

INTELLECTUAL PROPERTY AND ANTITRUST SEMINAR

Professor Alden F. Abbott (aabbott@ftc.gov, 202-326-2881(W))
Tuesday 8:00-9:50 p.m.

IP rights increasingly have been implicated in commercial transactions in recent years, reflecting the growth of the “knowledge economy”. At the same time, the interaction between IP law and antitrust law has attracted a significant amount of attention from legal scholars and practitioners.

This seminar will focus on selected topics dealing with the interface between antitrust and intellectual property rights (IP) – primarily patents. Readings will be drawn from a 2003 FTC report calling for patent reforms to better harmonize IP and Competition (“IP 1”), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; a 2007 FTC-Justice Department report on patent-antitrust (“IP 2”), available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.htm>; a 2008 Justice Department Report on Section 2 of the Sherman Act (“Section 2 Report”), available at <http://www.justice.gov/atr/public/reports/236681.pdf> (later withdrawn); a 2011 FTC report dealing with the “evolving IP marketplace” (“IP 3 Report”), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>; a 1995 FTC-Justice Department Antitrust Guidelines for the Licensing of Intellectual Property (“IP Guidelines”), available at <http://www.ftc.gov/bc/0558.pdf>; the 2007 Report and Recommendations of the congressionally mandated) Antitrust Modernization Commission (“AMC Report”), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm; and various other materials (most of which will be Internet accessible).

The course grade will be based primarily on a research paper (25-40+ double-spaced pages), which focuses on some aspect of the general topics covered in the seminar. I expect all students to prepare a paper proposal of no more than one single-spaced page and email it to me (at aabbott@ftc.gov) by no later than the date of the seventh class meeting.

As this is a seminar, I also will take class participation into account. The final course grade may be raised or lowered by one-half grade from the paper grade (or kept the same), based on the nature and quality of your participation. At the beginning of each class (other than the first, which I will lead), I will ask one or two individuals to be “particularly well prepared” to play a major role in the next week’s class. The paper will be due in my box (in a sealed envelope) no later than the last day of in-class exams. Below I list topics and assigned readings for the first 11 sessions. Special topics (to be announced) will be covered in weeks 12-14; we may also have time to discuss some students’ seminar papers during this period.

Week 1 An introduction to the antitrust-IP interface. IP 1 Executive Summary and Chapter 1; IP 2 Introduction; IP Guidelines chapters 1-2. Herbert Hovenkamp, *The Antitrust Intellectual Property Interface*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1287628&download=yes.

Week 2 Law and Economics of Innovation. Richard Gilbert, *Competition and Innovation*, available at http://elsa.berkeley.edu/users/gilbert/wp/competition_and_innovation.pdf; Mark Lemley, *A New Balance Between IP and Antitrust*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980045&download=yes; Jonathan Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962261&download=yes

- Week 3 Refusals to License. IP 2 chapter 1; Image Technical Services v. Kodak, 125 F. 3d 1195 (9th Cir. 1997); CSU v. Xerox, 203 F.3d 1322 (Fed. Cir. 2000); Verizon v. Trinko, 540 U.S. 398 (2004); Pacific Bell Telephone Co. v. linkLine, 555 U.S. ____ (2009), available at <http://www.law.cornell.edu/supct/html/07-512.ZS.html>; Section 2 Report, chapter 7; AMC Report, pp. 101-104.
- Week 4 Tying, Bundling, Misuse. IP Guidelines chapter 5.3; IP 2 chapter 5; U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001); Illinois Tool Works v. Independent Ink, 547 U.S. 29 (2007); Kobayashi working paper on Independent Ink, available at http://www.law.gmu.edu/assets/files/publications/working_papers/08-01%20Spilled%20Ink.pdf; European Court Microsoft decision summary (2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=CJE/07/63&format=HTML&aged=0&language=EN&guiLanguage=en>; Section 2 Report, chapters 5 and 6.
- PowerPoint “Tying and Bundling of IP Rights”
http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IPAntitrustSem-PPTa.pdf
- Week 5 Licensing Practices. IP Guidelines chapter 3-5; IP 2 chapters 4 and 6; Leegin Creative Products v. PSKS, 127 S.Ct. 2705 (2007), available at <http://www.law.cornell.edu/supct/html/06-480.ZO.html>; U.S. v. General Electric Co., 47 U.S. 192 (1926).
- PowerPoint “Framework for Evaluating IP Licensing Practices”
http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IP&Antitrust-PPT2.pdf
- PowerPoint “Analyzing Discriminatory IP Licensing Terms”
http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IP&Antitrust-PPT3.pdf
- Week 6 Cross Licenses and Patent Pools. IP 2 chapter 3; 3G DOJ Business Review Letter, available at <http://www.usdoj.gov/atr/public/busreview/200455.htm>; 6C DVD Business Review Letter, available at <http://www.usdoj.gov/atr/public/busreview/2485.htm>; 3C DVD Business Review Letter, at <http://www.usdoj.gov/atr/public/busreview/2121.htm>; MPEG 2 Business Review Letter, available at <http://www.usdoj.gov/atr/public/busreview/215742.htm>; Sheila Anthony speech, available at <http://www.ftc.gov/speeches/other/aipia.shtm#2.%20Summit>.
- Weeks 7-8 Standard Setting. IP 2 chapter 2; American Society of Mechanical Engineers, Inc. v. Hydrolevel, 456 U.S. 556 (1982); Allied Tube v. Indian Head, 486 U.S. 492 (1988); Radiant Burners v. People’s Gas Light & Coke Co., 364 U.S. 656 (1961); Petition for Rehearing en banc (D.C. Cir.) in Rambus Inc. v. FTC (2008), at <http://www.ftc.gov/os/caselist/0723038/080606rambusrehearingpetition.pdf>; VITA Business Review Letter, at <http://www.usdoj.gov/atr/public/busreview/219380.htm>; IEEE Business Review Letter, available at

