Intellectual Property and "Cheap Exclusion"

*By John T. Delacourt**

The transition in the Federal Trade Commission's leadership from Chairman Timothy Muris to Chairman Deborah Platt Majoras has, naturally, raised questions within the Bar regarding the agency's enforcement priorities. One intriguing answer to such questions was recently unveiled at the FTC's 90th Anniversary Symposium. During that program, the Director of the Bureau of Competition – the agency's antitrust enforcement arm – indicated that Commission staff would be taking a harder look at commercial and regulatory environments that may lend themselves to "cheap exclusion" strategies.[1] In other words, rather than applying an identical level of scrutiny to *all* potential competitive threats, the agency would devote more of its investigatory resources to those situations in which anticompetitive conduct is most likely to occur. Such "cheap exclusion" scenarios tend to arise in environments in which firms can effectively exclude rivals at low cost often, though not always, through manipulation of governmental processes.[2] This development is likely to be of particular interest to intellectual property practitioners as, to date, many of the Commission's most high profile "cheap exclusion" cases have focused on anticompetitive efforts to extend the scope or duration of intellectual property rights.

I. "Cheap Exclusion" Defined

One way to define a term is by first identifying what it is *not*. "Cheap exclusion" is, logically, the opposite of "expensive exclusion" – an approach which is perhaps best exemplified by the strategy of predatory pricing. Under traditional predatory pricing theory, a firm sells at a price below some measure of cost in order to drive its competitors out of business. Once its competitors have been driven from the marketplace, the predatory pricer recoups its losses by selling at a monopoly price which, presumably, it can maintain into the foreseeable future.[3]

Predatory pricing constitutes an "expensive collusion" strategy for a number of reasons. First, during the initial phase, the predatory pricer must forego profits and actually lose money on every sale. Second, the firm may have to price below cost for a substantial period of time before forcing its rivals from the market. Third, and most importantly, a predatory pricer's ability to recoup its losses is highly speculative. Despite the substantial expense of pricing its products below cost, it may not succeed in driving its rivals from the market. Furthermore, even if it does, new entrants may prevent the firm from maintaining a monopoly price long enough to recover its investment.

Rather than devoting a substantial portion of its scarce enforcement resources to such unlikely, and economically irrational, scenarios,[4] the Bureau of Competition has indicated that it will place greater emphasis on "cheap exclusion" scenarios. A "cheap exclusion" strategy is both more feasible and more rational than a long term, high risk approach like predatory pricing. As a result, it is also likely to be a great deal more common.

In practical terms, the Bureau's focus on "cheap exclusion" scenarios will entail devoting greater scrutiny to situations in which the alleged anticompetitive restraint, or practice, through which the exclusionary scheme is carried out satisfies three criteria:

1. *The restraint is cheap*. The restraint must be inexpensive for the defendant to maintain, in the sense that the cost of imposing or triggering the restraint is asymmetrical (*i.e.*, it is less expensive for the defendant to enact the restraint than it is for competing firms to challenge or remove it).

2. *The restraint is effective*. The restraint must successfully serve its anticompetitive end, in that it confers, or is likely to confer, durable market power on the defendant.[5]

3. *The restraint is inefficient*. The restraint must clearly result in consumer harm, in the sense that it does not advance any particular regulatory objective. In contrast, governmental restraints that impair competition, but in doing so advance a *bona fide* regulatory objective, are not a proper focus of antitrust enforcement, and are frequently shielded by specific antitrust exemptions.[6]

II. Common Cheap Exclusion Scenarios

Recent FTC experience suggests that "cheap exclusion" strategies may be most common where firms discover a weakness, or flaw, in an industry-wide regulatory scheme. Whether the result of initial poor drafting, a clever legal or business strategy, or unforeseen changes in the competitive landscape, such regulatory loopholes may confer substantial commercial advantage on firms willing to exploit them. Manipulation, or "gaming," of a regulatory scheme may enable a firm to achieve results it could not achieve through competition on the merits, and at substantially lower cost.

