

Preface and acknowledgements

This study is testament to the marvel of technology and to the profound impact it has had on legal research. Twenty years ago, a study examining every reported case in a field of the law could scarcely have been imaginable. It would have taken many hundreds of hours of laborious searching, photocopying and indexing to even consolidate a body of cases to commence the research. To hunt down the literature perused in this study would likely have taken as long. Today, many processes, from searching to cross-referencing are nearly instantaneous. Technology has facilitated the statistical analysis of legal data and narrowed the socio-legal research gap. While there will always be an important place for doctrine and policy, empirical work like this reflects the kind of practical scholarship our increasingly complex and sophisticated society demands from those who research and teach the law.

Technology has also connected the world in a way previously unimaginable. It has reduced the opportunity cost of travel and telecommunications, making many of the interviews conducted for this study possible today in a way that simply could not otherwise have been done between other professional commitments. The interviews were at once the most demanding and rewarding aspect of this study. Interviews are a two-way process, and I have learnt that interviewees can be expected to contribute much more to the content of the discussion than merely asking the “right” questions. But done well, interviews provide a rich and stirring interaction that breathes life into dry numbers and doctrine. It was a great privilege to be able to speak with a most remarkable group of interviewees, who gave most generously of both their time and thoughts. Because the interviews were conducted on the condition of confidentiality, references to their contributions do not appear. The purpose of the interviews was to capture the perceptions of stakeholders of patent misuse in practice, both in relation to, as well as apart from my findings. The interviews are not meant to be a representative survey of all constituents.

This book is an invitation to join my journey to understand the contours of patent misuse and how it relates to antitrust law. Readers will quickly see that this book features more verbatim quotes than they may be used to seeing in a legal publication such as this. More like a photographer and

less like a painter, I have tried to capture snapshots of how misuse has featured in real life into a scrapbook rather than present a projection of my own reality. The verbatim text as they left the minds of judges who wrote the opinions and the interviewees and commentators discussing them best represent the state of the world as they see it with as little distortion from my paraphrasing as possible. Those with even a passing knowledge of patent law or antitrust law will hear the echoes of many great minds who have given thought to issues intricately woven around each other to form and inform the doctrine of misuse within these pages.

The value of this enterprise revealed itself through the many interview sessions and subsequent presentation of my findings to experts in the field who were informed, engaged and entertained by the findings and how perceptions in practice deviated from case law and/or conventional wisdom. Indeed, the best moments came when one of them would remark—“Oh that’s interesting, I didn’t know this!” The study began in 2008 and was completed in 2012. The interviews were based on preliminary results whose trends remained the same over time. My hope as you read this book is that it will do for you what it has done for me and those I have shared snippets of it with—expanding your mind to look beyond conventional wisdom. Readers will also note the limited scope of this book. When it comes to an equitable doctrine like misuse, any book will reach its limits long before it exhausts its topic. This book is intended to be comprehensive but not exhaustive, and to be both exploratory and practical. With that said – welcome.

The pleasure of thanking those who have helped the writing process is a sweet one. I am grateful to Professor Hugh C. Hansen, Professor of Law, Director of the Fordham IP Law Institute and “IP provocateur”, for his friendship, guidance and the many opportunities he made possible. He also generously shared his thoughts on improving the study. This book blossomed while I served as the Institute’s inaugural Microsoft Teaching and Research Fellow. Teaching courses in patent law, copyright law and EU IP law refined the observations made in the book. I am also grateful to my supervisors at Stanford Law School: Professor Mark Lemley, Professor Deborah Hensler and Dr Moria Paz who guided the writing of my thesis on which this book is based. While at Stanford, I also benefited from the guidance of Visiting Professor Barton Beebe, whose seminal work on fair use in copyright law provided the inspiration for the case content analysis model used in this book, as well as Professor David Victor, whose thoughts helped refine my empirical analysis. The journey started at Stanford but moved through a number of places as I interviewed people and wrote and presented the work along the way. It has finally settled at the John Marshall Law School, my new academic home. Here,

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Economic theory teaches that the price one pays should reflect its market worth. It can only be hoped that the net present value of this work represents a fair return on its backers' investments. In this regard, I have been blessed to have received the Franklin Family Fellowship for my studies at Stanford Law School and the Ewing Marion Kauffman Foundation funding for my field research. The Law School also kindly supported me in attending the Fordham IP Conference at Cambridge University, UK, where the findings of this study was presented to the international IP community. I am also grateful to the Emily C. and John E. Hansen IP Institute and to the John Marshall Law School for their financial and administrative support. Finally, a book is always written at the expense of those closest to the author. They know who they are, and I thank them for their resigned but gracious tolerance.

The law is described as it appeared to me on December 31, 2012.