

# Silicon Valley Antitrust

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Preliminary Syllabus! Please check out [the latest version](#).

Textbooks:

- Herbert Hovenkamp, [Black Letter Antitrust Law \(2011\)](#)
- Herbert Hovenkamp, [Innovation and Competition Policy: Cases and Materials \(2011\)](#)

## 1. The law of “predatory innovation”. Showdown in the CPU industry: FTC and EC v. Intel.

*(1) Did Intel abuse its dominant position in the x86 CPU market by using various business tactics and technological design choices aimed at (i) defending its CPU monopoly and (ii) extending its CPU monopoly into the GPU market?*

*(2) A builds disk drives for B’s mainframes. B changes the interface. A’s disk drives are obsolete. Innovation or predation?*

*(3) A builds audio chips for smartphones. B builds graphics processors. B includes audio functionality into its new graphics processor. A’s business tanks. Efficient integration or anticompetitive foreclosure?*

*(4) B sells audio, graphics, and sensor modules. A sells audio modules only. B gives its customers a 25% across the board rebate if they buy all three components from B. A can’t match the discount on audio modules alone. Good deal for the buyer or below-cost bundled pricing?*

Topics for discussion include:

- Recap of monopolization/abuse of dominance law (“Big and bad”)
  - The role of antitrust in the OWS and 99% debate
- Antitrust enforcer boot camp
- Defensive abuses
- Offensive abuses (leveraging)

- Compulsory access and disclosure remedies

Reading:

- Joseph Stiglitz, [Of the 1%, by the 1%, for the 1%, Vanity Fair \(2011\)](#)
- FTC, [In re Intel press release, August 4, 2010](#)
- FTC [In re Intel, decision and order \(2010\)](#)
- FTC, [In re Intel complaint \(2009\)](#)
- EC Decision, [COMP/37.990 Intel](#)
- Damien Geradin, [The Decision of the Commission of 13 May 2009 in the Intel case: Where is the Foreclosure and Consumer Harm?](#)
- Allied Orthopedic v. Tyco Healthcare, 592 F.3d 991 (9th Cir. 2010)
- Cal. Computer Prods., Inc. v. Int'l Bus. Mach. Corp., 613 F.2d 727, 735 (9th Cir.1979)
- U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001)
- Case T-201/04, Microsoft Corp. v. Commission, CFI 2007
- [“Default defenders” and “choice screens”](#)

## 2. Search engine antitrust law

*B, a vertical search engine, enjoys the top position on A's dominant search engine. After an update to A's search algorithm, B drops to the second page and loses most of its traffic. Quality improvement to fight web spam or foreclosure attack on a competitor?*

Topics for discussion include:

- The Google search antitrust investigation universe
  - FTC
  - EC
  - States
  - Other jurisdictions
- Is Google a monopolist?
  - Market definition?
  - Market power?

- Does scale matter? (Economics and machine learning)
- Did Google abuse its dominant position?
  - Is Google a vertically integrated firm?
  - Advertiser lock-in
  - Demoting nascent threats
  - Promoting Google's own content
- What are the remedies?

Reading:

- Google, [Competition Website](#)
- FairSearch, [Google's Transformation from Gateway to Gatekeeper \(2011\)](#)
- Geoff Manne, Josh Wright, [Google and the Limits of Antitrust: The Case Against the Antitrust Case Against Google \(2010\)](#)
- DOJ, [Google/Yahoo!, DOJ investigation \(2008\)](#)
- EC, [M.5727 Microsoft/Yahoo! Search Business \(2010\)](#)
- FTC monopolization investigation in re Google (ongoing)
- EC abuse of dominance investigation in re Google (ongoing)

### 3. Display advertising antitrust law

*A acquires one key access point for publishers and advertisers after another. Creation of an efficient marketplace or foreclosure of rivals?*

Topics for discussion include:

- Fighting complexity: getting a legal grip on display advertising
  - Supply (publishers)
  - Demand (advertisers and their agents)
  - Intermediaries
    - Ad networks
    - Ad exchanges

- The growing importance of supply- and demand side platforms
- Publisher and advertiser ad servers
- Affiliate programs and resale price maintenance
- The intersection of antitrust and consumer protection law (online tracking)

Reading:

- Luma Parters, [Display Lumascope 2011](#)
- FTC, [Google/DoubleClick \(2007\)](#)
- FTC, [Google/Admob \(2010\)](#)
- DOJ, Google/Admeld (ongoing)

## 4. High-tech labor markets: “No poach agreements”

*Firms in the Valley agree not to poach each others’ employees. Sensible self-regulation or unlawful horizontal coordination?*

Topics for discussion include:

- The Silicon Valley labor market
  - “Non-compete agreements”; Silicon Valley v. Silicon Alley
  - Immigration patterns and innovation
- Review of horizontal agreements in the U.S. and in the EU
  - Per se and rule of reason analysis
  - Naked restraints
  - Ancillary restraints

Reading:

- [U.S. v. Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar \(2011\)](#)

## 5. Open v. closed systems

(1) *“Open systems win.” Jonathan Rosenberg, Google.*

(2) *"Open systems [are] good for making others lose."* John Prentice, Gartner.