The strategic use of public, or governmental, restraints is superior to a purely private anticompetitive scheme in at least two respects, both of which are likely to make public restraints a more attractive alternative to firms intent on pursuing a "cheap exclusion" strategy. First, the cost of enforcing the restraint is borne by the government, rather than the triggering firm. This ensures that the exclusionary strategy satisfies the first criteria: it is cheap. Second, governmental enforcement of the restraint is likely to be far more effective than private enforcement. For starters, a governmental restraint can be open and notorious.[7] In contrast to private restraints, which must be maintained in secret to avoid antitrust prosecution, governmental restraints are often shielded by some applicable antitrust exemption, such as the *Noerr-Pennington* doctrine.[8] Furthermore, the government is likely to have far greater enforcement resources. As a result, the government will have a greater ability to police and, where necessary, discipline the type of cheating that frequently undermines private restraints of trade, and ultimately prevents them from delivering durable market power.[9]

The temptation to "game" a specific governmental process may be particularly strong where the process involves the application or enforcement of intellectual property rights. Although the U.S. antitrust enforcement agencies have acknowledged that intellectual property rights are comparable to other property rights,[10] and that mere possession of IP rights does not create a presumption of market power,[11] it is also clear that, in many instances, the possession of IP rights confers a competitively significant right to exclude. A patent, for example, confers the right to prohibit rival firms from making, using, or selling the claimed invention in the United States for a period of twenty years.[12] Thus, even while acknowledging that most business conduct with respect to patents is procompetitive, the federal courts have recognized that certain practices – such as extending royalty payments beyond a patent's expiration date[13] and tying the purchase of patented product to the purchase of an unpatented product[14] – raise heightened antitrust concerns. While thankfully shorter than in days past, this list of "red flag" practices continues to serve as a reminder that intellectual property is competitively sensitive, and may have a greater impact on the marketplace than other types of property.

In addition to the fact that "gaming" a governmental process affecting IP rights may confer a particularly valuable competitive advantage, the likelihood that a firm will pursue a "cheap exclusion" strategy in this context is heightened by the sheer number of opportunities. For better or worse, the process of obtaining, exploiting, and protecting IP rights is suffused with government involvement at almost every level. The process of obtaining a patent, for example, involves extensive interaction with the U.S. Patent and Trademark Office. Not surprisingly, allegations that patent applicants have attempted to subvert this process for anticompetitive ends – whether through inequitable conduct[15] or outright fraud[16] – have been a substantial source of litigation. Those familiar with patent prosecution proceedings, however, will recognize that they are sufficiently time-consuming and costly that efforts to manipulate this particularly process can hardly be characterized as "cheap" exclusion. Interestingly, the same cannot be said for a growing number of peripheral governmental processes bearing on the application and enforcement of IP rights. As recent FTC experience has shown, these proceedings – which include both IP-centered regulatory approvals and government-sponsored standard setting proceedings – may be among the most fertile terrain for "cheap exclusion" strategies identified to date.

III. Recent FTC Cases Involving IP and Cheap Exclusion

Two IP-related Commission enforcement matters are particularly illustrative of this point. The first is the Commission's case against Bristol Myers Squibb, which involved allegations that the company had "gamed" the Food and Drug Administration's approval process for the marketing and sale of generic drugs. Pursuant to the Hatch-Waxman Act,[17] and related FDA regulations,[18] a pioneer drug company that files a New Drug Application ("NDA") is obligated to list any patent that claims the drug in an administrative publication known as the Orange Book. Listing a patent in the Orange Book entitles the pioneer company to certain procedural rights, the most competitively-sensitive of which is the right to trigger an automatic 30-month stay of FDA approval of a potential generic competitor's Abbreviated New Drug Application ("ANDA") by filing a lawsuit alleging that the generic product that is the subject of the ANDA infringes a listed patent.[19] Without FDA approval of its ANDA, the would-be generic competitor cannot enter the market, thereby shielding the pioneer company from potentially significant price competition.

