Technology Ventures, Current Problems and the Limited Utility of Joint Venture Guidelines

By

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I am happy to appear before you today. I do not have any specific policy recommendations at this point, and I have some reservations about the utility of guidelines for a subject with as many dimensions as the antitrust treatment of joint ventures.

I am going to make some general observations about joint ventures involving research and development and transfer of technology supplemented by some examples which I hope will prove useful to you. My remarks are intended to address characteristics of technology joint ventures which are not always shared, or not shared to the same extent, by other joint ventures. Some of my observations do, however, apply to your project more generally. I will focus on some areas in which antitrust treatment leads to ambiguity, despite initiatives such as the National Cooperative Research and Development Act of 1984 ("NCRA")[1] and the Intellectual Property Guidelines.[2] I will also address why parties do -- and do not -- enter joint ventures of this kind and why they may require a modicum of antitrust "breathing room" in order to be encouraged to form them.

I have consulted not only my own experience but that of a number of colleagues at my firm, counterparts at other firms, and clients. These remarks are my synthesis of the views of these people. I believe they represent prevalent, though perhaps not universal, views among those who draft joint venture agreements and counsel and supervise technology joint ventures. It is the prevalence of most of these views, rather than any originality or special insight, which I thought would make them useful to you.

Why Companies Do -- And Do Not -- Form Technology Ventures

There appear to be several reasons for formation of technology joint ventures, most of which are summarized in the Commission staff Report on Competition Policy in the

New High-Tech, Global Marketplace.[3] First, research, especially downstream research, tends to be risky and expensive. The greatest ideas in theory do not always lead anywhere, and technologies that do emerge after millions of dollars of effort are not always commercial successes. Sometimes they are colossal failures. Thus there exists something of the same "dry hole" phenomenon that exists in oil drilling.[4]

In the technology area, however, collaboration may also prove necessary because no one entity has all the pieces of a complicated puzzle. This is a major reason for giving antitrust breathing room to technology ventures. Where the research is mature, patent rights (or, in the software area, overlapping copyright rights) may be split among several parties. This fragmentation of necessary rights is a consequence of the way our intellectual property laws, particularly our patent laws, are drafted and administered.[5] This is the sense in which intellectual property rights may be considered complementary or blocking -- or may, at least, seem that way to the parties at the inception of their relationship. Antitrust law seems generally to recognize the value of licensing or pooling rights in these situations,[6] as the Supreme Court did in the old Standard Oil[7] and Line Materials case,[8] but doctrinaire rules have nevertheless sometimes been applied to restrictions.[9]

The cases often speak of blocking intellectual property rights, but the need for a joint venture approach may be much broader. For example, parties may have technology that is secret or know-how that is not exactly blocking but is potentially quite valuable. Parties may have rudimentary research results or data that if combined and built upon could prove extremely fruitful. Or parties may simply have scientists with experience, ideas and data that can cross-fertilize one another. Parties may also have complementary strengths in the manner spoken of in Section 2.3 of the IP Guidelines; that is, one party may be stronger in pure research while

another may have excess manufacturing capacity or simply have local contacts and distribution facilities in certain areas of the world.

Where the technology is mature and a market exists, the parties often, in my experience, enter a licensing arrangement rather than a more fully integrated joint venture unless significant costs or local political considerations dictate otherwise. It can therefore be expected that many technology ventures will owe their existence to a need to collaborate at a relatively nascent stage of development and that a fair proportion of them will have an international dimension.

The case law and the IP Guidelines draw a distinction between complementary rights and conflicting ones.[10] However sound this distinction is in theory, it is easy to apply only when mature technologies with mature, litigated patents are involved. In other circumstances -- the circumstances when many technology ventures are formed -- the situation may seem far more ambiguous and fluid. This ambiguity results from the many directions in which research in a technology such as biotechnology may lead and the breadth and uncertainty of the patent rights that may be awarded. A potential biotech discovery, for example, could conceivably yield a new therapeutic product competitive with other therapies; a new delivery vehicle partially complementary and partially competitive with other therapies; a new screening tool which may assist in research of yet additional therapies; or a combination of all these things. At the time investments and fundamental structural decisions must be made, a joint venture between two companies doing research in an area may not be readily characterizable in terms of a competitive/complementary dichotomy.