<http://www.usdoj.gov/atr/public/busreview/222978.htm>; Masoudi, *Antitrust Enforcement and Standard Setting: The VITA and IEEE Letters and the IP 2 Report* (2007), available at <http://www.usdoj.gov/atr/public/speeches/223363.htm>; Standards Development Organization Act of 2004, 15 U.S.C. 4301-4305; FTC Unocal Settlement, available at <http://www.ftc.gov/opa/2005/06/chevronunocal.shtm>; FTC Statements in N-Data (2008), available at <http://www.ftc.gov/opa/2008/01/ethernet.shtm>.

PowerPoint “Standard Setting Matters”

http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IPAntitrust-PPT4.pdf

PowerPoint “Standard Setting Matters, with a Focus on Hold Ups”

http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IPAntitrust-PPT6.pdf

PDF “Working Party No. 2 on Competition and Regulation”

http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IPAntitrust-PPT7.pdf

Week 9

Patent Settlements. Lemley & Schapiro, *Probabilistic Patents*, available at <http://faculty.haas.berkeley.edu/shapiro/patents.pdf>; Schering Plough v. FTC, 402 F.3d 1056 (11th Cir. 2005); Justice Department brief opposing cert. In Schering Plough (2006), available at <http://www.usdoj.gov/atr/cases/f216300/216358.htm>; FTC brief opposing motion to dismiss in FTC v. Cephalon (2008), available at <http://www.ftc.gov/os/caselist/0610182/080602opposition.pdf>; In re Tamoxifen Citrate Antitrust Litigation, 2006 WL 2401244 (2d Cir. 2006); FTC Amicus Brief In Re K-Dur Antitrust Litigation (3rd Circuit), available at <http://www.ftc.gov/os/2011/05/110518amicusbrief.pdf>.

Week 10

Patent Trolls, Patent Stacking, Innovation Markets, Reform. FTC Commissioner Rosch speech (2008), available at <http://www.ftc.gov/speeches/rosch/080531roschlecg.pdf>; IP 1 Report chapters IV.F., V. F., and VI.; IP 3 Report chapter 2, pp. 50-72; FTC Commissioner Statements in Genzyme-Novazyme, available at <http://www.ftc.gov/opa/2004/01/genzyme.shtm>; *Elves or Trolls*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136086&download=yes; *Revisiting Injunctive Relief*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1019611&download=yes.

Week 11

Comparing the IP and Antitrust Systems. Bohannon and Hovenkamp, *IP and Antitrust: Reformation and Harm*, available at <http://lawdigitalcommons.bc.edu/bclr/vol51/iss4/1/>.

PowerPoint “The IP-Antitrust Policy Balance”

http://www.law.gmu.edu/assets/files/academics/schedule/2011/fall/ABBOTT_IPAntitrust-PPT5.pdf

Week 12

Network Neutrality. Christopher Yoo, *Network Neutrality and the Economics of Congestion*, available at

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=825669&download=yes; Joh Peha, *Technology and the Benefits and Risks of Network Neutrality Requirements*, available at <http://www.ftc.gov/opp/workshops/broadband/presentations/peha.pdf>; Jonathan Neuchterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, available at <http://www.silicon-flatirons.org/neutralitylaw/NuechterleinAntitrustOversight.pdf>.

Weeks 13-14 Seminar presentations plus possible additional topics to be announced.