The Commission's complaint against Bristol Myers asserted, among other allegations, that the company had "gamed" the FDA's process by listing patents in the Orange Book that did not satisfy the statutory listing criteria.[20] This strategy was facilitated by the FDA's express policy of receiving and processing Orange Book filings on a ministerial basis, accepting the claims made therein at face value, rather than conducting an independent determination of whether the proferred patents did, in fact, claim the drug product described in the NDA.[21] As a result, by making a relatively small investment in fraudulent Orange Book filings, as well as the related infringement litigation necessary to trigger the automatic stay of its competitor's ANDA, Bristol Myers was able to effectively block generic competition for a period of two and a half years. In order to resolve these allegations, the Commission and Bristol Myers entered into a consent order which, among other restrictions, bars the company from seeking to obtain a 30-month stay when its conduct during the Orange Book listing processes has involved certain objectionable practices.[22]

The second, and more recent, matter demonstrating the intersection of intellectual property and "cheap exclusion" is the Commission's ongoing case against Unocal. Unlike the *Bristol Myers* case, which involved IP-centered regulatory approvals, the *Unocal* case involves allegations that the company engaged in "gaming" of a government-sponsored standard setting proceeding. The object of the proceeding in question, before the California Air Resources Board ("CARB"), was to develop and adopt a common formula for the production of cleaner-burning, low-emissions "summer- time" gasoline.[23] According to the Commission's complaint, all participants in the CARB proceeding understood that the resulting regulations would require gasoline producers to make substantial capital investments to reconfigure their refineries.[24] In other words, once a particular formula was adopted, and the resulting capital investments were made, the CARB fuel standard would likely be locked-in for a substantial period of time.

The Commission's complaint alleges that Unocal "gamed" the CARB proceeding by making intentional misrepresentations regarding the nature of it patent rights. Specifically, the complaint alleges that Unocal represented that key results of its emissions research were non-proprietary or in the public domain, and that incorporation of these results into the CARB standard would be "cost effective" and "flexible," while failing to mention that these results were covered by pending patent claims.[25] However, once the CARB standard had been adopted, and industry-wide lock-in had taken place, Unocal engaged in an aggressive campaign of patent

enforcement, and sought to exact supra-competitive royalties.[26] As a result of this relatively low cost "patent ambush" strategy, the complaint estimates that the company was able to reap more than $500 million annually, almost ninety percent of which would be passed on to consumers at the gas pump.[27] The *Unocal* trial was completed on January 28, 2005, and a decision from the Administrative Law Judge remains pending.

IV. Strategies for Combating "Cheap Exclusion"

In addition to bringing cases to address the "cheap exclusion" strategies of specific firms in the intellectual property context, the Commission has undertaken longer term, more systematic efforts to address the root causes of the problem. The Commission's recent experience suggests that certain factors may make a particular commercial or regulatory environment more susceptible to "cheap exclusion" strategies. Having preliminarily identified at least a few of these factors, the Commission is currently taking three principal steps to minimize their impact.

First, the Commission has sought, through the work of two task forces, to clarify the scope of antitrust exemptions. The State Action Task Force, for example, is examining whether overly broad interpretations of the state action exemption, which weaken such key limitations on the doctrine as whether the proponent of the exemption must demonstrate conformity with a "clearly articulated" state policy and "active supervision" by the state, may unwittingly shield anticompetitive efforts to manipulate state regulatory processes. In late 2003, the task force issued a detailed report,[28] including specific recommendations for clarifications of the doctrine, which it has sought to implement through a series of recent cases against the South Carolina State Board of Dentistry,[29] the Virginia Board of Funeral Directors and Embalmers,[30] and the Kentucky Household Goods Carriers Association.[31] Likewise, the *Noerr-Pennington* Task Force has sought to address concerns that the exemption for "petitioning" conduct has been expanded in ways that would shield anticompetitive schemes based on *de minimis* governmental involvement, and even efforts to subvert governmental processes through misrepresentations and omissions. Although the report of the *Noerr* Task Force is still a work in progress, the task force has developed a set of preliminary recommendations,[32] which it has sought to implement through litigation. It is notable, for example, that neither the Commission's case against Bristol Myers or Unocal could have proceeded without first overcoming a *Noerr* defense.[33]

