

ANTITRUST & INTELLECTUAL PROPERTY

Boalt School of Law, Fall 2010
Syllabus, Course 276.2 sec. 1
Mondays: 6:25 PM to 8:15 PM

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DATE	SUBJECT MATTER AND READINGS
08/16/10 (Session 1)	<p>Introduction and discussion of whether intellectual property laws and antitrust laws are complementary or are in conflict</p> <p><u>Reading:</u></p> <ol style="list-style-type: none">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) (http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf Read introduction, pages 1 – 13) <p><u>Supplemental Reading:</u></p> <ol style="list-style-type: none">3) Robert Pitofsky, “Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Policy,” 68 Antitrust L.J. 913 (2001)4) Richard A. Posner, “Antitrust in the New Economy,” 68 Antitrust L.J. 925 (2001)5) Deborah Platt Majoras, Chairman, Federal Trade Commission, “A Government Perspective on IP and Antitrust Law”, dated June 21, 2006 (http://www.ftc.gov/speeches/majoras/060621aai-ip.pdf)

DATE	SUBJECT MATTER AND READINGS
<p>08/23/10 (Session 2)</p>	<p>Recent Antitrust Complaints and Pleadings</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Slattery v. Apple Computer, Inc.</i>, Case No. Co-5-337 (N.D. Cal.); (Complaint; Briefs on Motions to Dismiss; and Order on Motion to Dismiss) 2) <i>U.S. v. Microsoft Corp.</i>, Civil Action No. 98-1232 (D.D.C.) (Complaint) 3) <i>Datel Holdings, Ltd. v. Microsoft Corp.</i>, Case C-09-05535 (N.D. Cal.); (Complaint; Defendant’s Motion to Dismiss). <p><u>Supplemental Reading</u></p> <ol style="list-style-type: none"> 4) <i>FTC Complaint against Intel</i>, FTC Docket No. 9341 (Dec. 16, 2009) 5) <i>Golden Gate Pharmacy Services v. Pfizer</i>, Case C-09-3854 (N.D. Cal.) (Complaint, filed August 21, 2009)
<p>08/30/10 (Session 3)</p>	<p>The Microsoft antitrust cases – Part I</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>U.S. v. Microsoft Corp.</i>, 84 F.Supp. 2d 9 (D.D.C. 1999) (Findings of Fact) 2) <i>U.S. v. Microsoft Corp.</i>, 87 F.Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law) 3) <i>U.S. v. Microsoft Corp.</i>, 253 F.3d 34 (D.C. Cir. 2001)
<p>09/06/10</p>	<p>LABOR DAY – NO CLASS</p>

DATE	SUBJECT MATTER AND READINGS
<p>09/13/10 (Session 4)</p>	<p>The Microsoft antitrust cases – Part II</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) Final Judgment, <i>US v. Microsoft</i>, Civil Action No. 98-1232, entered November 12, 2002 (http://www.usdoj.gov/atr/cases/f200400/200457.htm) 2) <i>Commonwealth of Massachusetts v. Microsoft Corporation</i>, 373 F.3d 1199 (D.C. Cir. 2004) 3) Article, “10 Years After U.S. v. Microsoft” <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 4) Assistant Attorney General for Antitrust Thomas O. Barnett, Issues Statement on European Microsoft Decision”, Sept. 17, 2007 (http://www.justice.gov/atr/public/press_releases/2007/226070.htm) 5) 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)
09/20/10	FALL BREAK WEEK – NO CLASS
<p>09/27/10 (Session 5)</p>	<p>Litigation of intellectual property rights and “sham” litigation</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Professional Real Estate Investors v. Columbia Pictures</i>, 508 U.S. 49 (1993) 2) <i>Nobelpharma v. Implant Innovations</i>, 141 F.3d 1059 (Fed. Cir. 1998) 3) <i>Kaiser Foundation Health Plan, Inc. v. Abbott Labs</i>, 552 F.3d 1033, 2009 U.S. App. LEXIS 584 (9th Cir. 2009) <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 4) <i>In re Terazosin Hydrochloride Antitrust Litigation</i>, 335 F. Supp. 2d 1336 (S.D. Fla. 2004)