Similar observations may be made about software ventures. The parties frequently possess complementary strengths but could also be characterized in some respects as

competitors or potential competitors. And because software is inconsistently protected by a patchwork of copyright, trade secret and patent principles around the world, the parties are likely to have even greater uncertainty about the scope of their rights.

So much for why technology ventures are needed. It may be even more important to understand why parties in a strong technological position do not form joint ventures: maintaining secrecy and preserving their break through inventions, to the extent possible, to themselves. This belief in their own scientific prowess exerts a strong tendency for companies hoard their technology, especially in fields where control may be difficult once technology is disclosed. This miserly tendency has two implications.

First, it suggests that joint ventures are usually formed only when and if a real need for some complementary piece of the puzzle is perceived to exist. Even in these circumstances a party may seek to achieve its objective with limited licensing to relatively few licensees. Where potentially fundamental technologies are at stake, this tendency to hoard technology -- the result of Adam Smith's invisible hand of individual greed being combined with professional pride and distrust of others -- should offer comfort to policy makers that some pro-competitive business necessity lies behind the formation and structure of most technology ventures. Antitrust should not add unnecessarily to the already powerful disincentives to their formation. Rather, intellectual property law and antitrust should work in tandem to encourage reasonable collaboration. It is not the sharing but the failure to share technology that is most apt to lead to monopolization of dependent successive layers of compatible innovation. (One can imagine circumstances in which a desire to suppress competition or cartelize an industry may explain the formation of a venture. A hallmark of these cases, however, is that, on investigation, the technology rights involved turn out to be trivial or non-existent.)

Second, if joint venturers hesitate to share their research initiatives with prospective partners, they often grow almost paranoid about doing so with strangers. These reasons, I believe, explain the rather modest extent to which many R&D collaborations have availed themselves of antitrust initiatives designed to help them, such as the detrebling features of the NCRA or the business review procedures of the agencies. At early stages of their work, parties may be loathe to reveal not only details but also even the mere fact of their collaboration to the world at large, fearful that the cognoscenti may then derive valuable information and eventually reverse engineer or even copy some of the results for themselves. For this reason (as well as the widely shared belief among antitrust counselors that this is a rule of reason area), ventures seldom avail themselves of procedures requiring notification except in circumstances where the venture is likely to be highly publicized, or involves a continuing series of consortia. (As noted in the staff's earlier report,[11] most of the NCRA filings are confined to a few industries or made by a relatively small number of well-publicized, ongoing research entities such as Bellcore and university research consortia.)

The "safety zone"[12] in the IP Guidelines also adds relatively little comfort for most ventures. The safety zone does not apply, according to its terms, to transactions in which new corporations are formed or assets (including exclusive licenses to 1P) are acquired. Even for transactions to which it does apply, the safety zone often proves of limited benefit because determining future market shares -- or even markets -- so often proves elusive. Moreover, the fact that a risky technology venture has no market position today does not mean that it will not achieve one years down the road if the venture proves successful. The Guidelines state, however, that the relevant time for assessing the market share safe harbor may be when the transaction is examined, as well as at the time of formation.[13]

Issues of Scope and Need for "Breathing Room"

I mentioned the prevalent concerns for secrecy and tendency to hoard one's technology that continue to deter or limit formation of joint ventures. These concerns, together with the nature of technology and intellectual property rights themselves, also strongly influence the scope of R&D ventures, the collateral restrictions that may be placed on the exploitation of contributed technology, and the treatment of improvements to the contributed technology.

It is here that the concept of allowing technology ventures some reasonable antitrust breathing room comes into play. If a motivating factor for many ventures is the felt necessity to achieve some necessary complementarity or avoid an impasse caused by fragmentation of intellectual property rights, one would expect to find fiercely negotiated restraints on the scope of licensed technology and even on the manner in which the venturers (including the venture itself) may compete with one another in areas related to the technology that is the subject of the venture.[14] And so one does. It is one thing to share one's valuable technology for a particular economic benefit and another to risk losing it forever to one's partner. One might indeed be suspicious of the parties' true objectives if restrictions were not present.

These restrictions should not necessarily be regarded as suspect even though the parties could be considered competitors or potential competitors. Attorneys and business people have increasingly come to realize that few joint ventures are forever. At the inception of a technological joint venture, the parties must negotiate provisions which, in an environment of uncertainty, they feel permit a joint venture to function, protect their individual as well as collective interests during the life of the venture, and treat those interests fairly upon dissolution.