Second, the Commission has advocated reform of specific problematic governmental processes. This approach has necessarily been more incremental, as the sheer number of governmental processes – at the federal, state, and local level – as well as the number of ways in which they can potentially be manipulated, is daunting. The FTC's ability to effect substantial change through this approach is also, appropriately, limited by jurisdictional constraints. The Commission has not sought to establish itself as the ultimate reviewer of *every* regulatory scheme, but rather has endeavored to offer limited recommendations, based on its competition policy expertise, as to how particular regulations might be amended to discourage and frustrate "cheap exclusion" strategies.[34] Notable successes in this area in include the Commission's study on Generic Drug Entry Prior to Patent Expiration,[35] which advocated specific reforms of the FDA's process for the approval of generic drugs. The FTC's report led to important, procompetitive amendments to both the Hatch-Waxman Act and the FDA's implementing regulations. The Commission has also made a more broad based effort to address so-called "legacy" laws, enacted in a pre-Internet environment, that may be impeding the development of e-commerce competition.[36] For example, the Commission's opposition to state licensing regimes that inhibit Internet sales of contact lenses[37] was instrumental in spurring passage of the Fairness to Contact Lens Consumers Act,[38] which enhances consumers' ability to fill contact lens prescriptions from sources other than their prescribing optometrist. The Commission also issued a report on Internet wine sales, which concluded that restrictions on interstate direct shipping increase price and reduce consumer choice, while doing little to promote temperance or reduce underage drinking.[39] This issue was recently taken up by the Supreme Court.[40]

Finally, and of greatest interest to the intellectual property practitioner, the Commission has advocated reforms of the patent system to improve patent quality. As noted earlier, while the U.S. antitrust agencies have long since abandoned the hostility toward intellectual property that characterized prior eras, patents and other IP may still have substantial competitive significance in certain markets. Consequently, there has been growing concern in some sectors that the increasing number of patents issued by the PTO,[41] as well as the expense and complexity involved in determining their scope, may be facilitating "cheap exclusion" strategies. In order to address these concerns, the FTC, in conjunction with the Antitrust Division of the Department of Justice, conducted an extensive series of hearings on the interface between antitrust and intellectual property policy. The resulting FTC report made a number of important recommendations, including advocating the creation of a new PTO procedure that would enable firms to contest patent validity in a less expensive and time-consuming manner than a federal court challenge.[42] The report also recommended enhancing courts' ability to weed out questionable patents by lowering the burden of proof on issues of patent validity from "clear and convincing" to "preponderance of the evidence."[43] While the impact of these recommendations remains to be seen, the issue of patent quality continues to generate significant interest, and has recently been taken up by other leading public policy groups.[44]

V. Conclusion

In many ways, the FTC's focus on "cheap exclusion" is not a new development. The antitrust agencies have always sought to identify and prevent anticompetitive practices, and cheap and effective anticompetitive practices have always been among the most popular. What is new, however, is the FTC's focus on the role of government as a sometimes unwitting, and sometimes unwilling, accomplice in "cheap exclusion" strategies. As early as 1978, Robert Bork observed

"an enormous proliferation of regulatory and licensing authorities at every level of government," and warned that the "profusion of such governmental authorities offers almost limitless possibilities for abuse."[45] These sentiments seemed to be echoed by then FTC Chairman Timothy Muris in 2003, when he observed that "[i]f you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take."[46] The FTC's antitrust enforcement efforts have increasingly begun to take this reality into account, and thereby advance a more comprehensive and effective – if admittedly still far from flawless – competition policy. The Commission's focus on "cheap exclusion" strategies should thus be regarded not so much as an *anti*-government approach, as an approach that prizes, and endeavors to foster, better and more consumer-friendly government.

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Footnotes

[1] *See* Susan A. Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest A. Nagata, *Cheap Exclusion,* __ Antitrust L.J. __ (forthcoming 2005) (manuscript on file with authors).

[2] Creighton and her co-authors describe a number of "cheap exclusion" scenarios in which the manipulation of a governmental process is *not* a factor, such as opportunistic behavior in a non-governmental standard setting proceeding or tortious conduct against a rival. *Id.* at 18-22. These scenarios are not encompassed by this article's more abbreviated treatment of the issue.

