GENERAL BACKGROUND TO THE CLASS

I. Antitrust Law

A. US antitrust law

1. Overview of US antitrust Laws
   a) Sherman Act
   b) Clayton Act
   c) FTC Act, § 5

2. Key institutions
   a) The DoJ
   b) The FTC
   c) The federal courts

Readings:

B. EU competition law

1. Overview of EU competition rules
   a) The Treaty provisions
   b) Regulation 1/2003

2. Key institutions
   a) The European Commission
   b) The EU courts

Readings:
II. Intellectual property law (with focus on patents)

A. US law

1. Granting of patents
   a) United States Patent and Trademark Office: Examination of application submitted by inventor(s).
      (1) Types of patents: utility (apparatus, composition, and method), design, and plant.
      (2) Patent term: utility, generally 20 years from filing.
   b) Criticism of U.S. patent system
      (1) USPTO lacks appropriate resources for handling the increasing number of patent applications and the complexity of the applications submitted.
      (2) Readings:
          (c) USPTO dashboard: see backlog, number of examiners, pendency to first office action, and total pendency.
      (1) Goal of AIA is to harmonize the U.S. patent system with international systems (i.e., transition from “first to invent” to “first to file”) and strengthen the current patent system (e.g., post-grant review mechanism, gives PTO fee-setting authority to alleviate the funding issues; new joinder rule attempts to limit NPEs from suing multiple disparate defendants in one action.)
          (a) Read the Wikipedia entry: http://en.wikipedia.org/wiki/Leahy-Smith_America_Invents_Act

2. Patent enforcement
   a) Federal district court cases
   b) International Trade Commission (ITC)
   c) Federal district court cases vs. investigations before the ITC
      (1) Chart comparing the two jurisdictions in process
      (2) Procedural differences; schedule.
(3) Standing / domestic industry.
(4) Type of relief available – ITC only injunctive relief:
   (a) Limited Exclusion Orders
   (b) General Exclusion Orders
       (i) All infringing products (even if manufactured by non-named respondents.)
       (ii) Must show widespread pattern of importation of infringing items and it is difficult to identify the exact source. 19 U.S.C. § 1337(d)(2).
   d) Infringement defenses (§§ 101, 102, 103)
   e) Damages analysis overview

B. **EU law**

1. Granting of patents
   a) European route: http://www.epo.org/applying/european.html
   b) International route: http://www.epo.org/applying/international.html
   c) National route: http://www.epo.org/applying/national.html

2. Patent enforcement
   a) National patent courts
   b) Differences of procedure in the Member States

3. Creation of a Unitary Patent and a Unified Patent Court

III. **The tumultuous relationship between antitrust and IP**

A. *Both antitrust and IP laws seek to promote dynamic competition*
   1. The difficulty is that competition law also seeks to protect other forms of efficiencies (allocative and productive)

B. Tensions between the two legal regimes
1. Competition rules can be used to place limits on the exercise of intellectual property rights
   a) Example: Compulsory licensing in EU Microsoft case
2. Competition rules may be used to “correct” (actual or perceived) deficiencies in IP law

Readings:

IV. Intense Rivalry between Tech Giants

A. The tech industry is dominated by a few giant corporations
   1. Microsoft: http://en.wikipedia.org/wiki/Microsoft
   5. Facebook: http://en.wikipedia.org/wiki/Facebook

B. Trends in high tech
   1. The Internet
      a) Two-sided market business model prevails on the Internet, see http://en.wikipedia.org/wiki/Two-sided_market
         (1) Online advertising is critical
         (2) Data is critical to online advertising
      b) Search dominated by Google
         (1) Horizontal search
         (2) Vertical search
   2. Hardware/software/content
      a) Mobile outgrows PCs
         (1) Smartphones
(2) Tablets
(3) Phablets
b) Apple’s business model of integrating hardware, software and content is the prevailing model in IT industry
c) Competition between platforms and ecosystems
d) Things are moving to the cloud

3. Intellectual property
a) Patents have become mission critical
b) Trolls are a true nuisance

Readings:

- Battle between tech giants:
  o The Economist, Another game of thrones - Google, Apple, Facebook and Amazon are at each other’s throats in all sorts of ways, Dec 1, 2012, http://www.economist.com/news/21567361-google-apple-facebook-and-amazon-are-each-others-throats-all-sorts-ways-another-game

- Eco-system competition:

- End of PC era:
- Patent war:
  o Patent acquisitions:
  o Patent trolls:
THE PATENT WAR

