Silicon Valley Antitrust v.2

Hanno Kaiser U.C. Berkeley, Boalt Hall School of Law, Spring 2013

Friday 8 - 9:50 am, Room 107 (subject to change)

Textbook:

Christopher L. Sagers, Examples & Explanations: Antitrust (2011)

Class 1: Introduction; antitrust and high-technology (January 11, 2013)

a. Topics for discussion

- A brief history of antitrust and the regulation of high tech
- Static and dynamic antitrust analysis
- Technological change and the limits of legal regulation

b. Required reading

- Thomas Rosch, Intel, Apple, Google, Microsoft, and Facebook: Observations on Antitrust and the High-Tech Sector (November 18, 2010)
- Hanno Kaiser, Excerpt from Antitrust Law And Policy: An Introduction (2012)

c. Optional reading

Sager, Antitrust, Chapter 1

Class 2: The Smartphone Wars, Part 1: Overview (January 18, 2013)

a. Topics for discussion

- The origins of the smartphone wars: collision between the computer and the telecommunications industries
- Different regulatory histories: computers v. telecommunications
- Delayed impact: The role of patents and patent portfolios
- Standard setting: the special power of standard-essential patents

b. Required reading

- Broadcom v. Qualcomm, 501 F.3d 297 (3rd Cir. 2007)
- Michael A. Carrier, A Roadmap to the Smartphone Patent Wars and FRAND Licensing, CPI Antitrust Chronicle, Vol. 2 (April 2012)

c. Optional reading

- Florian Muller, FOSS Patents
- Renata Hesse, Six Small Proposals for SSOs Before Lunch (October 10, 2012)
- EC press release, Commission sends Statement of Objections to Samsung on potential misuse of mobile phone standard-essential patents (December 21, 2012)

Class 3: The Smartphone Wars, Part 2: FRAND (January 25, 2013)

a. Topics for discussion

- FRAND breach: Theories of liability
- What about the Noerr-Pennington defense?
- International litigation strategies

b. Required reading

- FTC, In the matter of N-Data (2008)
- Apple, Inc. v. Motorola Mobility, Inc., 11-CV-178-BBC, 2012 WL 3289835 (W.D. Wis. Aug. 10, 2012)
- Microsoft Corp. v. Motorola, Inc., C10–1823JLR, 2012 WL 5993202 (W.D. Wash. Nov. 30, 2012)

c. Optional reading

- Sager, Antitrust, Chapter 21.4 (*Noerr-Pennington*)
- Sean Royall, Adam Di Vincenzo, The FTC's N-Data Consent Order: A Missed Opportunity, Antitrust, Vol.22 No.3 (Summer 2008)

Class 4: The Smartphone Wars, Part 3: The struggle for a remedy (February 1, 2013)

a. Topics for discussion

- The significance of remedies for the antitrust enterprise
- Is a "no injunctions" rule appropriate?
- The special role of the International Trade Commission ("ITC")
- Of "willing licensees" and "Orange Book" proceedings

b. Required reading

- Apple, Remarks for ITU Patent Roundtable (October 10, 2012)
- Google, Letter to IEEE (February 8, 2012)
- FTC, Comment before the ITC (June 6, 2012)
- FTC, In the Matter of Robert Bosch GmbH, Analysis of Agreement Containing Consent Orders To Aid Public Comment (November 26, 2012)
- Welford Hill, Reasons to Reject a 'No Injunctions' Rule for SEPs and FRAND-Obligated Patents, Competition Policy International (April 30, 2012)

c. Optional reading

- Contributions to ITU Patent Roundtable (October 10, 2012)
- Apple Inc. v. Motorola, No. 1:11-cv-08540, United States District Court, N.D. Illinois, Eastern Division (June 22, 2012)

Further down the road ...

Trolls and Anti-Trolls

- Under what circumstances is the aggregation and assertion of patents to extract hold-up value illegal?
- A new breed of non-practicing entities: Anti-Trolls
- Cascades v. RPX et al. (2012)

The Microsoft Universe

- · In-depth analysis of the foundational case for platform markets
- U.S. and EC

Antitrust remedies in high-technology markets

- Browser choice screen
- Behavioral economics
- Consent orders: Outsourcing of antitrust compliance (e.g., Google/ITA; Ticketmaster/LiveNation)

Windows on ARM (WOA)

• The next round in the "open v. closed" debate?

The Google Search Investigations

- Market power and probabilistic exclusion
- Remedies?

High-tech labor markets

- No-hire, no-solicit, and no-poach agreements
- US and EU experience