The joint venture itself may combine or improve technologies in ways that demand a sorting out of rights should the venture outlive its usefulness or simply founder. To a far greater degree than in a typical marketing, distribution, or production venture, the future market may only be dimly perceived at the time these fundamental decisions must be made and the appropriate provisions drafted.

Rules designed to further dissemination, exploitation and development of technology should encourage exit as well as entrance into collaboration. Rules focusing largely or entirely on the situation at the time of dissolution may have arbitrary effects which, in the long run, will ultimately only discourage formation of desirable joint ventures. Antitrust authorities must also be aware that, upon a venture's collapse, antitrust doctrine can be exploited to achieve a strategic advantage or renege on commitments made many years before.

A European and a U.S. Example

Let me give you a couple of examples from experience. The first is based on a case involving European antitrust principles in which my firm is involved. This example also underscores that the applicable antitrust principles aren't solely those in the U.S., and that harmonization of applicable antitrust rules and principles would be a desirable end in itself.

In this case two U.S. companies contributed both cash and secret technology (consisting both of patents conveyed outright and know-how made available by license) for producing certain chemical products to a joint venture with a Spanish company controlled by the Spanish government. The plant built by the joint venture was the first to use the new technology anywhere in the world and the first plant to produce these products in Spain. One of the U.S. companies subsequently bought the other's interest so that the Spanish production facility

became a 50-50 venture.

Seventeen years after the joint venture was organized, the U.S. Company sold its interest to the Spanish company. As part of the agreement winding up the joint venture, the U.S. company agreed to make further improvements developed at other plants around the world available to the Spanish company. The Spanish company received a paid-up license to continue to use the still highly confidential U.S. technology at the Spanish plant, but agreed to negotiate for new terms if it wished to expand that plant significantly or to use the technology elsewhere. The Spanish company also agreed to keep the technology confidential. The Spanish government approved the technology license.

Nine years later, the Spanish company announced that it was planning to build a new, larger plant using the same technology, without any agreement as to new terms. After negotiations failed, the U.S. company commenced arbitration proceedings and applied to the EU for a negative clearance of the wind-up agreements, and the Spanish company filed complaints in the EU and in Spain under the competition laws.

On these facts, the Commission's DG IV preliminarily concluded that the clause limiting use of the technology to the original Spanish plant violated EU competition law. There was no dispute that the technology was still valuable and confidential. In reaching its preliminary conclusion, which the American company is contesting, DG IV applied the EU technology transfer regulations retroactively and mechanically. It has so far refused to consider how a partner can exit a technology joint venture without losing rights to the technology it brought into the joint venture, other than to say that a running royalty would have been allowed. DG IV has refused to consider any other more flexible solution, and has threatened that the provisions will be held void and that fines may be levied. DG-IV has even suggested that the

American company's attempt to arbitrate the dispute, as provided in the contracts, is itself a serious and continuing violation of European competition law.

It would be an understatement to say that the U.S. company (which my firm represents) feels rather ill-used by this experience. It -- and other U.S. companies -- may think long and hard about contributing technology to joint ventures if substantially all control is lost over the technology once the parties have a falling out or otherwise terminate a venture. Or they may limit the scope, strangle the growth, and veto ownership transfers of ventures in which they do participate lest they find themselves victimized by the very entities they created with their own valuable knowledge and expertise.

Distrust is a pervasive enough problem in these large joint ventures. It does not seem necessary or desirable for antitrust to foster these attitudes among venturers or allow itself to be used as a surprise end game gambit when the venturers finally do part ways.

Now to my second example. Years ago, we were involved in transactions in which joint ventures involving foreign and U.S. companies were established in the United States. These ventures also involved construction of new facilities and introduction into U.S. commerce of products and fruits of research that might never have reached the U.S. market otherwise, or which would have done so much less effectively and on a much smaller scale.

Substantial investments were at stake, and, as is often the case, each partner was somewhat wary of the long term intentions of the other. The possibility of a future antitrust problem or divestiture loomed as a major issue for the foreign venturers which had heard the predictable horror stories, albeit in a foreign language, about the U.S. antitrust laws.

