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Political predictions are fraught with peril. Correctly foretelling what policies a new president will pursue—and whether his efforts will prove successful—is particularly difficult for matters that were not discussed extensively in stump speeches or the presidential debates. The intersection of antitrust law and intellectual property ("IP") is a niche that did not command national attention during the lead-up to the election. But evidence exists about President Obama's general views on antitrust law and on patent reform. From this, we have a basis for intuiting his likely approach to several issues at the intersection of these two areas of law.

Over the previous several years, the balance between antitrust law and intellectual property rights has shifted in favor of the latter. While not addressing this balance specifically, the Obama campaign promised to pursue different approaches in each of these individual areas of law. With respect to intellectual property, the Obama campaign noted the importance of protecting intellectual property, while emphasizing the "need to update and reform our copyright and patent systems to promote civic discourse, innovation and investment while ensuring that intellectual property owners are fairly

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treated."[1] Candidate Obama also advocated patent reform designed "to improve patent quality."[2] While short on particulars, the rhetoric suggests a greater wariness of patents issued by the U.S. Patent and Trademark Office ("PTO"), which could translate into more government scrutiny and perhaps challenges to patents.

Other aspects of Obama's presidential platform also suggest a willingness to stand up to powerful IP owners. For example, candidate Obama criticized the Federal Communications Commission for approving media mergers that "promoted the concept of consolidation over diversity."[3] While the campaign's position was cast as a call for viewpoint diversity, the campaign statements expressed a concern about market concentration and represented a direct challenge to media conglomerates that are politically powerful aggregators and owners of IP.

More specifically, regarding antitrust policy, the Obama campaign promised to "reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers."[4] In his statement to the American Antitrust Institute, Senator Obama faulted the Bush Administration for significantly reducing the number of merger challenges and for failing to bringing monopolization cases.[5] The senator noted America's historic leadership role internationally in the field of competition law and suggested a desire to restore American influence.

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[1]http://www.barackobama.com/issues/technology/(visited Dec. 19, 2008).

[2]http://www.barackobama.com/issues/technology/

[3]http://www.barackobama.com/issues/technology/

[4]http://www.barackobama.com/issues/technology/

[5]http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf

These promises to revive and strengthen federal antitrust enforcement and to take on powerful corporate interests, coupled with a concern over the quality of patents currently issued, may imply greater leadership from the White House on how antitrust law might evolve to affect the activities of IP owners. The new president may confront several contentious issues at the intersection of antitrust and intellectual property law, including the legality of reverse settlement payments, unilateral refusals to license, deceptive conduct before standard-setting organizations, tying arrangements imposed by IP owners, and so-called predatory innovation.

This essay will review the apparatus of antitrust that the new president has at his disposal and how he may use this apparatus to effect change in several areas where antitrust law and intellectual property law intersect. All three branches of government play important roles in American antitrust policy. President Obama can use his control over the executive branch, his influence with Congress, and his ability to appoint new judges to the federal judiciary in order to change the relationship between antitrust and intellectual property.

I. THE EXECUTIVE BRANCH

The executive branch sets its antitrust agenda and guides policy through the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC"). This is where Obama can have his most immediate impact by appointing people who favor a stronger role for antitrust law in the balance between antitrust and intellectual property. The federal antitrust agencies exert influence over antitrust law

through a number of mechanisms.

First, the antitrust agencies can influence the national debate and create persuasive authority by issuing reports and guidelines on various aspects of antitrust law. The agencies have held extensive hearings and written reports on the relationship between antitrust law and intellectual property rights,[6] and have issued guidelines on how antitrust law should—and should not—limit IP owners. These hearings, reports, and guidelines have all proved influential, as courts have cited them as persuasive authority in formulating the common law of antitrust.[7]

Second, the agencies affect antitrust policy through their prosecutorial decisions. The agencies can challenge mergers between intellectual property owners and negotiate consent decrees that provide for the sale or licensing of intellectual property as a condition for allowing the merger to proceed.[8] In non-merger contexts, the agencies decide which conduct by IP owners and agreements involving IP may violate antitrust laws. The government attorneys may litigate to a conclusion on the merits and request a judicially-imposed remedy or may negotiate settlements and consent orders that limit what IP owners may do in the future.[9]

Given his campaign promise to reinvigorate antitrust enforcement, one would expect President Obama to appoint men and women to key positions within the Federal Trade Commission and Department of Justice who would more carefully scrutinize and

[6]See, e.g., U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007).

