

FOREWORD

By Mozelle W. Thompson[†] and Susan Stark DeSanti[‡]

The Symposium on *Ideas into Action: Implementing Reform in the Patent System* laid the groundwork for high-technology companies, academics, legal practitioners, and government representatives to work for changes in the patent system that will benefit innovation and competition.¹ The pieces in this issue of the *Berkeley Technology Law Journal* help to memorialize this symposium, one that many recognize as a watershed event for the future of American innovation, and provide valuable insight and analysis about the existing patent system and the opportunities for reform. The ideas drawn from the symposium and the pieces, together with cooperative action by the symposium participants, will significantly influence the future of innovation in the United States.

Innovation has historically played a central role in the United States economy, spurring growth and providing consumers with a variety of high-quality, low-cost products and services. No one is more aware of that than West Coast high-technology businesses that have innovated—and thereby changed markets—as significantly and as swiftly as at any time in the world’s history. One of the most critical issues facing America is how it will maintain its position as a world leader in innovation, for innovation is essential to a thriving national economy and to consumer welfare.

Competition and patents stand out among the federal policies that influence innovation. Both competition and patents can foster innovation, but each requires a proper balance with the other to do so. Errors or systematic biases in how one policy’s rules are interpreted and applied can

[†] Commissioner, Federal Trade Commission. These remarks reflect my own views and not necessarily those of the Federal Trade Commission or any other Commissioner.

[‡] Deputy General Counsel for Policy Studies, Federal Trade Commission. These remarks reflect my own views and not necessarily those of the Federal Trade Commission or any Commissioner.

1. The Federal Trade Commission, the National Academy of Sciences, the Berkeley Center for Law and Technology, and the *Berkeley Technology Law Journal* were among many who sponsored the Symposium on *Ideas into Action: Implementing Reform of the Patent System*. A full transcription of the conference may be found at <http://www.ftc.gov/ftc/workshops.htm> or at <http://www.law.berkeley.edu/institutes/bclt/patentreform/schedule.html>, while an edited version may be found at *Edited & Excerpted Transcript of the Symposium on Ideas into Action: Implementing Reform of the Patent System*, 19 BERKELEY TECH. L.J. 1053 (2004).

harm another policy's effectiveness. A failure to strike the proper balance between competition and patent law and policy can harm innovation.

These observations owe a great deal to the lengthy history that preceded this symposium, as well as to the articles presented in this Issue. Many far-sighted academics, including many of the authors in this Issue, have brought crucial insights to intellectual property law and policy for more than a decade. Applying stringent analytical and empirical techniques, economics, and the basic principles of intellectual property law, these academics have shown new ways to assess when patent and copyright laws promote and protect innovation—and when they do not. The sophisticated analyses exemplified by this Issue have enriched our understanding of the interaction among innovation, intellectual property protection, and competition.

As academics studied these issues, high-technology businesses lived them. These businesses have witnessed both the promise and the problems of patents. Through technological breakthroughs and shifting business paradigms, these businesses have searched for new paths toward ongoing innovation and competition within ever more complex and overlapping patent landscapes. An increasing number of these businesses tell us that the task has become overwhelming and that, even with diligence and resourcefulness, they cannot identify all of the patents potentially relevant to their existing business and to areas in which they are considering to innovate. Even more problematic, these businesses also had difficulty in assessing with certainty the validity or non-infringement of the patents they do identify as potentially relevant.

The Federal Trade Commission (FTC) began examining these issues through hearings in 1995, leading to a 1996 FTC Staff Report, *Competition Policy in the New High-Tech, Global Marketplace*, which discussed the relationship among competition, innovation, and intellectual property, among other things.² Enforcement matters over the next several years extended the FTC's understanding of the role of patents in competition.³

2. FED'L TRADE COMM'N, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), available at http://www.ftc.gov/opp/global/report/gc_v1.pdf.

