100 written submissions. Business representatives were mostly from high-tech industries in the sectors of pharmaceuticals, biotechnology, computer hardware and software and the Internet Community.

On February 6, 2002 the Opening Day Comments[230] for the Public Hearings outlined the reasoning supporting the Business Review Letters, which were addressing the targeted patent pools' proposals to jointly license the protected technologies to other companies. Specifically, the addressees were an MPEG patent pool, based on an industry standard for video compression technology, and two DVD patent pools. In all cases under examination, as anticipated above, the Division concluded that the proposed arrangements did not appear to pose antitrust concerns. In particular, and with reference to the Business Review process, it was stated that "the Division's decisions rested on a number of factors, including the fact that the pools only license those patents essential for a manufacturer to comply with an established standard. The pools were designed to capture the efficiencies that may come from licensing complementary technologies. Concomitantly, they were designed to limit the anticompetitive effect that can arise from pooling technologies, such as the elimination of competition or the increase in prices that could arise if substitute technologies (that is, technologies that could compete against each other) were placed in a pool".

Anticipating this resolution, just one year before those Public Hearings, in January 2001, the US Patent and Trademark Office issued a White Paper on Patent Pool-

229 For a wider, comprehensive debate on the issue, see i.a.: Drexl J., "Is There a 'More Economic Approach' to Intellectual Property and Competition Law?", In: Drexl J. ed.: Research Handbook on Intellectual Property and Competition Law, Cheltenham, UK, Northampton, MA, USA, Edward Elgar, 2008, p. 27 *et seq.*

230 James C., Opening Day Comments for F.T.C/D.O.J. Public Hearings, Feb. 2002, available at: http://www.ftc.gov/opp/intellect/james.htm

ing,[231] acknowledging that patent pools can indeed be used to create a number of social and economic benefits. These include, in particular, the elimination of problems caused by "blocking" patents or "stacking" licenses,[232] reducing licensing transaction costs, sharing the risks in research and development, and facilitating the exchange of technical information or know-how not covered by patents.

Lastly, following those joint hearings, in October 2003 the Federal Trade Commission issued a comprehensive report dedicated "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" (hereinafter Innovation Report),[233] which gave several recommendations for improvements in the current inter-relation between such complementary bodies of law, putting its main focus on the patent system and thoroughly considering forms of licensing practices, such as patent pools, in view of their pro-competitive potential.

This study has actually paved the way for the most recent joint report of the US Department of Justice and the Federal Trade Commission on "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition",[234] released in April 2007. This represents the federal antitrust agencies' current view on the matter at issue, in line with the preceding approach outlined. Accordingly, the present report discusses a broad range of IP licensing practices, with particular attention to settings where business endeavours are rapidly evolving, including collaborative standard setting and patent pooling, from a competitive standpoint and in an ultimate attempt to strive for innovation. The basic insight the report is based on is that preserving incentives for both creative efforts and competition is of paramount importance for the progress of society.[235] Hence, the competitive effects of cross-licensing practices and patent pools[236] are evaluated under the "rule of reason" framework as articulated in the 1995 Antitrust IP Guidelines, thereby signalling the

231 USPTO, White Paper on Patent Pooling, available at: http://www.uspto.gov/web/offices/com/speeches/01-06.htm

232 On the issue, see Carl Shapiro, University of California at Berkeley, "Navigating the Patent Thicket: Cross Licenses, Patent Pools and Standards-Setting", March 2001, available at: http://www.haas.berkeley.edu/~shapiro/thicket.pdf

233 Federal Trade Commission, "To Promote Innovation: the Proper Balance of Competition and Patent Law", Report, October 2003, available at: http://www.ftc.gov/os/2003/10/innovationrpt.pdf

234 US Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition", Joint Report, April 2007, available at: http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf

235 Federal Trade Commission's Press Release, April 17, 2007, available at: http://www.ftc.gov/opa/2007/04/ipreport.shtm

236 See in particular: Chapter 3, "Antitrust Analysis of Portfolio Cross-Licensing Agreements and Patent Pools", p. 57 *et seq.*, in: US Department of Justice and Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition", Joint Report, April 2007, also available at: http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf

continuation of an enduring trend, in line with the level-headed approach endorsed in recent years.

However, just as antitrust law is catching up with a more mature assessment of patent pools in their established forms, alongside with increasingly well-defined antitrust norms, such agreements are becoming more complex. In particular, pools are increasingly being adopted as devices to better coordinate the implementation of technical standards, as initially specified by standard setting organizations.[237] In this respect, at the intersection of standardization processes and patent pooling, a new range of greatly unexplored new issues arises which still need to be fully addressed by US courts and antitrust authorities.[238]

237 For a balanced outline of some of the issues arising in this context, see *i.a.*: Raymond D., "Benefits and Risks of Patent Pooling for Standard-Setting Organizations", Annual Review of Antitrust Law Developments, Summer 2002, p. 41 *et seq.*; Hovenkamp H., "Standards Ownership and Competition Policy", Boston College Law Review, March 2006, vol. 48, p. 87 *et seq.*, also available at:
http://bc.edu/schools/law/lawreviews/bclawreview/meta-elements/pdf/48_1/04_hovenkamp.pdf

238 For a focused and illuminating analysis on this new issue, see: Crane D., "Patent Pools, RAND Commitments, and the Problematics of Price Discrimination", Cardozo Legal Studies Research Paper No. 232, April 2008, also available under the Social Science Research Network at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120071