

# IP/Antitrust Common Issues

- IP ‘off the rails’
  - ‘bad patents’
  - Copyright over facts
  - Functional trademarks
- Misuse of IP rights
  - Spurious claims
  - Anti-competitive settlements to game the regulatory system
  - Post-term licensing
- Middle men with market power
  - E.g. ASCAP, Patent Pools
    - Lower transaction costs, but decrease some forms of competition

# Ip And Antitrust

**Thorsten Käseberg**



## **Ip And Antitrust:**

**Antitrust Law and Intellectual Property Rights** Christopher R. Leslie, 2011 In *Antitrust Law and Intellectual Property Rights Cases and Materials* Christopher R. Leslie describes how patents, copyrights and trademarks confer exclusionary rights on their owners and how firms sometimes exercise this exclusionary power in ways that exceed the legitimate bounds of their intellectual property rights. Leslie explains that while substantive intellectual property law defines the scope of the exclusionary rights, antitrust law often provides the most important consequences when owners of intellectual property misuse their rights in a way that harms consumers or illegitimately excludes competitors. Antitrust law defines the limits of what intellectual property owners can do with their IP rights. In this book, Leslie explores what conduct firms can and cannot engage in while acquiring and exploiting their intellectual property rights and surveys those aspects of antitrust law that are necessary for both antitrust practitioners and intellectual property attorneys to understand. This book is ideal for an advanced antitrust course in a JD program. In addition to building on basic antitrust concepts, it fills in a gap that is often missing in basic antitrust courses yet critical for an intellectual property lawyer: the intersection of intellectual property and antitrust law. The relationship between intellectual property and antitrust is particularly valuable as an increasing number of law schools offer specializations and LL.M.s in intellectual property. This book also provides meaningful material for both undergraduate and graduate business schools programs because it explains how antitrust law limits the marshalling of intellectual property rights.

*Intellectual Property, Antitrust and Cumulative Innovation in the EU and the US* Thorsten K  seberg, 2012-06-08 For decades the debate about the tension between IP and antitrust law has revolved around the question to what extent antitrust should accept that IP laws may bar competition in order to stimulate innovation. The rise of IP rights in recent years has highlighted the problem that IP may also impede innovation if research for new technologies or the marketing of new products requires access to protected prior innovation. How this cumulative innovation is actually accounted for under IP and antitrust laws in the EU and the US and how it could alternatively be dealt with are the central questions addressed in this unique study by lawyer and economist Thorsten K  seberg. Taking an integrated view of both IP and antitrust rules, in particular on refusals to deal based on IP, the book assesses policy levers under European and US patent, copyright and trade secrecy laws such as the bar for and scope of protection as well as research exemptions, compulsory licensing regimes and misuse doctrines. It analyses what the allocation of tasks is and should be between these IP levers and antitrust rules, in particular the law on abuse of dominance (Article 102 TFEU) and monopolisation (Section 2 Sherman Act), while particular attention is paid to the essential facilities doctrine, including pricing methodologies for access to IP. Many recent decisions and judgments are put into a coherent analytical framework such as *IMS Health AstraZeneca*, *GlaxoSmithKline* in the EU, *Apple France*, *Orange Book Standard*, *Germany Trinko*, *Rambus*, *NYMEX*, *eBay*, *US Microsoft* and *IBM T3* both EU and US. Further topics covered include IP protection for software, interoperability, information and databases.

industry specific tailoring of IP antitrust innovation market analysis and the WTO law on the IP antitrust interface **IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law, 3rd Edition** Hovenkamp, Janis, Lemley, Leslie, Carrier, 2016-01-01 **Intellectual Property and Antitrust** Mariateresa Maggiolino, 2011-01-01 This book brings to bear Professor Maggiolino's considerable skills as a comparative competition law scholar on what is perhaps the single most important competition policy issue facing us today namely how to use IP policy and competition policy in tandem to further both economic competition and competition in innovation Professor Maggiolino's book covers a large range of IP practices by dominant firms where competition law can be invoked including sham litigation and product design improper infringement actions predation and refusals to license This book is well researched well written and completely up to date Every serious competition law antitrust and intellectual property scholar and practitioner should regard it as must reading