I. Background

A. Standard-setting Organizations and IPRs

1. Standards
   a) Objectives and Benefits of Standardization
   b) Various forms of standards
   c) Strategic battles in SSOs
   d) The traditional IPR policies adopted by SSOs

2. Licensing under FRAND commitments
   a) The traditional model of bilateral negotiations between potential licensors and licensees
   b) Rationale behind FRAND Commitments
   c) Meaning(s) of FRAND
      (1) Fairness and reasonableness
      (2) Non-discrimination
      (3) What is a FRAND royalty?
         (a) Can it be determined in the abstract?
         (b) Various methods proposed to calculate FRAND royalties
      (4) FRAND and injunctive relief
   d) What is the legal nature of FRAND?
   e) Is FRAND enforceable?
   f) Does FRAND work?

3. Perceived problems with the FRAND regime
   a) Patent Ambush
   b) Patent hold-up
   c) Royalty-stacking

Readings:


B. Policy Statement by antitrust authorities

1. US
   a) FTC
      (1) Official statements
         (b) Speeches
      (2) Speeches

   b) DoJ
      (1) Official statements
          (a) Antitrust Division (DOJ) and the U.S. Patent and Trademark Office (USPTO) issued Policy

(2) Speeches

(i) Owners of SEPs are able to extract higher royalty rates in spite of FRAND obligations.
(ii) “If the licensee has already invested in a product and faces costs to designing around the patent, the licensor can extract some of the licensee’s investment, not just the value of his IP.”
(iii) “All truly essential patents for a successful standard inherently have market power. We believe declared SEPs can be a powerful weapon, perhaps enhanced by over declaration, and can be used to harm competition through holdup.”

2. EU
a) Speeches and articles

3. US and EU
C. The smartphone war


II. Apple vs. Samsung

A. Background to the dispute


B. US litigation

1. ITC
   a) In the Matter of Certain Mobile Electronic Devices (Samsung v. Apple; investigation no. 337-TA-794, complaint filed on 06/28/11)
      (1) On June 4, 2013, the ITC found that Apple infringed a Samsung patent and imposed a limited exclusion order. See http://www.usitc.gov/secretary/fed_reg_notices/337/337-794_notice06042013sgl.pdf
         (a) For comments, see Florian Mueller, Yes we FRAND: various pending ITC complaints over standard-essential patents may be withdrawn, August 4, 2013, available at http://www.fosspatents.com/2013/08/yes-we-frand-various-pending-ITC.html
   b) In the Matter of Certain Electronic Digital Media Devices and Components Thereof (Apple v. Samsung; investigation no. 337-TA-796, complaint filed on 07/05/11)
         (a) For comments on the decision, see Florian Mueller, ITC orders import ban against Samsung over two Apple patents -- how good are the workarounds?, August 9, 2013, available at http://www.fosspatents.com/2013/08/ITC-orders-import-ban-against-samsung.html

2. Federal courts
      (1) Background:
         (a) http://en.wikipedia.org/wiki/Apple_Inc._v._Samsung_Electronics_Co.,_Ltd.
      (2) Materials:
         (a) Complaint filed on April 15, 2011 in the Northern District of California; design and utility patents (bounce-back effect, on-screen navigation, rounded corners and
tapered edges, on-screen icons), trade dress, unfair competition.
(b) Jury verdict over $1.049 billion for Apple on August 24, 2012, see http://www.scribd.com/doc/103860673/12-08-24-Apple-Samsung-Amended-Jury-Verdict
(c) On November 21, 2013, federal jury in the Northern District of California awarded Apple $290 million in damages with respect to 13 patent-infringing Samsung products, replacing a $410 million portion of the $1.049 billion award, see http://de.scribd.com/doc/186172965/13-11-21-Apple-v-Samsung-Limited-Damages-Retal-Jury-Verdict

(3) Comments on the 2012 decision

C. US antitrust


D. EU patent litigation

The EU cases will not be discussed in this seminar.

