

ANTITRUST & INTELLECTUAL PROPERTY

Boalt School of Law, Fall 2012
Syllabus, Course 276.2 sec. 1
Mondays: 8:00 AM to 9:50 AM

Lecturer: Samuel R. Miller

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This course will focus on the intersection of Antitrust and Intellectual Property law. We will focus on recent and pending antitrust cases in high-technology fields, including computers, software and pharmaceuticals. In addition to the required reading in the syllabus, I will make available optional supplemental materials, including pleadings and briefs in pending cases, which will be of interest to students who intend to practice in this area, or who want to “dig deeper” on the subject matters covered in the syllabus.

Regular attendance is expected. Your course grade will be based 10% on your class participation, and 90% based upon your written submission at the end of the semester. I will expect your written submission to be in the form of a legal brief of 15-20 pages in a case of your choosing, based upon the course materials. I will give suggestions and advice to students regarding the selection of the legal brief to submit. The deadline for submission of the brief will be December 4, 2012.

I will make myself available at convenient times to meet with any student regarding the course materials or antitrust practice in general. We can set up a time to meet after class (for those students who do not have a class immediately following this class) or at another mutually convenient time.

Please call my direct number at 415-772-7447 or e-mail me at srmiller@sidley.com to set up a time to meet. Set forth below are the topics and required reading materials for each session of the class. In addition, attached as an appendix is a list of optional supplemental reading materials which may be of interest. All of these materials are posted on bSpace.

I may add or delete topics to account for the pace of our discussions, new developments in the law, etc.

DATE	SUBJECT MATTER AND READINGS
08/27/12 Session 1	Introduction and Overview of U.S. Antitrust Law and Recent Antitrust Complaints and Pleadings Reading: 1. “Overview of U.S. Antitrust Law” slides 2. Complaint in <i>U.S. v. Apple, Inc.</i>, Case 1:12-cv-02826 (S.D.N.Y. April 11, 2012) (eBook case) (www.justice.gov/atr/cases/f282100/282135.pdf) Issues covered: Primer on Antitrust Law; Sherman Act Section 1 and Section 2; Section 7 of the Clayton Act.
09/03/12	LABOR DAY – NO CLASS
09/10/12 Session 2	Discussion of Whether Intellectual Property Laws and Antitrust Laws are Complementary or are in Conflict Reading: 1. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property (1995) (DOJ website: http://www.usdoj.gov/atr/public/guidelines/0558.htm) 2. DOJ/FTC Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) (“IP 2 Report”) (http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf Read introduction, pages 1 – 13) Issues covered: goals of IP Law; Goals of Antitrust Law; Changing view of Market Power of IP
09/17/12 Session 3	The Microsoft Antitrust Cases – Part I Reading: 1. <i>U.S. v. Microsoft Corp.</i>, 253 F.3d 34 (D.C. Cir. 2001) (Pages 44-97) Issues covered: Market definition, what is monopoly power, what is “Exclusionary Conduct”; Why was Microsoft held liable.

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09/24/12 Session 4	The Microsoft Antitrust Cases – Part II – Remedies in Section 2 Cases Reading: 1. <i>Commonwealth of Massachusetts v. Microsoft Corporation</i>, 373 F.3d 1199 (D.C. Cir. 2004) (Pages 1204-1234) 2. Article, “10 Years After U.S. v. Microsoft” 3. Assistant Attorney General Thomas O. Barnett, “Section 2 Remedies: What to Do After Catching a Tiger by the Tail,” June 4, 2008 (http://www.usdoj.gov/atr/public/speeches/233884.htm) Issues covered: Remedies for monopolization. What should the government do about Google?
10/01/12 Session 5	Litigation of Intellectual Property Rights and “Sham” Litigation Reading: 1. <i>Professional Real Estate Investors v. Columbia Pictures</i>, 508 U.S. 49 (1993) (Pges 52-66) 2. <i>Nobelpharma v. Implant Innovations</i>, 141 F.3d 1059 (Fed. Cir. 1998) (Pages 1061-1063, 1066-1073) 3. <i>Kaiser Foundation Health Plan, Inc. v. Abbott Labs</i>, 552 F.3d 1033 (9th Cir. 2009) (Pages 1036-1042, 1044-1053). Issues covered: Consequences of enforcing a fraudulently-obtained patent; Pursuing IP Litigation known to be frivolous; Patent misuse v. Antitrust Violation.
10/08/12 Session 6	The “Essential Facilities” Doctrine and Refusals to Deal Reading: 1. <i>Verizon Communications, Inc. v. Trinko, LLP</i>, 540 U.S. 398 (2004) 2. <i>In re: ISO Antitrust Litigation</i>, 203 F.3d 1322 (Fed. Cir. 2000) (Pages 1324-1350) 3. <i>Image Technical Services v. Kodak</i>, 125 F.3d 1195 (9th Cir. 1997) (Pages 1200-1220) Issues covered: Does an IP owner have a duty to license? Did the “Essential