*Antitrust, Patents, and Copyright* François Lévêque, Howard A. Shelanski, 2005-01-01 In modern markets innovation is at least as great a concern as price competition The book discusses how antitrust policy and patent and copyright laws interact to create market dynamics that affect both competition and innovation Antitrust and intellectual property policies for the most part are complementary sharing common goals of promoting innovation and economic welfare In some cases however their distinct approaches one based on competition and the other on exclusion come into conflict As antitrust authorities focus increasingly on ensuring that firms do not interfere with innovation by rivals or impede the pace of technological progress in an industry they necessarily must confront difficult questions about the strength and scope of intellectual property rights When should private property rights give way to public competition objectives When is it appropriate to remedy anticompetitive outcomes through access to protected intellectual property How does antitrust enforcement or competition itself affect incentives to innovate Leading economists and lawyers address these questions from both US and EU perspectives in discussing salient antitrust cases involving intellectual property rights such as Microsoft Magill Kodak IMS and Intel The Intersection of Antitrust and Intellectual Property Gary Myers, 2007 As intellectual property has grown in importance the interaction between antitrust law and intellectual property has developed into a crucial part of the legal landscape This new text is the first casebook expressly designed for a course on the intersection of intellectual property and antitrust law or for an advanced seminar on intellectual property misuse It may also be suitable for supplemental use in a course on intellectual property licensing or litigation Written by a professor who has worked in both the antitrust and intellectual property fields for over two decades the casebook addresses both the rights of authors and inventors and the interest of society in promoting competition expanding its base of knowledge improving technology and protecting consumer welfare *IP and Antitrust* Nuno Pires de Carvalho, 2015-04-14 Consumers can make choices because of the differentiation that is preserved by intellectual property Competition law informs intellectual property generally with the intent of ensuring that it achieves this main purpose However very often certain public policies relating to competition interfere with the way

intellectual property should normally operate either with the purpose of reinforcing its differentiating role or with the objective of submitting it to other public goals such as access to essential goods and services or in recognition of situations where a given invention becomes part of a technical standard or is deemed dangerous to health or the environment This book presents eighty cases that interpret the various public policies that mould the interface of intellectual property law with competition law or antitrust Although most cases are from the United States which has developed an enormously wide wealth of jurisprudence in this area there are also cases from the European Union the United Kingdom Australia Canada South Africa Brazil South Korea India and Argentina The author presents the cases under the following general headings setting the right dosage i e avoiding too much or too little intellectual property setting the standards of differentiation refusing to license intellectual property licensing and assigning intellectual property enforcing intellectual property rights remedies intellectual property in sectors of special public interest and technical standards Revealing in extraordinary depth the tensions behind the values of the free market which intellectual property serves and the variety of responses these tensions provoke this book may be regarded as a watershed resource regarding the principles and policies that sometimes coherently sometimes not preside over the very complex relationship between intellectual property and antitrust It is sure to be greatly valued by all professionals in both fields from practitioners to policymakers as well as by academics **IP and Antitrust**

Christina Bohannon,2013 IP and Antitrust Herbert Hovenkamp,Mark D. Janis,Mark A. Lemley,Christopher R. Leslie,Michael A. Carrier,2017 Maximize intellectual property rights and minimize antitrust risks with the Third Edition of IP and Antitrust An Analysis of Antitrust Principles Applied to Intellectual Property Law While intellectual property licensing agreements are generally pro competitive antitrust issues can arise Licensing arrangements raise concerns under the antitrust laws if they are likely to adversely affect the prices quantities qualities or varieties of goods and services available Therefore companies MUST factor these antitrust considerations into the drafting and review of these licensing agreements The Third Edition of IP and Antitrust An Analysis of Antitrust Principles Applied to Intellectual Property Law is reorganized and rewritten to address the following important topics Exclusion payment settlements in the pharmaceutical industry Post expiration royalties and payments Monopolization and Refusals to License Tying Exclusive Dealing and Related Licensing Practices REMS product hopping and manipulation of the regulatory process Package Licensing Blanket Licenses and Block Booking Anticompetitive Royalty Provisions Resale Price Maintenance Confidently draft and review intellectual property licensing agreements with IP and Antitrust An Analysis of Antitrust Principles Applied to Intellectual Property Law