[3] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993) (the proponent of a predatory pricing theory must show: (1) "that the prices complained of are below an appropriate measure of its rival's costs," and (2) "a dangerous probability [of its rival] recouping its investment in below-cost prices."). *See also* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 698 (1975) ("[T]he classically-feared case of predation [predatory pricing] has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.").

[4] Although the view that predatory pricing is economically irrational and rare is not without its detractors, it remains the majority position of both Supreme Court Justices and antitrust commentators. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[T]he success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits." As a result, "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."). *See also* Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 Geo. L.J. 2475, 2494 (2001) ("[T]hose who want antitrust law to assume an aggressive posture against price-cutting have been unable to assemble a theoretical and empirical case that has persuaded the antitrust community or the courts. For this consumers can be grateful."); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 264 (1981) ("I conclude that there is no sufficient reason for antitrust law or the courts to take predation seriously.").

[5] In the antitrust context, the Supreme Court has generally defined the term "exclusion" as conduct that contributes to the acquisition or maintenance of market power by means other than competition on the merits. *See* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406-08 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

[6] *See*, *e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (articulating the state action doctrine, which provides an antitrust exemption for the regulatory actions of state governments); Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) (articulating the doctrine of implied repeal, which provides a parallel exemption for the regulatory actions of the federal government).

[7] *See* Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, Address Before the Fordham Annual Conference on International Antitrust Law & Policy 2 (Oct. 24, 2003), *at* http://www.ftc.gov/ speeches/muris/fordham031024.pdf ("In many ways, public restraints are far more effective and efficient at restraining competition. Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel.").

[8] The *Noerr-Pennington* doctrine provides an antitrust exemption for conduct that constitutes "petitioning" of a governmental body. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mineworkers of America v. Pennington, 381 U.S. 657 (1965).

[9] *See* Muris, *supra* note __, at 2 ("Perhaps the clearest advantage of public restraints is that they frequently include a built-in cartel enforcement mechanism.").

[10] *See* U.S. Dep't of Justice & Federal Trade Comm'n Antitrust Guidelines for the Licensing of Intellectual Property § 2.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

[11] *Id.* at § 2.2.

[12] 35 U.S.C. § 154 (1994).

[13] *See* Brulotte v. Thys Co., 379 U.S. 29 (1964).

[14] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[15] *See* Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945).

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

[17] 21 U.S.C. § 355.

[18] 21 C.F.R. § 314.53.

[19] 21 U.S.C. § 355(j)(5)(B)(iii).

[20] In re Bristol Myers Squibb Co., FTC Dkt. No. C-4076 at ¶¶ 34-58 (Apr. 18, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf.

[21] *See* 59 Fed. Reg. 50338, 50343 (1994). *Accord* Abbott Laboratories v. Novopharm Ltd., 104 F.3d 1305, 1307 n.1 (Fed. Cir. 1997) ("[t]he FDA must accept as true the patent information supplied by the patentee"). The FDA has consistently maintained that it has neither the resources nor the expertise to resolve patent issues. *See* 54 Fed. Reg. 28872, 28910 (1989) (preamble to proposed regulations); 59 Fed. Reg. at 50345 (cols. 2, 3) (preamble to final regulations in which FDA rejected two comments that asserted that "FDA should ensure that patent information submitted to the agency is complete and applies to a particular NDA").

[22] In re Bristol Myers Squibb Co., FTC Dkt. No. C-4076 at Part VII (Apr. 18, 2003) (Consent Order), *at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbdo.pdf.

[23] In re Union Oil Co. of California, FTC Dkt. No. 9305 at ¶¶ 19-27 (Mar. 4, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[24] *Id.* at ¶ 24.

[25] *Id.* at ¶ 78.

[26] *Id.* at ¶¶ 68-72.