[7]See, e.g., Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006); County Materials Corp. v. Allan Block Corp., 502 F.3d 730 (7th Cir. 2007).

[8]See, e.g., In the Matter of Ciba-Geigy Ltd, et al., 123 F.T.C. 842 (1997).

[9]See, e.g., In the Matter of Summit Technology, 127 F.T.C. 208 (February 23, 1999)

challenge anticompetitive conduct and agreements by IP owners. For example, the agencies under Obama may focus more attention on the issue of deceptive conduct by patentees directed toward standard-setting organizations and government agencies. With respect to mergers, during the campaign, Senator Obama pledged to "step up review of merger activity and take effective action to stop or restructure those that are likely to harm consumer welfare."[10] In the context of mergers involving firms with similar IP portfolios, this could mean the agencies might require divestiture of some IP assets or compulsory licensing as a condition to merger approval.

The agencies' ultimate power, however, is often limited because courts sometimes reverse their decisions. For example, in a lengthy opinion, the FTC held that Rambus had violated Section Two of the Sherman Act by, among other acts, concealing its patents from fellow members of a standard-setting organization that subsequently adopted a standard that included Rambus' patented technology. The D.C. Circuit, however, disagreed with the FTC's reasoning and reversed.[11] The FTC has also fared poorly in its recent challenges to reverse settlement payments, in which pharmaceutical firms with patents allegedly pay generic manufacturers to stay out of the market.[12] Pro-defendant decisions like those in *Rambus*, *Schering*, and *Tamoxifen* may embolden IP owners not to settle antitrust cases brought by the government. This suggests that executive action alone is insufficient [to …] and legislative action may be necessary.

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[10]http://www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf

[11]Rambus, Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[12]In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187 (2nd Cir. 2006); Schering-Plough Corp. v. F.T.C., 402 F.3d 1056 (11th Cir. 2005).

II. LEGISLATIVE INITIATIVES

As a former member of the Senate, President Obama may likely have better rapport with and influence over the legislative branch than any president in the last forty years. Congress, however, generally plays a relatively limited role in the development of antitrust policy compared to other areas of law and regulation. Though statutorily based, American antitrust law is essentially common law. In contrast to other more fully fleshed-out statutory schemes, federal antitrust statutes are skeletal, broadly worded decrees that leave it to courts to determine what precise conduct and agreements run afoul of antitrust principles. Nonetheless, there are two specific issues at the intersection of antitrust and intellectual property law that might be amenable to legislative attention during the Obama administration. In addition, more general patent reform legislation advocated by President Obama during the campaign may have antitrust implications.

A. Reverse Settlement Payments

While reversing judicial antitrust decisions through legislative action is relatively rare, in the context of antitrust decisions involving intellectual property Congress can structure its legislation as amendments to the patent, copyright, and/or trademark statutes—which are more often amended—than as amendments to federal antitrust statutes. There is one area in particular involving the intersection of antitrust and intellectual property rights that may lend itself to a legislative response: agreements between pioneer and generic drug companies to limit market entry. The Hatch-Waxman Act sought to increase competition in pharmaceutical markets by allowing a generic drug

manufacturer to file an abbreviated new drug application ("ANDA"). The ANDA allows the generic drug company to rely on the FDA's prior determination of safety and efficacy arrived at in approving an earlier pioneer drug. The generic drug manufacturer, however, cannot actually enter the market if the pioneer drug is protected by a patent. In order to get around this problem, the generic drug maker can file a so-called Paragraph IV certification in which the ANDA applicant certifies that the pioneer company's patent "is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted."[13] The patentee may sue for infringement, but if the generic drug company prevails (or is not challenged by the patentee), "the first generic manufacturer to submit an ANDA with a paragraph IV certification receives a 180-day period of exclusive marketing rights, during which time the FDA will not approve subsequent ANDA applications."[14] Some pioneer pharmaceutical firms sought to take advantage of this provision by paying the generic drug firm to remain out of the market for these 180 days, essentially giving the pioneer firm another six months of monopoly.[15]

