Introduction

Application of antitrust rules to intellectual property (IP) has always been a perplexing subject. It has recently gained importance in the context of new technologies and the associated market developments. Over the past few years, the US and EU antitrust enforcers have taken steps to reevaluate their approach to IP rights and to tackle the related issues concerning application of the antitrust rules in high-tech sectors of the economy. In the US the Federal Trade Commission (FTC) and the Department of Justice (DOJ) held months-long hearings focusing on the intersection of antitrust and IP laws in 2002 and published two reports on the topic. Both IP and high-technology industries were among the issues addressed in the 2007 report published by the Antitrust Modernization Commission. The agencies have also brought a number of high-profile cases involving information technology (IT) industries and IP rights, including Microsoft, Intel and Rambus. Moreover, the Supreme Court addressed issues of vital importance to the antitrust and intellectual property intersection in the Illinois Tool and Trinko cases.

Equally fundamental developments have taken place on the other side of the Atlantic. In the spring of 2004, the European Commission adopted a new Technology Transfer Block Exemption Regulation and ruled that Microsoft’s refusal to provide interoperability information to its rivals constituted an abuse of a dominant position. In 2005, the Commission adopted a ground-breaking decision in the AstraZeneca case – the first case in which EU competition law has been applied to an alleged misuse of the patent system and the procedures for marketing pharmaceuticals. In the same year, the Commission published

5 Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398 (2004). Although the case does not involve IP rights, it is of vital importance for cases involving a refusal to license IP rights.
the Article 82 Discussion Paper, which outlined the Commission’s views on the assessment of unilateral conduct involving intellectual property rights under competition laws. In 2007, the Court of First Instance (CFI) delivered the long-awaited judgment in the Microsoft case, upholding the Commission’s position on Microsoft’s obligations to share interoperability information with its competitors, and the Commission also issued a statement of objections in a first case involving an alleged patent ambush. The pharmaceutical sector inquiry launched by the Commission in 2008 targeted patent settlements between generic and brand name pharmaceutical companies. Many of these recent cases involved a direct conflict between IP rights and antitrust laws, where the ordered remedies deprived the right holders of exclusivity either by imposing licensing obligations or by limiting their ability to enforce their rights.

The recent developments highlight a growing divergence between the EU and US antitrust enforcers over the approach to the application of antitrust rules to IP rights. This is so even though there is a broad analytical consensus as to the economic principles governing the application of antitrust rules to IP rights. It is equally accepted on both sides of the Atlantic that IP rights do not create monopolies, that IP and antitrust rules have the common objective of stimulating innovation and economic growth, and that IP rights need to be treated with some level of deference so that antitrust enforcement does not undermine the objectives of IP policy. It also appears that in both jurisdictions the antitrust authorities focus on dynamic competition and incentives to innovate.

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10 See DG Competition Staff Working Paper, Pharmaceutical Sector Inquiry Preliminary Report, 28 Nov. 2008, at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/exec_summary_en.pdf. The Report does not identify wrongdoing of individual companies or provide guidance on the compatibility of certain behavior with EU competition law, but concludes that brand name companies engaged in practices that delayed market entry of generic medicines and possibility limited innovation in the pharmaceutical sector. The Commission announced public consultations to consider steps to address these issues.
This book strives to offer a better understanding of the roots of the differences in the application of antitrust principles to IP rights. It focuses on unilateral conduct and on cases where antitrust remedies deprive the right owner of exclusivity, the core of an IP right. This area merits special attention for two reasons. First, it is the source of the greatest differences in the approaches of EU and US antitrust enforcers to IP rights. Second, it is the area where the application of antitrust rules to IP rights can have the direst consequences for the right holders.