(3) *"Closed systems are prima facie suspect, while open systems can never be an antitrust problem."* Useful antitrust rule or analytical fallacy?

(4) *A sells games for B's gaming console. B starts requiring pre-approval of the game concept and final approval of the finished game as a condition for a license to B's console. Sensible quality control measure or monopolization of the aftermarket for B-console games?*

Topics for discussion include:

- The political philosophy of open systems
- The economics of platforms
  - The players: system sponsors, users, contributors
  - Platforms as "managed economies"
  - "More is not always better" How platform rules emerge.
- Single platform aftermarkets
- Examples: Gaming platforms (XBOX, PS3, Wii), mobile (Android, iOS, Blackberry, Windows), online stores (eBay, Amazon)

Reading materials:

- Kaiser, [Are Closed Systems an Antitrust Problem?](#), *Competition Policy International* 91, Vol.7, No.1 (2011)
- Thomas R. Eisenmann, Geoffrey Parker, Marshall W. Van Alstyne, [Opening Platforms: How, When and Why?](#) (2008)
- David S. Evans, Andrei Hagiu and Richard Schmalensee, [Invisible Engines](#) (2006)
- [Google/Admob \(FTC, 2010\)](#)
- *Apple, Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D.Cal. 2008)
- *Datel Holdings Ltd. v. Microsoft Corp.*, CV 09–5535 (N.D. Cal., November 20, 2009)
- *Newcal Industries v. Ikon Office Solution*, 513 F. 3d 1038 (9th. Cir. 2008)
- [eBay International AG - Notification - N93365](#) (Australian Competition & Consumer Commission) (2008),

## 6. Social networks: Virtual property and real market power?

(1) *Social media platform A introduces its own in-game currency to the exclusion of other in-game payment mechanisms. Abuse of a dominant position?*

(2) *Search engine A introduces a new social network. Shortly thereafter, it lets search users jump directly to its social network brand pages. Improper leveraging of search market power into the social network space?"*

Topics for discussion:

Reading materials:

- ConsumerWatchdog, [Complaint to the FTC re Facebook Credits \(2011\)](#)
- ConsumerWatchdog, [Analysis of revised FB Credits Terms \(2011\)](#)
- Facebook [Credits Terms](#)
- Tim Rogers, [Who killed videogames? \(2011\)](#)
- Neal Stephenson, [Reamde \(2011\)](#)
- Cory Doctorow, [For the Win \(2010\)](#)
- [Wikipedia, EVE Online](#)
- [Wikipedia, Facebook Credits](#)

## 7. Open source and antitrust

*A sells proprietary databases and services for open source operating systems. B owns the copyright to and sells services for open source databases. A acquires B. Is the acquisition a boon for or threat to B's open source database?*

Topics for discussion:

- The political philosophy of open source
- The economics of open source software
  - Revenues from services, complements, dual licenses
  - Strategic reasons for promoting open source

- “Zero dollar” price fixing?
- Acquisition of open source assets to control dynamic innovation?

Reading materials:

- [Richard Stallman, The Free Software Definition](#)
- faberNovel, [Business Models of Open Source and Free Software \(2007\)](#)
- [Wallace v. IBM, 467 F.3d. 1104 \(7th. Cir. 2006\)](#)
- [M.5529 Oracle / Sun Microsystems, Commission Decision \(2010\)](#)

## 8. Buying patent portfolios

*A acquires a large patent portfolio ‘to defend its ecosystem.’ Defensive move to minimize the threat of a patent holdup or procurement of ammunition to extract differentiating IP from others?*

Reading materials:

- Acquisition of Novell and Nortel patents (ongoing)
  - [Google](#)
  - [Microsoft](<https://twitter.com/-%21/BradSmi/status/98902130412355585>)
- [Google/Motorola \(ongoing\)](#)
- [Intergraph Corp. v. Intel Corp., 195 F. 3d 1346 \(Fed. Cir. 1999\)](#)
- [Broadcom v. Qualcomm, 501 F.3d 297 \(3rd Cir. 2007\)](#)
- [In the matter of N-Data \(2008, FTC\)](#)
- [Florian Mueller’s FOSS Patents Blog](#)

## 9. Mergers: Buying future products; conglomerate mergers

*A acquires B. Some customers say that B’s pipeline products would likely be a good alternative to A’s products, but B’s products are more likely to make it to market if they are supported by A’s R&D and distribution infrastructure. Efficient merger to ensure that new products come to market more quickly and with greater certainty or substantial lessening of future competition?*

Topics for discussion include:

- Potential competition and innovation markets
- The 2010 U.S. Horizontal Merger Guidelines
- Agency practice v. court decisions

Reading:

- FTC/DOJ, [2010 Horizontal Merger Guidelines](#)
- [U.S. v. Oracle Corp.](#), 331 F.Supp.2d 1098 (N.D.Cal. 2004)
- FTC, [In the matter of Thoratec and HeartWare](#), Docket No. 9339, FTC File No. 091 0064
- [Case No COMP/M.5984 - INTEL / MCAFE](#)