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10/04/10 (Session 6)	<p data-bbox="358 331 1008 363">The “essential facilities” doctrine and refusals to deal</p> <p data-bbox="358 401 467 432"><u>Reading:</u></p> <ol data-bbox="480 468 1305 632" style="list-style-type: none"><li data-bbox="480 468 1305 499">1) <i>Verizon Communications, Inc. v. Trinko, LLP</i>, 540 U.S. 398 (2004)<li data-bbox="480 533 1305 564">2) <i>In re: ISO Antitrust Litigation</i>, 203 F.3d 1322 (Fed. Cir. 2000)<li data-bbox="480 598 1305 632">3) <i>Image Technical Services v. Kodak</i>, 125 F.3d 1195 (9th Cir. 1997) <p data-bbox="358 667 618 699"><u>Supplement Reading:</u></p> <ol data-bbox="480 735 1430 869" style="list-style-type: none"><li data-bbox="480 735 1430 766">4) <i>In re Microsoft Antitrust Litigation</i>, 274 F. Supp. 2nd 743 (D. Md. 2003)<li data-bbox="480 800 1430 869">5) Robert Pitofsky, Donna Patterson, Jonathan Hooks, “The Essential Facilities Doctrine Under U.S. Antitrust Law,” 70 Antitrust L.J. 443 (2002)

DATE	SUBJECT MATTER AND READINGS
<p>10/11/10 (Session 7)</p>	<p>Antitrust Issues involving intellectual property standards</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Qualcomm, Inc. v Broadcom</i>, 548 F.2d 1004 (Fed. Cir. 2008) 2) <i>Rambus, Incorporated v. Federal Trade Commission</i>, 522 F.3d 456, 2008 U.S. App. LEXIS 8662 (D.C. Cir. 2008) 3) <i>Broadcom Corp. v. Qualcomm, Inc.</i>, 501 F.3d 297, 2007 U.S. App. LEXIS 21092 (3d Cir. Sept. 4, 2007) <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 4) David L. Meyer, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "How to Address "Hold Up" in Standard Setting Without Deterring Innovation: Harness Innovation by SDOs" (http://www.justice.gov/atr/public/speeches/234124.htm) 5) Gerald F. Masoudi, Deputy Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, "Antitrust Enforcement and Standard Setting", dated May 10, 2007 (http://www.usdoj.gov/atr/public/speeches/223363.htm) 6) DOJ Business Review Letter and Press Release regarding Patent Policy of VITA, dated October 30, 2006 (http://www.usdoj.gov/atr/public/busreview/219380.htm) (http://www.usdoj.gov/atr/public/press_releases/2006/219379.htm) 7) <i>In the Matter of Negotiated Data Solutions</i>, (FTC file no. 051-0094) (http://www.ftc.gov/os/caselist/0510094/index.shtm) 8) <i>Special Verdict Form in Hynix v. Rambus</i>, Case No. 5:00-cv-20905 (N.D. Cal., docket number 3613) 9) DG Comp., EU Commission welcomes ICom's public FRAND, declaration, April 21, 2009 (http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/549&format=HTML&age)

DATE	SUBJECT MATTER AND READINGS
<p>10/18/10 (Session 8)</p>	<p>Tying, Bundling, and Package Licensing – Part I</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) Article entitled “Antitrust Pitfalls in Intellectual Property Licensing” by Samuel R. Miller 2) <i>Leegin Creative Leather Products v. PSKS, Inc.</i>, 127 S. Ct. 2705, 2007 U. S. LEXIS 8668 (2007) 3) <i>Independent Ink, Inc. v. Illinois Tool Works, Inc.</i>, 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 (Minnesota Mining and Manufacturing Company)</i>, 324 F.3d 141 (3d Cir. 2003) <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 6) “The Long and Winding Road: Convergence in the Application of Antitrust to Intellectual Property”, Remarks by Makan Delrahim, Deputy District Attorney General, U.S. Dept. of Justice, Oct. 6, 2004 (http://www.usdoj.gov/atr/public/speeches/205712.htm) 7) “Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust”, R. Hewitt Pate, Asst, Attorney General, U.S. Dept. of Justice, June 3, 2005 (http://www.usdoj.gov/atr/public/speeches/209359.htm) 8) European Commission – “DG Competition discussion paper on the application of Article 82 of the treaty to exclusionary abuses”, December 2005 (http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf) 9) J. Thomas Rosch, FTC Commissioner, “Reflections on the DG Competition Discussion Paper on the Application of Article 82 to the Exclusionary Abuses,” May 11, 2006 (http://www.ftc.gov/speeches/rosch/060511roschstgallenremarks.pdf) 10) “Forcing Firms to Share the Sandbox: Compulsory Licensing of Intellectual Property Rights and Antitrust”. Remarks by Makan Delrahim, Deputy District Attorney General, U.S. Dept. of Justice, May 10, 2004 (http://www.usdoj.gov/atr/public/speeches/203627.htm)