In response to pharmaceutical companies gaming the Hatch-Waxman regulatory scheme, Congress has amended it, for example, by requiring that when a patentee and generic pharmaceutical company settle litigation arising out of an ANDA application, the parties must file the settlement with the FTC and the Department of Justice Antitrust Division.[16] After the 11th Circuit upheld a suspect reverse payment settlement in

[13]21 U.S.C. § 355(j)(2)(A)(vii)(IV).

[14]In re Cardizem CD Antitrust Litigation, 332 F.3d 896 (6th Cir. 2003).

[15]*Id.*

[16]21 U.S.C. § 355.

Schering,[17] several senators introduced the "Preserve Access to Affordable Generics Act," which would have declared it an unfair method of competition whenever an "ANDA filer agrees not to research, develop, manufacture, market, or sell the ANDA product for any period of time" in exchange for "receive[ing] anything of value" from the patentee.

Although the legislation has not yet passed, its chances of success seem greater under an Obama administration. Praising the cost-reducing effects of generic drug manufacturers, the Obama campaign pledged that an "Obama administration will ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals onto the market, while preserving the incentives to innovate that drive firms to invent life-saving medications." That certainly sounds like a promise to seek amendments to the Hatch-Waxman Act that would minimize anticompetitive gaming.

B. Deception

President Obama may also care about patentees engaging in misrepresentations to standard-setting organizations or government bodies. If so, President Obama may appoint commissioners to the FTC—and lawyers to lead the Antitrust Division—who believe that such misrepresentations may rise to the level of antitrust violations and treat them accordingly. It is not clear, however, whether this would have any meaningful effect. As noted earlier, the FTC under President Bush issued a lengthy and a strongly worded opinion condemning a monopolist who made misrepresentations to a standard-setting

[17] Schering-Plough Corp. v. F.T.C., 402 F.3d 1056 (11th Cir. 2005).

organization, only to have that opinion reversed on appeal by the D.C. Circuit. In order to overcome the problem of judicial reversal of commission decisions, President Obama may consider proposing legislation that would prohibit a member's misrepresentations to a standard-setting organization about that member's patent portfolio—or the member's commitment to charge a fair, reasonable, and nondiscriminatory royalty. Such legislation might appear to be outside the ambit of traditional antitrust legislation. But it could be included in a larger package of patent reform, for example, making such conduct a form of patent misuse.

C Gold-Plated Patents

Some patent reform proposals associated with President Obama may have as-yet unappreciated antitrust significance. For example, President Obama initially publicly supported the idea of so-called gold-plated patents. A gold-plated patent is a patent that survives a more rigorous examination by the PTO (paid for by the patent applicant) than patent applications currently receive.[18] The original proponents of gold-plated patents also advocated a more meaningful post-grant opposition system in which competitors could request a more thorough examination by the PTO (paid for by the challenger) of a recently issued patent.[19] In late 2007, Obama's website proposed that "the Patent and Trademark Office could offer patent applicants who know they have significant inventions the option of a rigorous and public peer review that would produce a 'gold-

[18]Mark A. Lemley, Douglas Lichtman, and Bhaven N. Sampat, *What to do About Bad Patents*, 28 REGULATION 10, 12 (Winter 2005-2006).