Because one transaction was large and involved the creation of a new company, an HSR filing was required and led to a fairly extensive review, in that case by the Antitrust

Division. There was much grumbling at the time about the scope of the second request and the delay in closing the transaction (this was actually rather early in the history of the HSR review process). But in some ways this process eventually proved quite helpful. Justice took a realistic look at the future using the best information obtainable and decided to allow the transaction to go through with a few agreed upon modifications.

Justice examined not only product markets but what we might today call innovation and technology markets. (We were not sophisticated enough to give them a name back then.) The then head of the Antitrust Division made the most realistic call that he could, eschewing ephemeral possibilities of world dominance if every scientist's most optimistic wish came true.

Although Justice or the Commission would not be estopped from ever re-looking at the transaction, the parties, and particularly the foreign entity, derived a great deal of comfort from this informal but thorough review and have relied on it over the years since. This transaction had been publicly announced, but the confidentiality of the information reviewed under HSR was extremely important to the parties. Even assuming that a business review procedure would have been available, it would have been impossible to explain enough about the transaction to secure a meaningful analysis without getting into highly confidential plans and research data, and a business review letter taking any position might have been a hard thing for a government official to write in a transaction with so many speculative features. Given the attention the enforcement agencies have recently attached to innovation markets, the agencies might wish to consider an informal, confidential channel for advice which parties could use to obtain this same level of comfort for technology ventures involving extensive future commitments.

I must, however, also report a less positive aspect of one of these transactions. Final versions of definitive agreements were still being drafted when review of an agreement in principle began. The staff made several “suggestions” on issues relating to control and independence of the venture and other contract terms. One party or the other would then seize on these “suggestions” to renegotiate parts of the agreement. Perhaps naively, the other party would feel pressured to acquiesce. In the end, I doubt that any of this tinkering with structure influenced the perception of whether a real antitrust problem existed.

This micro-managing did, however, lead to much gamesmanship, came close to causing the parties to scuttle the transaction once or twice, and scarcely proved conducive to the spirit of cooperation in a common enterprise that parties should have when embarking on a long term joint venture. Some of the points that were subject to this antitrust-inspired tinkering have been exploited by one party or the other over the years and may remain bones of contention during -- and perhaps even after -- the life of the venture.

I offer this as an example of how overkill in application of antitrust rules to joint ventures can be manipulated to serve, not the public interest, but the private agendas of participants. Unless fundamental considerations dictate restructuring or there exist clear indicia that the venture is more sham than reality, it may prove wisest not to meddle with the terms that the parties negotiated for themselves based on their own market positions and business judgment.

To Exclude or Not to Exclude

Although not a factor in the above examples, serious questions may also arise at the beginning or during the course of many technology ventures concerning the degree of

inclusiveness which must be permitted. Fundamental decisions may often have to be made at a time when the significance of a venture is quite uncertain and in an atmosphere of considerable guesswork. Unfortunately the law in this area sometimes only compounds all the other uncertainties.

The philosophy of the NCRA was that ventures should be encouraged to reach a reasonable size but that they should not become over inclusive: that it was preferable, whenever possible, to preserve the possibility of several diverse sources of research in an industry rather than to encourage all competitors to unite in a single endeavor.[15] The IP Guidelines reflect and reinforce that same philosophy.[16]

The agencies' enforcement policy, and even the NCRA, however, do not fully solve the problem for one counseling a venture or venture participant, even when one can make a semi-informed assessment of the facts. One must always be concerned with private actions as well as government enforcement. Indeed, because of the treble damage remedy -- or even the single damage remedy, in the few cases when an NCRA filing is made -- one may be far more concerned with the relief which may be sought by a desperate or greedy private opponent than with that which might be sought by a diligent but disinterested public official.

As has already been noted in these hearings,[17] excluding a competitor from an important venture may be the invitation to a law suit. Of course such an action <u>should</u> be tried under the NCRA as a rule of reason case. But even assuming that it will be, what is the rule of reason? The NCRA does not tell us how the effect on excluded competitors is to be balanced against the desire to encourage diversity in research approaches, how research needs in the past or future are to be balanced against an exclusion today, or how the interests of an excluded, perhaps bankrupt, competitor are to be balanced against the NCRA's more abstract concerns.

These issues may not be litigated by an agency with a broader public interest at heart but by a competitor with a much narrower, more parochial interest: its own. And the balancing will be performed not by antitrust scholars and economists in forums such as this but by juries in courtrooms chosen for their sympathy for plaintiffs.