3. *In re Dell Computer Co.*, No. 982 3563 (Fed. Trade Comm'n May 13, 1999) (Agreement Containing Consent Order), available at http://www.ftc.gov/os/1999/05/dell_agreement.htm; *In re Intel Co.*, No. 9288 (Fed. Trade Comm'n Mar. 17, 1999) (Agreement Containing Consent Order), available at http://www.ftc.gov/os/1999/03/d09288_intelagreement.htm; Press Release, Federal Trade Commission, FTC Seeks to Block Cytoc Corp.'s Acquisition of Digene Corp. (June 24, 2002), available at http://www.ftc.gov/opa/2002/06/cytc_digene.htm.

In 2001, the FTC, together with the Antitrust Division of the Department of Justice, commenced broad, in-depth hearings on the relationships among innovation, patents, and competition. Significantly, the first full week of hearings took place in Berkeley, California, with representatives from leading high-technology businesses, academics, independent inventors, and patent and antitrust practitioners. The hearings continued in Washington, D.C., ultimately involving more than 300 panelists and producing over 100 written submissions.

Those hearings revealed a broad consensus that the patent system would benefit from reforms designed to reduce the number of questionable patents. The FTC's 2003 report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, made specific recommendations for such reforms.⁴ Six months later, the National Academy of Sciences (NAS) issued a report, *A Patent System for the 21st Century*, that reached similar conclusions and recommended similar, although not identical, solutions.⁵ In an interesting development that reflects the consensus that patent reforms are needed, both the American Intellectual Property Law Association (AIPLA) and the Intellectual Property Owners Association (IPO) have endorsed some, but not all, of the proposed reforms.⁶ Their reaction suggests that patent reform will be on the legislative agenda in 2005.

As we move forward, two questions confront us. First, how do we take this compilation of bright ideas and keen insights about patent law and process and turn them into something more meaningful for innovation and the U.S. economy? Second, how do we capitalize on this opportunity to make the patent system accommodating to the world we see today, especially in information-technology and biotechnology industries? Achieving these positive outcomes will take more than recommendations from the

4. FED. TRADE COMM'N, *TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY* (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

5. NAT'L ACAD. OF SCIS., *A PATENT SYSTEM FOR THE 21ST CENTURY* (Stephen A. Merrill et al. eds., forthcoming 2004), available at <http://www.nap.edu/books/0309089107/html>.

6. American Intellectual Property Law Association, *AIPLA Response to the October 2003 Federal Trade Commission Report: "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy"* (Apr. 21, 2004), at http://www.aipla.org/Cotent/ContentGroups/Issues_and_Advocacy/Comments2/Patent_and_Trademark_Office/2004/ResponseToFTC.pdf; Intellectual Property Owners Association, *Summary of IPO Position on Federal Trade Commission (FTC) Report* (July 8, 2004), at http://www.ipo.org/Template.cfm?Section=IPO_Position_Statements&Template=TaggedPage/TaggedPageDisplay.cfm&TPLID=14&ContentID=8239.

FTC and the NAS, despite their importance as focal points for discussion and debate.

We have four suggestions:

- *Create an organized, continuing voice.* The information-technology and biotechnology industries and academia should work to create their own voice in favor of reforming and improving the U.S. patent system.
- *Create an ongoing policy resource.* To understand how patents are used in information-technology and biotechnology markets, policymakers need ongoing information from participants in those markets.
- *Continue the movement.* This symposium revealed a consensus among West Coast high-technology industries, academia, and legal practitioners that patent reform should occur. To capitalize on this start, we must find mechanisms for ongoing dialogue, so that consensus can be reached on specific areas of patent reform. Without this, different perspectives and ideas may be left behind in the next round of patent reform.
- *Talk to the public about your industry, innovation, and patent reform.* Those who attended this symposium understand the importance of a patent system that works well to promote, not frustrate, innovation in the context of rapidly changing, high-tech markets. But the public does not necessarily understand your company, its innovation, or why patent reform can benefit the U.S. economy and consumers.

We believe these suggestions are doable. Indeed, at the end of this conference, a core group of leading technology companies agreed there is an opportunity to make the patent system more attuned with the technology innovation of today. Chiron, Cisco, E-Bay, Genentech, Google, Intel, Microsoft, and Symantec have agreed to continue discussion among themselves, academia, and policymakers about the proposals for patent reform debated at this symposium. With these companies' commitment, we believe that patent reform is off to a good start.