**Antitrust Enforcement & Intellectual Property Rights: Promoting Innovation & Competition** United States. Department of Justice,2007 **Antitrust Issues in Intellectual Property Law** Bradford P. Lyerla,2016 Focusing on specific recent developments in antitrust law this guide helps the intellectual property lawyer stay informed about the many ways in which antitrust law limits disciplines and counterbalances intellectual property law and vice versa Practical and

clearly written this is a concise and handy resource help you understand the issues and outcomes for clients who will be directly affected by the interplay of these two areas of law Topics cover these IP antitrust issues from a practitioner s viewpoint Acquisition procurement and ownership of IP Licensing Litigation Settlements under the Hatch Waxman Act Incorporation of IP into a standard set by a standard setting organization SSO      **A New Balance Between IP and Antitrust** Mark A. Lemley,2011 In this article I introduce the interaction between intellectual property IP and antitrust law I describe the ways in which these two important areas of government regulation are and are not in tension and discuss the history of the relationship between these laws I argue that IP and antitrust have cycled between over and under protection and that we are currently and mistakenly conditioned to think of private property and private ordering as efficient in and of themselves rather than as efficient only in the context of robust market competition Further I argue that antitrust can serve the goals of innovation and dynamic efficiency directly in circumstances in which competition not monopoly serves as a spur to innovation The goal of the IP and antitrust laws should be to seek a robust balance between competition and monopoly in the service of dynamic efficiency When IP laws are strong antitrust laws should also be strong and vice versa

**Intellectual Property and Antitrust Law** William C. Holmes,1983      **IP and Antitrust** Herbert Hovenkamp,Mark D. Janis,Mark A. Lemley,2001-11-19 AUTHOR NEWS Justice Department Honors Herbert Hovenkamp with Sherman Award on July 29 2008 The USDOJ Antitrust Division presented Professor Herbert Hovenkamp with the prestigious John Sherman Award for his lifetime contributions To The teaching and enforcement of antitrust law And The development of antitrust policy This annual award is given for outstanding contributions To The field of antitrust law The protection of American consumers And The preservation of economic liberty Hovenkamp s publications include some 70 articles approximately 50 essays and book reviews and a dozen books He is the senior surviving author of Antitrust Law formerly with Phillip Areeda Donald Turner which currently spans 20 volumes and with Mark Janis and Mark Lemley author of IP and Antitrust Law IP and Antitrust is a 2 volume reference that focuses on the intersection of the areas of IP and antitrust While intellectual property licensing arrangements are typically pro competitive antitrust concerns may nonetheless arise Licensing arrangements raise concerns under the antitrust laws if they are likely to adversely affect the prices quantities qualities or varieties of goods and services either currently or potentially available The Justice Department s rekindled interest in intellectual property licensing arrangements now requires that companies factor antitrust considerations into the drafting and review of intellectual property licensing arrangements Thus licensing agreements involving intellectual property must now be drafted with two considerations in mind maximizing the commercial value of intellectual property rights and minimizing antitrust risks IP and Antitrust is the first comprehensive resource that fully examines intellectual property from an antitrust perspective To help you steer clear of unexpected problems it provides a sophisticated discussion of intellectual property law not currently available in the antitrust treatises on the market today including Areeda and Hovenkamp s