These cases may often be brought as Section Two essential facility cases. The case law under cases such as Aspen[18] and Kodak[19] -- private cases, I might add, which the Government did not bring and in Kodak even opposed -- would probably place the burden on the defendants to prove a legitimate, pro-competitive business reason for refusing to deal. The fact that the venturers thought only two, out of several, players sufficient to develop a new technology might not qualify when the case is litigated through the prism of hindsight, particularly if few competing technologies have in fact emerged.

I do not mean to suggest that these cases would always be lost by defendants acting in good faith. But some of them could be. And the risk that that might happen, coupled with the costs and burdens of defending the cases, may profoundly affect the calculus of how to treat the person knocking at the door. When push comes to shove, the NCRA, the IP Guidelines and any future guidelines may be only one of the things -- and far from the most important thing -- to which one will look to determine one's behavior[20]

As noted above,[21] the safety zone of the Guidelines has, I believe, little impact on most of these decisions. In fact, paradoxically, if one attempted to monitor a venture to assure that it did not exceed the Guidelines' safe harbor, one would only be likely to add to what is already likely to be a substantial risk of failure.

Summary of Observations

I said I wouldn't have conclusions on a subject that is at once so abstract and factually variegated as technology ventures. But I hope the Commission will keep in mind some observations and object lessons based on experience with these ventures:

1. The concerns that venturers have about secrecy of technology and loss of control of IP rights, as well as the problem of dealing with improvements to technology made during the life of a venture and the pervasive uncertainty likely to exist when many technology ventures are entered, mean that it is particularly important for these ventures, more so perhaps than many others, to have breathing room to impose restrictions on use of technology. This breathing room is needed even when venturers are perceived as competitors and even after a venture has terminated. Indeed, the critical time when the parties most need to rely on protections they have bargained for is likely to be after the venture has collapsed.

Some ventures are forever, but most are not. These days, parties pay a lot of attention to their pre-nuptial agreements. They will not enter risky joint ventures or contribute technology or rights of real value if they do not have confidence they can enforce those agreements when the honeymoon is over.

2. As a corollary, enforcers must resist the temptation to evaluate these agreements by rules applied only after the fact. The relevant focus for purposes of analysis is when the parties entered the agreement.

3. In the R&D area, many factors counsel parties not to share their technology even when it might be socially desirable for them to do so. This is one reason breathing room seems so desirable, and it is also some guarantee that parties probably have strong justification for the technology ventures they enter. This does not mean that the agencies should not be vigilant to

attack pure shams; it is to suggest that they should be loathe to second-guess the business judgment of the parties in the absence of evidence of sham conduct.

4. Initiatives such as the IP Guidelines make a significant contribution to the intellectual underpinnings, evolution and public understanding of the law. But given the risk and reality of private actions, and the prevalence of other legal regimes, they may have a limited influence on actual behavior. Especially for things as diverse as technology joint ventures, it would be difficult -- and could prove counter-productive and even misleading to those most in need of guidance -- to draft a one-size-fits-all set of guidelines. Efforts and resources might equally and perhaps more effectively be devoted to seeking legislative change, appearing in private actions, providing informal channels for advice, contributing to antitrust scholarship, and attempting to harmonize U.S. joint venture and licensing rules with those of other nations.

5. The concern for secrecy and somewhat limited protections afforded by existing notification and business review procedures mean that these procedures are invoked relatively rarely. Although less public procedures are apt to cause some institutional discomfort in the United States, the enforcement agencies might wish to consider making available more confidential avenues for seeking advice or informal pre-clearance of certain joint ventures in a manner similar to that which now occurs in many other parts of the world.

6. The agencies might also wish to reconsider and clarify the HSR requirements pertaining to corporate joint ventures centered on R&D and technology transfers. Not only are the size of transaction thresholds particularly low for joint ventures, but also the valuation rules are notoriously difficult to apply to exclusive licenses to intellectual property for new or non-existent products and other assets and contracts commonly contributed to technology ventures.