[27] The $500 million figure is based on estimates that: (1) California consumers will purchase 14.8 billion gallons of gasoline per year, (2) CARB "summer-time" fuel requirements will be in effect up to 8 months per year, and (3) Unocal will receive a royalty of 5.75 cents per gallon of "summer-time" gasoline. *Id.* ¶ 10. The ninety percent pass-on figure is based on the sworn testimony on Unocal's own expert. *Id.*

[28] Office of Policy Planning, Federal Trade Commission, Report of the State Action Task Force (2003), *at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[29] In re South Carolina State Board of Dentistry, FTC Dkt. No. 9311 (Sept. 15, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/09/socodentistcomp.pdf. The full Commission issued an opinion denying the Board's state action defense on July 30, 2004. The Board subsequently appealed the Commission's opinion to the Fourth Circuit, where the case remains pending.

[30] In re Virginia Board of Funeral Directors and Embalmers, FTC Dkt. No. C-4124 (Oct. 5, 2004) (Consent Order), *at* http://www.ftc.gov/os/caselist/0410014/ 041005do0410014.pdf.

[31] In re Kentucky Household Goods Carriers Ass'n, Inc., FTC Dkt. No. 9309 (July 9, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/07/ktadmincmp.pdf. The Administrative Law Judge issued an Initial Decision in favor of FTC Complaint Counsel on June 25, 2004, and the case is currently on appeal to the full Commission.

[32] *See* Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 Harv. J. L. & Pub. Pol'y 443 (2004). *See also* John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, Antitrust, Fall 2003, at 77; John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, Antitrust, Summer 2003, at 36.

[33] *Noerr* protection for Orange Book filing conduct analogous to that in the Commission's *Bristol Myers* case was rejected by a federal district court in a related pharmaceutical matter in which the Commission filed an influential *amicus* brief on the *Noerr* issue. In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation, 185 F. Supp. 2d 363 (S.D.N.Y. 2002). *Noerr* protection for Unocal's participation in the CARB standard setting proceeding was rejected by a decision of the full Commission. In re Union Oil Co. of California, FTC Dkt. No. 9305 (July 7, 2004) (Opinion), *at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[34] *See* Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying A Cost/Benefit Analysis to the FTC's Advocacy Program*, Address Before the Charles River Associates' Conference on Current Topics in Antitrust Economics and Competition Policy 1 (Feb. 8, 2005), *at* http://www.ftc.gov/speeches/ majoras/050208currebttopics.pdf ("While the Commission's competition advocacy program is rooted in fundamental antitrust concepts and the same types of empirical economic evidence that undergird enforcement, our advocacy promotes these concepts in a variety of arenas in which competition concerns are vital but may be overlooked.").

[35] Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration (2002), *at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[36] In order to address these issues in a more systematic manner, the Commission hosted a public workshop in October 2002. The workshop was intended to enhance the Commission's understanding of particular practices and regulations, and focused on a variety of industries, including: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) casket sales; (6) on-line legal services; (7) telemedicine and on-line pharmaceutical sales; (6) auctions; (7) real estate, mortgages, and financial services; and (8) retailing. *See* Federal Trade Commission, Public Workshop, Possible Anticompetitive Efforts to Restrict Competition on the Internet (Oct. 8-10, 2002), *at* http://www.ftc.gov/opp/ecommerce/ anticompetitive/index.htm.

[37] *See* Office of Policy Planning, Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses (2004), *at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf; FTC Staff Comment before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), *at* http://www.ftc.gov/be/v020007.htm.

[38] 15 U.S.C. 7601 *et seq.*

[39] *See* Office of Policy Planning, Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Wine (2003), *at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[40] Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (2004). Oral argument was held on December 7, 2004, and a decision by the Court remains pending.

[41] *See* Gerald J. Mossinghoff & Vivian S. Kuo, *Post-Grant Review of Patents: Enhancing the Quality of the Fuel of Interest*, 85 J. Pat. & Trademark Off. Soc'y 231, 231 (2003) ("In fiscal year 1981, there were 114,710 patent applications filed and 71,010 U.S. patents granted. Just twenty years later, in fiscal year 2001, there were 344,717 patent applications filed and 187,822 U.S. patents granted – a three-fold increase.").

[42] Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy 7-8 (2003), *at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[43] *Id.* at 8-10.

[44] *See, e.g.*, Science, Technology, and Economic Policy Board, National Academies, Patents in the Knowledge-Based Economy (2003).

[45] Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 347 (1978).

[46] Muris, *supra* note __, at 2.