Antitrust Law treatise      **Intellectual Property and the Limits of Antitrust** Katarzyna Czapracka, 2010-01-01 An excellent account of practice on both sides of the Atlantic regarding the intersection of antitrust and intellectual property rights The author provides a detailed account of the legal discussion in an economics informed manner A must read as far as I am concerned for practitioners and academicians alike Petros C Mavroidis Columbia Law School New York US University of Neuch tel Switzerland and CEPR UK This book examines the growing divergences between the EU and the US in their approach to antitrust law enforcement particularly where it relates to intellectual property IP rights The scope of US antitrust law as defined in the Supreme Court s decisions in Trinko and Credit Suisse Securities is much narrower than the scope of EU competition law US antitrust enforcers have become increasingly reluctant to apply antitrust rules to regulated markets whereas the European Commission has consistently used EU competition rules to correct the externalities resulting from government action The contrasting approaches adopted by US and EU antitrust enforcers to these issues as with the differences in addressing market dominance have had a profound impact on the scope of antitrust intervention in the IP field This book provides an in depth analysis of the relevant recent developments on both sides of the Atlantic and identifies the pitfalls of regulating IP through competition rules With a unique comparative perspective this book will be an invaluable resource for postgraduate students academics and practitioners in IP and competition law      **Intellectual Property and Antitrust Handbook** ,2007      *Innovation for the 21st Century* Michael A. Carrier, 2009-03-26 In recent years innovation has been threatened by the United States legal system Much of the blame can be attributed to the antitrust and intellectual property laws Innovation for the 21st Century seeks to reverse this trend offering ten revolutionary proposals from pharmaceuticals to peer to peer software to help foster innovation Michael A Carrier illustrates the benefits of improving the patent system and incorporating innovation into copyright and antitrust law He also dips into a rich business literature to import ideas on disruptive innovation and user innovation And he replaces the 20th century view that the IP and antitrust laws are in conflict with a new 21st century framework that treats them as collaborators Innovation for the 21st Century Harnessing the Power of Intellectual Property and Antitrust Law provides a comprehensive framework for the patent copyright and antitrust laws to promote innovation      Research Handbook on Intellectual Property and Competition Law Josef Drexler, 2010-01-01 The volume offers an outstanding collection of studies on the interaction of IP and competition policy and is highly recommended for academics graduate students and practitioners with an interest in more theoretical studies Ioannis Lianos World Competition Each chapter in the Research Handbook on Intellectual Property and Competition Law is written so lucidly that it will be of great interest to law professors and post graduate students of intellectual property and competition law as well as those interested in innovation and competition theory and legal practices in intellectual property and competition law Madhu Sahni Journal of Intellectual Property Rights This is a book that delivers on its promise With a strong cast of contributors from a variety of countries economies and disciplines it makes the reader wonder how any

commercially attractive IP ever gets exploited at all IPKAT Here it comes the book that I have been waiting for This will surely be an inspiring source of knowledge in my Masters Programme in European Intellectual Property Law at Stockholm University While promoting intellectual property protection as an important means for innovations and cultural developments a critical analysis and a flexible approach to the needs for free creative space and effective competition is crucial As this book so well illustrates this delicate balance is no either or Marianne Levin Stockholm University Sweden This comprehensive Handbook brings together contributions from American Canadian European and Japanese writers to better explore the interface between competition and intellectual property law Issues range from the fundamental to the specific each considered from the angle of cartels dominant positions and mergers Topics covered include among others technology licensing the doctrine of exhaustion network industries innovation patents and copyright Appropriate space is devoted to the latest developments in European and American antitrust law such as the more economic approach and the question of anti competitive abuses of intellectual property rights Each original chapter reflects extensive comments by all other contributors an approach which ensures a diversity of perspectives within a systematic framework These cutting edge articles will be of great interest to law professors and postgraduate students of intellectual property and competition law as well as those interested in innovation and competition theory and legal practices in intellectual property and competition law

**IP and Antitrust** Herbert Hovenkamp, Mark D. Janis, Mark A. Lemley, Christopher R. Leslie, Markets in IP and Antitrust Herbert Hovenkamp, 2013 The purpose of market definition in antitrust law is to identify a grouping of sales such that a single firm who controlled them could maintain prices for a significant time at above the competitive level The conceptions and procedures that go into market definition in antitrust can be quite different from those that go into market definition in IP law When the issue of market definition appears in IP cases it is mainly as a query about the range over which rivalry occurs This rivalry may or may not have much to do with a firm's ability to charge a high price Antitrust is more sensitive to market structure than any discipline and entirely on the basis of statutes that say little about structure By contrast intellectual property law says almost nothing about structure and largely proceeds without these inquiries We know a great deal about the relationship between market structure and innovation about the types of industries in which patents work better and are more valuable those in which trade secrets are preferred or where first mover advantages alone provide sufficient incentives We can also identify markets in which copying is easiest thus justifying strong protection and where it is much more difficult Knowing all of this IP law might have developed much more market specific rules than it has and if those rules had been properly formulated and applied we would be in a better place than we are today What we in fact have however are IP laws that proceed as if market structure doesn't matter To be sure there is less consensus and poorer quality information about the relationship between market structure and innovation than about the relationship between market structure and traditional power over price under constant technology But that hardly justifies a set of protections that are invariant to

market structure in those areas where it counts most In the Supreme Court s Prometheus decision Justice Breyer s opinion for a unanimous Court may have opened a window for differentiating the application of patent law with the market in question

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