DATE	SUBJECT MATTER AND READINGS
<p>10/25/10 (Session 9)</p>	<p>Tying, Bundling, and Package Licensing – Part II</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Datel Holdings, Ltd., v. Microsoft Corp.</i>, 2010 U.S. Dist. LEXIS 40021 (N.D. cal. April 23, 2010) 2) <i>Cascade Health Solutions v. Peace Health</i>, 515 F.3d. 883 (9th Cir. 2008) 3) <i>U.S. Philips Corporation v. International Trade Commission</i>, 424 F.3d 1179 (Fed. Cir. 2005) 4) <i>U.S. v. Dentsply International</i>, 399 F. 2d 181 (3rd Cir. 2005)
<p>11/01/10 (Session 10)</p>	<p>Cross-licensing and patent pooling</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Princo Corp. v. International Trade Commission</i>, 563 F.3d 1301, 2009 U.S. App. LEXIS 8230 (Fed. Cir. 2009), Motion for Rehearing <i>en banc</i> Granted, 583 F.3d 1380, 2009 U.S. App. LEXIS 8230 (Fed. Cir. 2009) 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) DVD Business Review Letter no. 2 (letter from Joel I. Klein to Carey R. Ramos), dated June 10, 1999 (DVD Business Review Letter No. 2) 4) MPEG-2 Business Review Letter (letter from Joel I. Klein to Garrard R. Beeney), dated June 26, 1997 5) Summit Technologies/VISX FTC Consent Decree Docket No. 9286 FTC website: www.ftc.gov/os/caselist/d9286.htm

DATE	SUBJECT MATTER AND READINGS
<p>11/08/10</p> <p>(Session 11)</p>	<p>Merger enforcement in technology markets</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>U.S. v. Oracle Corp.</i>, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) 2) Materials relating to Google/AdMob and Google/DoubleClick transactions (to be provided) 3) <i>Golden Gate Pharmacy Services v. Pfizer</i>, 2009 U.S. Dist. LEXIS 96003 (N.D. Cal. October 14, 2009) 4) Materials on Ticketmaster/Live Nation merger (to be provided) (including "Plaintiff United States' Response to Public Comments) Doc, 13, filed on June 21, 2010 in U.S. v. Ticketmaster Entertainment, Case 1:10-cv-00139 (D.D.C.) (http://www.justice.gov/atr/public/press_releases/2010/254540.htm; http://www.justice.gov/atr/cases/f256300/256322.pdf; http://www.justice.gov/atr/cases/f254500/254544.pdf) 5) Materials on proposed NBC/Comcast merger (to be provided) <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 6) FTC Materials from Chevron/Unocal Merger, "Dual Consent Orders Resolve Competitive Concerns About Chevron's \$18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal" (http://www.ftc.gov/opa/2005/06/chevronunocal.htm) 7) <i>FTC v. Ovation Pharmaceuticals</i>, News Release and Complaint, available at (http://www.ftc.gov/os/caselist/0810156/081216ovationcmpt.pdf and http://www.ftc.gov/opa/2008/12/ovation.shtm) 8) Draft revisions to Horizontal Merger Guidelines released for public comment, April 20, 2010 (http://www.ftc.gov/os/2010/04/100420hmg.pdf)

DATE	SUBJECT MATTER AND READINGS
<p>11/15/10 (Session 12)</p>	<p>Antitrust issues in settling intellectual property litigation; the pharmaceutical cases</p> <p><u>Reading:</u></p> <ol style="list-style-type: none"> 1) <i>Schering-Plough Corporation v. Federal Trade Commission</i>, 402 F.3d 1056 (11th Cir. 2005) 2) <i>In re Tamoxifen Citrate Antitrust Litigation</i>, 466 F. 3d 187 (2nd Cir. 2006) 3) <i>Valley Drug Co. v. Geneva Pharms.</i>, 344 F.3d 1294 (11th Cir. 2003) 4) <i>In Re: Cardizem CD Antitrust Litigation</i> 332 F.3d 896 (6th Cir. 2003) <p><u>Supplement Reading:</u></p> <ol style="list-style-type: none"> 5) Statement of Richard A. Feinstein, Director of Bureau of Competition, Federal Trade Commission, entitled “Anticompetitive Pay-for-Delay Settlements in the Pharmaceutical Industry: Why Consumers and the Federal Government Are Paying Too Much for Prescription Drugs”, submitted June 3, 2009 to the Subcommittee on the Courts and Competition, Committee on the Judiciary, U.S. House of Representatives 6) <i>FTC v. Cephalon, Inc.</i> No. 08-cv-2141 (E.D. Pa. complaint filed Feb. 13, 2008) FTC brief in opposition to motion to dismiss (http://www.ftc.gov/os/caselist/0610182/080602opposition.pdf) 7) Amicus Brief of FTC and DOJ in <i>Arkansas Carpenters Health and Welfare Fund v. Bayer (In re Ciprofloxacin Hydrochloride Antitrust Litigation)</i>, Case 05-2851 (2nd Cir.) May 20, 2010
<p>11/22/10 (Session 13)</p>	<p>Student presentations</p>