[19]*Id*. at 13.

plated' patent much less vulnerable to court challenge."[20] However, the reference to gold-plated patents was subsequently removed from Obama's website. This could indicate either a change of heart on the subject or the desire to divert attention away from an issue that generated controversy in some patent circles. After all, the No-Drama Obama mantra sought to avoid unnecessary controversy and the gold-plated patent scheme was unlikely to translate into actual votes during the presidential election. As a result of this endorsement and apparent desertion of gold-plated patents, it remains unclear whether the new president will pursue this initiative. Before changing the patent system in this manner, decision makers should consider the consequences of gold-plated patents for antitrust plaintiffs.

Some antitrust violations are predicated on invalid patents. Three examples come to mind:

- First, the Supreme Court in *Walker Process*[21] held that a monopolist violates Section Two of the Sherman Act if it has acquired or maintained its monopoly through a fraudulently procured patent.
- Second, anticompetitive litigation brought by IP owners can violate antitrust laws— Section One if brought by multiple parties or Section Two if brought by a monopolist. The *Noerr-Pennington* doctrine, however, provides that legal action cannot be the basis of antitrust liability unless the lawsuit is a sham. The Supreme Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries,*

[20]In their original proposal, Professors Lemley, Lichtman, and Sampat also advocated weakening the presumption of patent validity that applies to regular patents. Candidate Obama's website did not mention whether he supported this aspect of a gold-plated patent regime.

[21]Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

Inc.,[22] articulated a two-element test to define sham litigation: (1) "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and (2) "the baseless lawsuit conceals 'an attempt to interfere directly with the business relationships of a competitor,' through the 'use [of] the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'"[23] The first element often involves claims that the patent that is the basis of the anticompetitive infringement suit is invalid.

- Third, some judicial opinions have held that agreements involving patents—such as reverse settlement payments—can violate Section One if the patents are invalid.[24]

If gold-plated patents receive more judicial deference, it could make proving an antitrust violation more difficult in each of these cases. For example, if the initial patent fraud was not discovered during the gold-plating process, could that make it more difficult for a plaintiff to prove a *Walker Process* claim? Is it necessarily objectively reasonable to sue to enforce a gold-plated patent such that it becomes harder to prove sham litigation? Can owners of gold-plated patents enter into anticompetitive agreements more easily than holders of regular patents? In sum, until the antitrust implications are better understood, prudence counsels against implementing a system of gold-plated patents.

[22]508 U.S. 49 (1993).

[23]*Id.* (citations omitted).

[24]In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187 (2nd Cir. 2006).

VI. THE JUDICIARY

Because antitrust law is essentially common law, the judiciary determines the actual parameters of antitrust law, including when the actions of IP owners in acquiring and enforcing their rights violate antitrust law. And judicial decisions in the antitrust field generally have staying power: although the president could support antitrust legislation to counteract such decisions, Congressional attempts to reverse controversial Supreme Court antitrust opinions generally lose steam before any remedial legislation is actually enacted.[25] This suggests that the new administration will not quickly resolve some questions involving how antitrust law may affect IP rights; President Obama, however, may be able to have a long-term impact through judicial appointments to the Federal Circuit.

A. Unilateral Refusals to License

The Obama administration seems unlikely to enter the most contentious judicial split regarding the intersection of antitrust law and IP rights. Whether—and when—antitrust law condemns a monopolist's refusal to license its intellectual property remains a hotly disputed topic in antitrust circles. Three federal appellate decisions laid the groundwork for an intense debate about the proper role of antitrust law when IP owners refuse to license or sell their property to competitors. In *Data General Corp. v. Grumman Sys. Support Corp.*,[26] the First Circuit held in a Section Two case "that while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright,

[25]For example, despite several efforts to repeal the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which precluded indirect purchasers from bringing suits to recover overcharges, Congress has not passed legislation, though some states have passed so-called *Illinois Brick* repealer statutes that allow indirect purchasers to sue under state antitrust law.

[26]36 F.3d 1147 (1st Cir. 1994).

an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." The court provided little guidance as to how an antitrust plaintiff can successfully rebut the presumption.

