

Foreword

For much of the 20th century, the systems of U.S. antitrust law and patent law resided in largely separate domains. Academics, public officials, and practitioners formed two distinct communities, each with its own professional culture and training (many patent lawyers are engineers or scientists, and many antitrust lawyers regard mathematics and science with bewilderment). Individuals with deep knowledge of both the antitrust and patent regimes were rare. The absence of a widely shared interdisciplinary perspective obscured conceptual connections between the two disciplines and impeded recognition of complementarities between the antitrust and patent systems.

At times, outright antagonism reinforced the separation. From the 1940s through the 1970s, many expressions of U.S. antitrust policy regarded patents with suspicion. Antitrust lawyers developed the common habit of speaking of “the patent monopoly,” as though the issuance of a patent automatically conferred substantial market power upon its owner. Antitrust courts and public enforcement agencies skeptically examined restrictions embodied in licensing agreements. Monopolization cases served as tools to resist what antitrust agencies regarded as overreaching by the patent system.

This gloomy history has taken a decided turn for the better. The past twenty years have witnessed an encouraging realignment of the relationship between U.S. antitrust law and patent law. Public enforcement policy has abandoned the former hostility to patents and patent licensing. Courts and enforcement agencies increasingly emphasize the complementary roles that competition and patent rights can play in promoting innovation that improves economic performance. The work of academics and professional societies reflects the need for a truly interdisciplinary approach to understanding the origins and content of antitrust and patent institutions and to facilitate the development of coherent doctrine and policy between the two fields.

Daryl Lim exemplifies the new generation of scholars whose work is dismantling barriers between the antitrust and patent regimes and spurring a transformation in the relationship between the two bodies of law and policy. In this volume, he not only provides the best study to date of the

patent misuse doctrine, but he also sets a valuable foundation for integrating the study of antitrust law and patent law, generally.

Three major contributions stand out. First, *Patent Misuse and Antitrust Law* illustrates as well as any other work how to bridge the study of antitrust law and patent law, for Professor Lim displays mastery of both the technical details and broader policy considerations of the patent misuse doctrine and traces its origins in patent and antitrust law. In doing so, he reveals how concepts of antitrust policy informed judicial development of the patent misuse doctrine. Only a scholar proficient in both fields could illuminate important interactions between the two fields.

A second and related feature is Professor Lim's excellent use of historical narratives to show how patent misuse concepts have developed over time. He places doctrinal developments in their historical context and relates them to changes in law and policy. By this approach, he highlights the historical and intellectual forces that have shaped misuse principles over time. This provides a useful basis for anticipating how the law might unfold in the future, and what distinctive contributions misuse doctrine might make to resolve tensions that arise in determining which mix of policies are best suited to stimulate innovation.

A third impressive dimension of *Patent Misuse and Antitrust Law* is its powerful empirical orientation. Professor Lim is faithful to the cause of theory, and he skillfully sets out the conceptual framework for misuse doctrine. What he does next makes this volume special. Professor Lim combines a comprehensive examination of misuse cases with extensive interviews to demonstrate how theory meets practice. Painstaking empirical study, not mere theory-based intuition, supports Professor Lim's inquiry. He provides an unprecedented view of the jurisprudence and the forces that have determined outcomes in individual cases. The interviews supply rich interpretations of the cases and broader trends, as well as valuable insights about possible future directions for law and policy.

In these respects and others, *Patent Misuse and Antitrust Law* broadens and extends the emerging path of a refreshing new scholarship that links antitrust and patent law. Professor Lim supplies a model for future work, not only in what he has done but in how he has done it. In the years to come, as we benefit from the deeper intellectual integration of antitrust and patent law and policy, we will look back with gratitude at *Patent Misuse and Antitrust Law* for showing us the way.

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