Whereas the scope of antitrust laws has been shrinking in the United States, EU competition law has been consistently used to regulate a number of issues that are considered to be outside the scope of the Sherman Act. In the United States, unilateral conduct involving exercise of a valid IP right can hardly give rise to liability under antitrust rules and antitrust authorities have been reluctant to intervene in what is perceived to be the sphere of IP policy. In contrast, the EU antitrust enforcers have been much more active than their US counterparts in addressing the consequences of what they perceive as imperfect IP laws, thus reshaping the substantive standards for IP protection. In a few cases involving difficult questions relating to the scope of IP rights, the Commission and the EU courts have ruled that, in limited circumstances, a dominant company may violate Article 82 by refusing to license a valid IP right to its competitors. Allocation of the burden of proof is also significant. For example, in the recent Microsoft ruling, the CFI required that the dominant company submit evidence showing that compulsory licensing would have ‘a significant negative impact on its incentives to innovate’ in order to justify its refusal to share its IP with competitors. At the same time, it appears that the Court was satisfied that a compulsory license would stimulate follow-on innovation on the basis of less concrete evidence than was required in previous compulsory licensing cases.

One reason for these divergences is that EU and US courts assess market power and its abuse quite differently. Monopolization under §2 of the Sherman Act and an abuse of a dominant position under Article 82 of the EC Treaty comprise two elements: possession of market power and anticompetitive conduct. Yet, there are major differences between the EU and US rules relating, for example, to the definition of dominance, the assessment of what constitutes anticompetitive conduct, and the requirement of a causal link between maintenance of monopoly power and anticompetitive conduct. Whereas §2 of the Sherman Act is designed to protect competition by prohibiting the acquisition or maintenance of ‘monopoly power’, Article 82 is used to regulate the actions of companies in ‘dominant positions’. One of the principles repeated in EU

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11 Microsoft judgment, ¶697.
case law is that dominant companies have a ‘special responsibility’ not to impair competition in the market. The EU antitrust enforcers have been receptive to the idea that monopolists may be required to provide certain services or share the essential inputs which they control. They advocate a relatively wide scope for antitrust intervention in cases involving unilateral refusals to deal, including refusals to license IP rights and to provide interoperability information. By contrast, the US Supreme Court questioned the merit of ‘enforced sharing’ in the *Trinko* case and set a very narrow scope for antitrust scrutiny of unilateral refusals to deal.¹² In the United States, there is a more general reluctance towards regulating the future conduct of companies with market power as it is perceived to potentially have a chilling effect on beneficial, pro-competitive activities.

The transatlantic differences relating to the assessment of market dominance are only a partial explanation for the clashes over IP rights. An equally important issue is the application of antitrust laws to market distortions resulting from a government action. In unregulated markets, competition enforcement may remedy specific market failures. In regulated markets, competition law may also be used to address externalities created by regulatory activity. Patents, copyrights, trademarks, trade secrets and other forms of IP give their owners some exclusivity over the particular use and expression of a piece of information. The relation between antitrust law and regulation that may disrupt competitive processes is vital for the antitrust analysis of anticompetitive concerns resulting from IP rights. The differences in the approaches taken by the EU and US antitrust enforcers to these issues are even greater than those relating to the scrutiny of companies exercising their market power. The Sherman Act is generally inapplicable to actions by a state operating in its sovereign capacity or to private conduct approved and supervised by a state as a matter of state policy. In contrast, EU competition law has been used to curb anticompetitive policies at the national level and to erode the position of national monopolies. The roles of competition law and industrial policy have never been clearly delineated and the European Commission has been using competition law to promote industrial policy goals. Laws of the Member States may be and have been challenged as anticompetitive. This is also the case with IP laws, which are still largely regulated at the national level. Some commentators have interpreted the EU compulsory licensing decisions as a means to deal with what was considered an ‘aberrant’ national IP right.

Just as with state action, the use of government process by private parties may give rise to competitive concerns. Again, there are significant differences as to how antitrust enforcers approach such conduct in the two jurisdictions.

¹² *Trinko*, 540 U.S. at 408.
In the United States the Noerr-Pennington doctrine provides antitrust immunity to those who use genuine efforts to influence public officials. Persons who seek action from any branch of the state or federal government by using administrative procedures or bringing a court action are immune from antitrust scrutiny, unless their action is a mere ‘sham’ to cover an attempt to interfere directly with a competitor’s business relationships. While the status of antitrust immunity for government petitioning is uncertain in the EU, the available case law suggests that EU antitrust enforcers are more likely to challenge such conduct than their US counterparts. This has important consequences for the antitrust scrutiny of acquisition and enforcement of IP rights.