The Ninth Circuit took up that task in *Image Tech. Serv. Inc. v. Eastman Kodak Co.*,[27] a case in which independent service organizations (ISOs) sued Kodak for illegally monopolizing the market for servicing Kodak copiers by refusing to sell ISOs replacement parts needed to service Kodak machines. At trial, Kodak argued that because its parts were patented, Kodak could refuse to sell them to competitors without violating antitrust laws. The Ninth Circuit claimed to "adopt a modified version of the rebuttable presumption created by the First Circuit in *Data General*."[28] The Ninth Circuit held the First Circuit's presumption of a valid business justification overcome by the fact that very few of the parts were actually patented and that the jury could have found the IP rationale for the monopolist's refusal to deal to be pretextual because the defendant's parts manager was apparently unaware that the parts were patented. With the presumption rebutted, the court affirmed a jury verdict against the defendants.

On a virtually identical fact pattern, the Federal Circuit also claimed to embrace the First Circuit's presumption that refusals to license do not violate antitrust laws, but did so in a dramatically different fashion than the Ninth Circuit. In *In re Independent Service Organizations Antitrust Litigation v. Xerox Corp.*[29] the Federal Circuit rejected the Ninth Circuit's approach because it requires the jury to consider "the patentee's

[27] 125 F.3d 1195 (9th Cir. 1997).

[28] *Id.* at 1218.

[29] 203 F.3d 1322 (Fed. Cir. 2000).

subjective motivation for refusing to sell or license its patented products." The court seemed to limit the grounds for rebutting the presumption to cases in which the plaintiff could show that the defendant acquired its IP in an unlawful manner.

The opinions in *Kodak* and *Xerox* became the circuit split that launched a thousand law review articles. But while the issue remains contentious, the new administration is unlikely to play a prominent role in this debate. As discussed below, the power to appoint new judges is a slow-moving response at best. More importantly, it is unclear whether this debate can be explained by a divide between Democrat and Republican judicial appointees. Commentators often characterize the Ninth Circuit as liberal and other circuits, including the Federal Circuit, as Republican-dominated, and use these generalizations to explain circuit splits involving the Ninth Circuit. But such an explanation is unpersuasive here because the Ninth Circuit opinion was authored by Judge Robert Beezer, a Reagan appointee, and joined by fellow Reagan-appointee David Thompson.[30]

While Obama judicial appointments are unlikely to address directly the circuit split over this issue, the Obama administration is also unlikely to use the federal antitrust agencies to dramatically affect antitrust law related to unilateral refusals by IP owners. Prior to the conflict between the Ninth and Federal Circuits, the Department of Justice Antitrust Division and the Federal Trade Commission entered the fray in 1995 by noting in their jointly issued Antitrust Guidelines for the Licensing of Intellectual Property that even when intellectual property owners possess market power, antitrust law should not

[30]Filling out the appellate panel was District Court Judge Helen Gillmor, sitting by designation, who was appointed by President Clinton. Judge Gillmor concurred in part and dissented in part because she disagreed with the injunctive relief approved by the majority.

"impose … an obligation to license the use of that property to others."[31] The Federal Circuit invoked the Guidelines in advocating a minimal role for antitrust law in cases of refusal to license.[32]

Several years after the *Kodak* and *Xerox* opinions, the antitrust agencies noted academic and practitioner discontent with both the Ninth and Federal Circuits' approaches, largely criticizing the former as too broad and the latter too narrow.[33] In their 2007 report, the Antitrust Division and the Federal Trade Commission indicated that they did not plan to pursue antitrust claims based on a patentee's unconditional refusal to license.[34] Further pronouncements by the antitrust agencies would be unlikely to prove decisive. With the dozens of articles by respected academics, advocating an array of different antitrust approaches to the issue of unilateral refusals to license, the issue will continue to percolate and the Obama administration's influence will probably be through participation in amicus briefs in private litigation.

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[31]Antitrust Guidelines for the Licensing of Intellectual Property § 2.2.