E. EU Competition investigations

1. European Commission

Reading:


III. **Apple vs. Motorola**

A. **Background to the dispute**

B. **US**

1. **Litigation**
   a) Generally, see [http://en.wikipedia.org/wiki/Motorola_Mobility_v._Apple_Inc.](http://en.wikipedia.org/wiki/Motorola_Mobility_v._Apple_Inc.)
   b) ITC
      (1) ITC materials
         (b) On Aug. 24, 2012, the Commission affirmed ALJ’s finding of no violation for patents 6,272,333 and 5,636,223. Reversal of ALJ’s decision on patent 6,246,697, finding no direct or induced infringement. Reversal of ALJ’s determination of indefiniteness regarding patent 6,246,862. The Commission remands the investigation to the ALJ for an initial determination on infringement, validity, and domestic industry.
         (c) On Dec. 18, 2012, the ALJ issued his final initial determination on remand, finding no violation of section 337 with respect to the ’862 patent.
(d) On April 22, 2013, the ITC found no violation of section 337 with respect to the ’862 patent, hence terminating the investigation.

c) Federal courts
   (1) *Apple v. Motorola, Northern District of Illinois, 1:11-cv-08540*
   
   (a) Judge Posner dismissed the case with prejudice (June 22, 2012) – neither party proved that damages are not an adequate remedy, and thus neither party is entitled to an injunction. See [http://allthingsd.com/20120622/judge-dismisses-apple-v-motorola/](http://allthingsd.com/20120622/judge-dismisses-apple-v-motorola/)


   (2) *Apple v. Motorola, 3:11-cv-00187, W.D. Wis.*

   (a) This case arises out of the ITC investigation no. 337-TA-745.

   (b) Apple’s counterclaims allege that Motorola has engaged in anticompetitive behavior by failing to disclose timely patents that are now SEPs and by failing to offer licenses to those SEPs to Apple on FRAND terms. Notice filed Mar. 11, 2011 is sealed.


   (i) (SJ for Motorola): No violation of the Sherman Act, California State Consumer Protection Law, and tortious interference of contract because Apple has offered no evidence of damages relating to Motorola’s conduct.

   (ii) (SJ for Apple): Motorola’s statements to ETSI and IEEE constitute a binding contract with ETSI and IEEE to license patents on FRAND terms. Apple is a third party beneficiary to this contract.
Motorola has an obligation to make a bona fide effort to identify patents that might be part of the standard in question. Motorola is required to disclose certain patent applications before a standard is adopted (Motorola disclosed the applications relating to these patents after the standard had been adopted.) The issue is not whether a contract exists, but rather which party breached this contract. This in turn basically means that the issue is whether Motorola’s offer of a 2.25% royalty rate and subsequent attempts to negotiate were unfair, unreasonable or discriminatory.

(d) Order on Motions in Limine Oct. 29, 2012. Judge rejects Motorola’s three arguments that “(1) Motorola’s obligations under the contracts with the standards-setting organizations are too vague; (2) there is not enough evidence in the record from which the court could determine appropriate license terms; and (3) supervising the performance would not be practicable for the court.” Court also determines that if Apple establishes that Motorola breached its obligations with IEEE and ETSI (specifically the FRAND obligations), the court may allow Apple to seek specific performance. Judge Posner’s ruling regarding invalidity and non-infringement regarding three patents has preclusive effect, and Motorola will not be able to assert them in this case. The court holds also that Motorola has not breached its contract with ETSI or IEEE by seeking injunctive relief even though the court agrees with Judge Posner that Motorola was not entitled to injunctive relief. Apple is denied the ability to offer evidence of patent exhaustion on the grounds that it would be prejudicial to Motorola.

(e) Motorola’s motion for clarification that Apple will be bound by the contract if the court finds that there was one (dated Oct. 30, 2012.)

(f) Apple’s response to Motorola’s motion for clarification. Apple will comply with the court’s FRAND order only up to $1 per phone, but otherwise “reserves the right to exhaust all appeals and also reserves the right available to any party offered a license: the right to refuse and proceed to further infringement litigation.”

(g) Opinion and order dated Nov. 2, 2012. The judge has reconsidered the issue of specific performance and now believes it would be inappropriate to grant Apple’s request for specific performance on public interest grounds (and
especially since Apple has indicated in its briefs that more litigation between these parties is likely to continue.) Also, it would be inappropriate for the court to declare a FRAND rate.


(h) Order dismissing with prejudice Apple Inc.’s claims that Motorola Mobility, Inc. violated § 2 of the Sherman Act, violated Cal. Bus. & Prof. Code § 17200, and tortiously interfered with contracts; dismissing without prejudice Apple’s claims against Motorola for equitable estoppel, breach of contract and declaratory judgment. Dated Nov. 28, 2012.


(j) Apple files for appeal to the Federal Circuit (Jan. 4, 2013). The appellate hearing will most likely be held in the spring of 2014.

(i) For a comment, see Florian Mueller, Apple says Motorola demanded more than 12 times the rate it charged others for the same patents, July 23, 2013, available at http://www.fosspatents.com/2013/07/apple-says-motorola-demanded-more-than.html

(3) Apple v. Motorola, 3:10-cv-00662, W.D. Wis.
(a) Total of 15 patents being litigated.
(c) Case transferred to N.D. Ill (Posner) on Dec. 1 2011.