[1]. Now the National Cooperative Research, Development and Production Act, 15 U.S.C.A., §§ 4301-06.
[2]. U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for the Licensing of Intellectual Property (April 6, 1995), reprinted in 4 Trade Reg. Rep. (CCH) ¶13, 132 (April 6, 1995) (the "IP Guidelines").
[3]. FTC Staff Report, Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, Volume I at Chapter 10 (May, 1996); Joseph Kattan, Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation, 61 Antitrust L.J. 937, 938-44 (1993); Robert Pitofsky, Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn Olin, 82 Harv. L. Rev. 1007, 1050-51 (1969).
[4]. Thomas M. Jorde and David J. Teece, Innovation, Cooperation and Antitrust, 4 High Tech. L.J. 1 (1989); Thomas A. Piraino, Jr. Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures, 35 Wm. & Mary L. Rev. 871 (1994).
[5]. Countries such as France provide for depenency licenses that achieve governmentally what can often be achieved, if at all, only by private agreement in the United States. For a good discussion of these issues, see John H. Barton, Patents and Antitrust: A Rethinking in Light of Patent Breadth and Sequential Innovation, 65 Antitrust L.J. 449 (1997). Absent combinations of killer patent portfolios and deliberate exclusionary conduct, see Willard K. Tom & Joshua A. Newberg, "U.S. Enforcement Approaches to the Antitrust/Intellectual Property Interface," in Nancy Gallini & Rob Anderson, eds., Competition Policy, Intellectual Property Rights and International Economic Integration (Industry Canada 1997); United States v. Singer Mfg. Co., 374 U.S. 174 (1963); Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 683-91 (D.S.C.), aff'd in part and rev'd in part, 594 F. 2d 979 (4th Cir. 1979), cert. denied, 444 U.S. 1015 (1980), or sham transactions, antitrust sought generally to encourage these arrangements, either through licensing or joint ventures.
[6]. See IP Guidelines §2,3; Carpet Seaming Tape Licensing Corp. v. Best Seam Inc., 616 F.2d 1133 (9th Cir. 1980).
[7]. Standard Oil Co. (Indiana) v. United States, 283 U.S. 163 (1931).
[8]. United States v. Line Materials Co., 333 U.S. 287 (1948).
[9]. If one assumes that the GE doctrine permitting control of the price of the first sale in a bona fide license is good law, the condemnation of that practice on per se grounds when blocking patents are involved, as occurred in Justice Reed's deciding opinion in the Line Materials, case itself, is difficult to justify. (This is not to say that the facts of the Line Materials case might not have permitted a finding that the price fixing arrangement resulted in large part from a horizontal agreement among preexisting competitors to which the licensing scheme was ancillary rather than vice versa.)
[10]. Compare IP Guidelines §2.3, with id. §§3.2.2. (technology markets); 3.3.2 (innovation markets); 5.5. (cross-licensing and pooling arrangements)
[11]. FTC Staff Report, supra note 3, Ch. 10, at p. 14.
[12]. IP Guidelines § 4.3.
[13]. Id at last paragraph & n. 32.
[14]. See generally Joseph F. Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1571-73 (1982); Piraino, supra note 4, at nn. 179,180.
[15]. H.R. Conf. Rep. No. 98-1044, 9th Conq., 3d Sess. at 10 (1984), reprinted in 1984 U.S.C.C.A.N. 3131, 3134-35.
[16]. IP Guidelines § 4.3. n.31 and accompanying text; ABA Antitrust Section, The 1995 Federal Antitrust Guidelines for the Licensing of Intellectual Property Commentary and Text 43-44 (1996).
[17]. Testimony of Robert A. Skitol before the Federal Trade Commission Joint Venture Project Hearings (Washington, D.C., June 5, 1997).
[18]. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[19]. Eastman Kodak Co v. Image Technical Servs., Inc. 504 U.S. 451 (1992); Image Technical Servs. v. Eastman Kodak Co., 1996 U.S. Dist. Ct. LEXIS 2386, at 13 (N.D. Cal. Feb. 28, 1996) (permanent injunction and post-judgment memorandum), appeal docketed, Nos. 96-15293, 96-15296 (9th Cir. 1996).

[20]. People advising ventures with international dimensions may also feel that European or other non-U.S. antitrust principles will impose a duty not to exclude once a substantial market share is achieved.

[21]. See text at notes 13-14 supra. See also Remarks of Joseph Kattan presented at the Federal Trade Commission's Hearings on Joint Venture Project (Washington, D.C. June 5, 1997).