[32]The Obama administration also seems unlikely to propose legislation to address the circuit split. Prior to the trio of cases discussed above, Congress had amended federal patent law through the Patent Misuse Reform Act of 1988 to specifically provide that "[n]o patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . refused to license or use any rights to the patent . . . ." 35 U.S.C. 271(d)(4).

[33]U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 5 (2007).

[34]*Id.* ("Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part in the interface between patent rights and antitrust protections. Antitrust liability for refusals to license competitors would compel firms to reach out and affirmatively assist their rivals, a result that is "in some tension with the underlying purpose of antitrust law." Moreover, liability would restrict the patent holder's ability to exercise a core part of the patent—the right to exclude.") (quoting Trinko, 540 U.S. at 407-08)

B. The Federal Circuit

The full effect of Obama's policies will not be felt until judicial vacancies on the federal courts are filled by Obama appointees. It would take quite some time, however, for the new president to dramatically change the course of antitrust law through judicial appointments. The vast majority of sitting federal judges were appointed by Republican presidents. Some evidence exists that federal judges appointed by Democratic presidents tend to be more sympathetic to antitrust plaintiffs. Although there is nothing inherently anti-antitrust about Republican appointees, those judges who have been the most vocal and vociferous about rolling back antitrust and making life more difficult for antitrust plaintiffs—most notably Judge Easterbrook and Justice Scalia—were appointed by Republican presidents. As the new president decides which men and women to nominate to the federal bench, it seems unlikely that their views on antitrust law are going to weigh heavily—and certainly will not be a litmus test—in the decision-making process.

There is one area, however, where the new president may be able to more easily affect the balance between antitrust law and intellectual property law through judicial appointments—appointments to the Federal Circuit. Congress did not intend the Federal Circuit to be an antitrust court.[35] In *Nobelpharma*,[36] however, the Federal Circuit expanded its own reach, holding that while regional circuit law would apply to non-patent antitrust issues, the Federal Circuit would develop its own body of law to determine whether "conduct in procuring or enforcing a patent is sufficient to strip a patentee of its

[35]David T. DeZern, *Federal Circuit Antitrust Law and the Legislative History of the Federal Courts Improvement Act of 1982*, 26 REV. LITIG. 457 (2007).

[36]Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998) (en banc in relevant part).

immunity from the antitrust laws."[37] In general, this has not been good news for antitrust plaintiffs because the Federal Circuit has been notoriously reluctant to embrace antitrust claims, particularly those brought as counterclaims by infringement defendants.

If he wanted to adjust the balance between antitrust law and patent rights, the new president could nominate to the Federal Circuit people who have a strong background in patent law yet also have a firm understanding of and appropriate respect for antitrust laws. Several academics would be strong candidates to join the Federal Circuit. For example, Professors Mark Lemley of Stanford Law School, Michael Meurer of Boston University School of Law, and Arti Rai of Duke Law School are excellent examples of patent experts who have also written about the need to appreciate antitrust principles. Having someone of their stature on the Federal Circuit would serve President Obama's stated desire to bring greater rationality to the patent system. It would also serve the additional goal of ensuring that antitrust principles are given greater currency by the Federal Circuit.

IV. CONCLUSION

Over the last several years, the antitrust/patent balance has tilted more heavily in favor of patent protection over antitrust enforcement. The Obama administration will likely shift that balance in two ways that would provide greater emphasis on antitrust principles. First, President Obama has indicated that he will enforce antitrust laws more aggressively than did the Bush administration. Second, President Obama has indicated that he will increase scrutiny of the patent system, including greater scrutiny of patent

[37] *Id*. at 1068.

applications, and will advocate patent reforms that could reduce the unnecessary anticompetitive effects of patents.

Because antitrust law is primarily common law, a new president cannot revise it immediately. But he can appoint people to the antitrust agencies who are more likely to challenge conduct, agreements, and mergers involving IP; he can support patent legislation that takes antitrust philosophy into account; and, in the long run, he can affect antitrust law by appointing men and women to the federal judiciary who have a healthy respect for antitrust principles.