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	Facilities” doctrine survive <i>Trinko</i> ? Are the rules different in the EU?
10/15/12 Session 7	Antitrust Issues involving intellectual property standards Reading: 1. <i>Broadcom Corp. v. Qualcomm, Inc.</i>, 501 F.3d 297 (3d Cir. Sept. 4, 2007) (skip Part III D.) 2. <i>Rambus, Incorporated v. Federal Trade Commission</i>, 522 F.3d 456 (D.C. Cir. 2008) 3. <i>Research in Motion Ltd., v. Motorola, Inc.</i> 644 F.Supp. 2d 788 (N.D. Tex. 2008) (discussion of antitrust claim) 4. <i>Apple v. Motorola Mobility, Inc.</i>, 2011 U.S. Dist. LEXIS 72745 (W.D. Wis. June 7, 2011) (discussion of antitrust claim) Issues covered: Obligation of IP holder to disclose IP to a Standard-Setting Organization (“SSO”); Consequences of deception or failure to disclose IP to an SSO; legal consequences of a FRAND commitment.
10/22/12 Session 8	Tying, Bundling, Package Licensing and Other IP Licensing Issues– Part I Reading: 1. Article entitled “Antitrust Pitfalls in Intellectual Property Licensing” by Samuel R. Miller 2. <i>Leegin Creative Leather Products v. PSKS, Inc.</i>, 551 U.S. 877, 127 S. Ct. 2705, 2007 U. S. LEXIS 8668 (2007) 3. <i>Independent Ink, Inc. v. Illinois Tool Works, Inc.</i>, 547 U.S. 28, 126 S. Ct. 1281, 2006 U.S. LEXIS 2024 (U.S. 2006) 4. <i>Medtronic Minimed Inc., v. Smiths Medical MD Inc.</i>, 2005 U.S. Dist LEXIS 6336, 371 F.Supp 3d 578 (D. Del 2005) 5. <i>LePage’s Incorporated v. 3M</i> (Minnesota Mining and Manufacturing Company), 324 F.3d 141 (3d Cir. 2003) (Pages 144-164) Issues covered: IP Licensing provisions raising Antitrust Issues; presumption of market power from IP; antitrust liability for bundled rebates?; technological tying.

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10/29/12 Session 9	Tying, Bundling, and Package Licensing – Part II Reading: 6. <i>Datel Holdings, Ltd., v. Microsoft Corp.</i>, 2010 U.S. Dist. LEXIS 40021 (N.D. Cal. April 23, 2010) 7. <i>Cascade Health Solutions v. Peace Health</i>, 515 F.3d. 883 (9th Cir. 2008) 8. <i>U.S. Philips Corporation v. International Trade Commission</i>, 424 F.3d 1179 (Fed. Cir. 2005) Issues covered: Bundled discounts – when are they exclusionary?; package licensing of patents; when is tying actionable?
11/05/12 Session 10	Cross-Licensing, Patent Pooling and Patent Misuse Reading: 1. <i>Princo Corp. v. International Trade Commission</i>, 616 F.3d 1318 (Fed. Cir. 2010) 2. Business Review Letter involving DVD Licensing (letter from Joel I. Klein to Garrard R. Beeney, dated December 16, 1998 (DVD Business Review Letter no. 1) 3. MPEG-2 Business Review Letter (letter from Joel I. Klein to Garrard R. Beeney), dated June 26, 1997 4. Summit Technologies/VISX FTC Consent Decree Docket No. 9286 FTC website: www.ftc.gov/os/caselist/d9286.htm Issues covered: Package licensing of IP and patent misuse; antitrust issues in the creation of patent pools.
11/12/12 Session 11	Merger Enforcement in Technology Markets Reading: 1. <i>U.S. v. Oracle Corp.</i>, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) 2. Materials relating to Google/ITA, Google/AdMob and Google/DoubleClick transactions (to be provided)

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	3. <i>U.S. v. H&R Block, Inc.</i>, 2011 U.S. Dist. LEXIS 130219 (D.D.C. Nov. 11, 2011) Issues covered: Market definition in merger enforcement; when are mergers anticompetitive; remedies in merger cases.
11/19/12 Session 12	Antitrust Issues in Settling Intellectual Property Litigation; the Pharmaceutical Cases Reading: 1. <i>King Drug Co. of Florence, Inc. v. Cephalon, Inc.</i>, 702 F. Supp. 2d 514 (E.D. Pa. 2010). 2. <i>FTC v. Watson Pharmaceuticals</i>, Case 10-12729 (11th Cir. April 25, 2012) 3. <i>In re: Cardizem CD Antitrust Litigation</i> 332 F.3d 896 (6th Cir. 2003) Issues covered: Are reverse payment settlements between branded pharmaceutical companies and generics anti-competitive?
11/26/12 Session 13	Different Approaches to Antitrust Enforcement in U.S. and Other Countries Reading: 1. Materials on EU to be provided 2. Article on Antitrust enforcement in China – to be provided.