As mentioned above, the most common §2 challenges in the United States against IP owners involve allegations that their rights are invalid or improperly enforced. But the scope of antitrust scrutiny in such cases is rather limited, because these claims are very narrowly crafted and require a high burden of proof. To prevail on a *Walker Process* claim, for example, the antitrust plaintiff must show an intentional fraud on the Patent Office, causation, and other elements of a §2 violation. Similarly, an action to enforce an invalid IP right can be challenged under §2 only if it is objectively baseless, which requires showing that no reasonable litigant could realistically expect success on the merits.

In *AstraZeneca*, the European Commission suggests a lower standard of antitrust liability in cases involving acquisition or enforcement of IP rights. In this case, the Commission alleged that AstraZeneca abused its dominant position by giving misleading information to several national patent offices in order to extend patent protection for one of its drugs. The Commission advanced the view that it is sufficient that the dominant company knowingly provides ‘misleading’ information; it did not allege that AstraZeneca’s conduct was a ‘sham’ or amounted to fraud. Notably, the patent cases initiated by AstraZeneca’s conduct were referred to the ECJ for clarification of the applicable EU regulations. The lack of clarity in applicable laws was no excuse. The Commission’s position seems to be that a dominant company must refrain from exploiting uncertainties in applicable laws to preserve its exclusive rights. Moreover, the element of causation is not required to establish an abuse of Article 82, meaning that an act of petitioning may be abusive regardless of whether it would result in issuing an invalid patent. All in all, the AstraZeneca case suggests that acquisition and enforcement of IP rights will be subjected to greater antitrust scrutiny in the EU as compared with the US regime.

Application of antitrust rules to address imperfections in IP laws may offer significant advantages, especially given that IP policy makers often do not take due account of competition values. Still, it also has dangerous implications. Antitrust authorities are not always best positioned to create substantive standards for IP protection. Unduly restrictive antitrust rules may undermine...
the coherence of the IP system. In the pursuit of equilibrium between IP and antitrust law, European enforcers have embraced theories that may have led to a desirable outcome in a particular case but are unsuitable or too vague to serve as a general rule.

An example of such overeager antitrust enforcement is the application of antitrust laws to trade secrets. Both in the US and in the EU, ‘federal’ antitrust rules trump inconsistent trade secret laws adopted at the state level. Yet while the US antitrust authorities treat trade secrets with the same level of deference as IP rights, the European Commission does not. In the course of enforcing competition rules, the Commission adopted a definition of protectable trade secrets, asserted that they are not a form of property, and concluded that they do not merit the same level of protection as IP rights. In doing so, the Commission has been predominantly concerned with the need to ensure free competition and less with the companies’ need to protect their valuable know-how. It has also ignored the basic principles of trade secret laws, thus undermining national trade secret protection measures.

It is crucial that the antitrust enforcers take due account of the applicable IP laws and clearly state the limiting principles, so that there is no doubt which conduct may be considered an antitrust violation. In this context, the recent decision of the Court of First Instance in the Microsoft case is particularly disappointing. The decision failed to clarify some of the important questions of law raised by the Microsoft case and further blurs the picture when it comes to the assessment of unilateral refusals to license under Article 82.

This book is organized as follows. The first chapter addresses the differences between the core EU and US antitrust principles crucial for the application of antitrust laws to IP rights, including the major differences between the monopolization offense and the abuse of dominance, the state action doctrine and the immunity for government petitioning, all of which are crucial to the understanding of the limits of antitrust intervention in the EU and in the US. The following chapters discuss examples of conduct involving IP rights that may amount to an antitrust violation in the two jurisdictions. The focus is on cases where antitrust enforcement affects the core of an IP right: refusals to license and anticompetitive acquisition or enforcement of IP rights. The last chapter describes cases where the antitrust laws were applied to trade secrets, showing how overeager antitrust intervention in the EU undermined national measures designed to protect trade secrets. Trade secrets merit a separate chapter also for another reason: the available case law suggests that the EU antitrust enforcers, unlike their US counterparts, apply different rules to trade secrets from those applied to other forms of IP.