A logical place to start is to change rules that discourage the use and dissemination of existing technology and prevent the pursuit of promising avenues of research and development. Some of these rules arise from judicial decisions that erroneously create a tension between the antitrust laws and the intellectual property laws.

Our bill would eliminate a court-created presumption that market power is always present in a technical antitrust sense when a product protected by an intellectual property right is sold, licensed, or otherwise transferred. The market power presumption is wrong because it is based on false assumptions. Because there are often substitutes for products covered by intellectual property rights or there is no demand for the protected product, an intellectual property right does not automatically confer the power to determine the overall market price of a product or the power to exclude competitors from the marketplace.

On May 14, 1996, the Judiciary Committee held a thorough hearing on H.R. 2674, an identical bill that was introduced in the last Congress. At the hearing, the bill received support from the Intellectual Property Owners, the American Bar Association, and the Licensing Executives' Society. The administration agreed that the bill reflected the proper antitrust policy, but hesitated to endorse a legislative remedy.

Despite the administration's reluctance to endorse the bill fully in last year's hearing, the recent antitrust guidelines on the licensing of intellectual property—issued jointly by the antitrust enforcement agencies, the Department of Justice and the Federal Trade commission—acknowledge that the court-created presumption is wrong. The guidelines state that the enforcement agencies ''will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner. Although the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.'' Antitrust guidelines for the Licensing of Intellectual Property, April 6, 1995, p. 4 (emphasis in original).

For too long, Mr. Speaker, court decisions have applied the erroneous presumption of market power thereby creating an unintended conflict between the antitrust laws and the intellectual property laws. Economists and legal scholars have criticized these decisions, and more importantly, these decisions have discouraged innovation to the detriment of the American economy.

The basic problem stems from a lower Federal court decision that construed patents and copyrights as automatically giving the intellectual property owner market power. *Digidyne Corp.* v. *Data General Corp.,* 734 F.2d 1336, 1341–42 (9th Cir. 1984), *cert. denied,* 473 U.S. 908 (1984). The sheer size of the Ninth Circuit and its location make this holding a serious problem, even though some other courts have not applied the presumption. *Abbott Laboratories* v. *Brennan,* 952 F.2d 1346, 1354–55 (Fed. Cir. 1991), *cert. denied,* 505 U.S. 1205 (1992); *A.I. Root Co.* v. *Computer/Dynamics, Inc.,* 806 F.2d 673, 676 (6th Cir. 1986). The Ninth Circuit covers nine States and two territories, and it has a population of more than 45 million people. In addition, it contains a significant portion of the computer industry, including Silicon Valley in California and Microsoft in Washington.

So, in this very important area, the law says one thing in the Ninth Circuit, a different thing in other circuits, and in still other circuits, the courts have not spoken. See Antitrust Guidelines for the Licensing of Intellectual Property, p. 4 n. 10. This lack of clarity causes uncertainty about the law which, in turn, stifles innovation and discourages the dissemination of technology.

For example, under Supreme Court precedent, tying is subject to per se treatment under the antitrust laws only if the defendant has market power in the tying product. However, the presumption automatically confers market power on any patented or copyrighted product. Thus, when a patented or copyrighted product is sold with any other product, it is automatically reviewed under a harsh per se standard even though the patented or copyrighted product may not have any market power. As a result, innovative computer manufacturers may be unwilling to sell copyrighted software with unprotected hardware—a package that many consumers desire—because of the fear that this bundling will be judged as a per se violation of the prohibition against tying. The disagreement among the courts only heightens the problem for corporate counsel advising their clients as to how to proceed. Moreover, it encourages forum shopping as competitors seek a court that will apply the presumption. Clearly, intellectual property owners need a uniform national rule enacted by Congress.

Very similar legislation passed the Senate during past Congresses with broad, bipartisan support. S. 438 passed the Senate once as separate legislation and twice as an amendment to House-passed legislation during the 100th Congress. S. 270, a similar bill, passed the Senate again during the 101st Congress.

During the debate over that legislation, opponents of this procompetitive measure made various erroneous claims about this legislation—let me dispel these false notions at the outset. First, this bill does not create an antitrust exemption. To the contrary, it eliminates an antitrust plaintiff's ability to rely on a demonstrably false presumption without providing proof of market power. Second, this bill does not in any way affect the remedies, including treble damages, that are available to an antitrust plaintiff when it does prove its case. Third, this bill does not change the law that tying arrangements are deemed to be per se illegal when the defendant has market power in the tying product. Rather, it simply requires the plaintiff to prove that the claimed market power does, in fact, exist before subjecting the defendant to the per se standard. Fourth, this bill does not legalize any conduct that is currently illegal.

Instead, this bill ensures that intellectual property owners are treated the same as all other companies under the antitrust laws, including those relating to tying violations. The bill does not give them any special treatment, but restores to them the same treatment that all others receive.

In short, the time has come to reverse the misdirected judicial presumption. We must remove the threat of unwarranted liability from those who seek to market new technologies more efficiently. The intellectual property and antitrust laws should be structured so as to be complementary, not conflicting. This legislation will encourage the creation, development, and commercial application of new products and processes. It can mean technological advances which create new industries, increase productivity, and improve America's ability to compete in foreign markets.

I urge my colleagues in the House to join us in cosponsoring this important legislation. If you would like to join as a cosponsor, please call Joseph Gibson of the Judiciary Committee staff at extension 5–3951.

INTRODUCTION OF THE MARINE RESOURCES REVITALIZATION ACT OF 1997

HON. JIM SAXTON

OF NEW JERSEY

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 9, 1997

Mr. SAXTON. Mr. Speaker, today I am pleased to introduce the Marine Resources Revitalization Act of 1997, a bill to reauthorize the National Sea Grant College Program.

By way of background, the National Sea Grant College Program was established by Congress in 1966 in an effort to improve our Nation's marine resource conservation efforts, to better manage those resources, and to enhance their proper utilization. Housed within the National Oceanic and Atmospheric Administration, Sea Grant is modeled after the highly successful Land Grant College Program created in 1862.

Over the past 30 years, Sea Grant has dramatically defined our capabilities to make decisions about marine, coastal, and Great Lakes resources—vast, publicly owned resources which are of vital economic, social, and cultural importance to our rapidly growing coastal populations. In doing so, Sea Grant promotes high quality, peer-reviewed scientific research. Furthermore, Sea Grant distributes scientific results regionally and locally through educational and advisory programs at over 300 universities and affiliated institutions nationwide. Twenty-nine of these are specifically designated as Sea Grant colleges or institutional programs, and they serve to coordinate Sea Grant activities on a State-by-State basis.

The Marine Resources Revitalization Act of 1997 authorizes funding for Sea Grant through fiscal year 2000; simplifies the definition of issues under Sea Grant's authority; clarifies the responsibilities of State and national programs; consolidates and clarifies the requirements for the designation of Sea Grant colleges and regional consortia; repeals the postdoctoral fellowship and international programs, both of which have never been funded; and makes several minor clerical or conforming amendments.

I would like to acknowledge three of my distinguished colleagues—DON YOUNG of Alaska, NEIL ABERCROMBIE of Hawaii, and SAM FARR of California—for their leadership in this reauthorization effort. We firmly believe that this legislation represents a realistic approach to reauthorizing the Sea Grant Program—the bill is inherently noncontroversial and has been fully endorsed by the administration. By enacting this legislation, we send a clear message supporting the protection and wise use of our marine and coastal resources.