(4) Apple v. Motorola, 3:12-cv-00355, S.D. Cal.
(a) Apple is attempting to prevent the enforcement of injunctions issued by German courts. This is a Declaratory Judgment action where Apple wants to establish that it is a third party beneficiary to a contract between Motorola and Qualcomm, and as a result it is insulated from patent infringement liability lawsuits initiated by Motorola. Complaint dated Feb. 10, 2012.
(b) Second amended complaint dated Aug. 3, 2012 addresses the judge’s dismissal on grounds of ripeness: “This is a lawsuit asserting claims for anticipatory breach of contract by repudiation and declaratory relief related to
Motorola’s license agreements with Qualcomm covering Motorola’s declared cellular standards-essential patents.”

2. Antitrust
   a) FTC statement of January 3, 2013 ends some of the Google issues (see full set of materials under *Motorola v. Microsoft* (ITC) Inv. No. 752 below)

C. EU

1. Litigation

   We will not cover EU litigation in this class.

2. Antitrust

IV. **Microsoft v. Motorola Mobility (now Google)**

A. Background to the dispute


B. US litigation

   1. ITC
b) Final ID and bond recommendation (public version dated Dec. 29, 2011). ALJ finds infringement on only one patent, and recommends that bond be set at a reasonable royalty rate (see p. 219 of opinion).
c) Submission of non-party Google comments regarding public interest (Mar. 19, 2012). Google argues that an exclusion order in this case with hurt competition based on cumulative effect of multiple exclusion orders and the fact that the Android is the only open mobile computing platform.

2. Western District of Washington
   a) Complaint dated Oct. 1, 2010 (includes patents as exhibits). 12 patents, with overlap in the ITC investigation.
   b) Amended complaint dated Oct. 6, 2010 leaves only 9 patents in the litigation, the same 9 patents as in the ITC investigation.
   c) Stipulation and order to stay pending the outcome of the ITC investigation (Nov. 8, 2010).

C. EU litigation

We will not cover EU litigation in this class.

V. Motorola Mobility (now Google) vs. Microsoft

A. Background to the dispute

B. US litigation
   1. ITC
      a) Materials
         (1) Motorola v. Microsoft complaint dated Nov. 22, 2010 (patents relate to wireless networking and decoding of digital video files; accused products are gaming and entertainment consoles)
(2) Initial Determination issued on April 24, 2012 – ALJ recommended a limited exclusion order against Microsoft (public version May 11, 2012, 6 files)

(3) Limited exclusion order and cease and desist order against Microsoft, as well as a bond for importation of the accused products.

(4) Commission Notice dated June 29, 2012 to review ALJ’s ID in its entirety; one basis for review is to determine whether ALJ’s ID is consistent with the decision in 337-TA-724 where the Commission ruled that to prevail on a claim of infringement (direct or indirect), a complainant must show that the accused article is infringing in its condition as imported. (see also, MMI’s opposition to Microsoft’s request for interlocutory review which shows how the decision in 337-TA-724 changed dramatically the ITC law on infringement.)

(5) Remand hearing Dec. 5-6, 2012. The Target Date for the Initial Determination is March 22, 2013; completion of the investigation by July 23, 2013 (July 24, 2012 ALJ order).

(6) On March 22, 2013, an Administrative Law Judge (ALJ) at the ITC has given notice of a preliminary ruling that Microsoft’s Xbox gaming console does not infringe Google's (Motorola's) U.S. Patent No. 6,069,896 on a "capability addressable network and method therefor". See http://www.usitc.gov/press_room/documents/337_752R_ID.pdf

(7) On May 24, 2013, the ITC determined not to review the final initial remand determination issued by the presiding ALJ on March 22, 2013. The Commission affirms the ALJ’s final initial determination issued on April 23, 2012, as to the remaining patent as modified by the RID, hence effectively closing the case. See http://www.usitc.gov/secretary/fed_reg_notices/337/337_752_Notice05232013sgl.pdf

2. Federal courts
   a) Microsoft, Corp. v. Motorola, Inc., 10-cv-1823 (W.D. Wash. 2012)

      (1) June 6, 2012 opinion (864 F.Supp.2d 1023) held that statements and declarations made by patent holders to SSOs do form contractual obligations to license standard essential patents on RAND terms. See https://casetext.com/case/microsoft-corp-v-motorola-inc-3

      (a) Implementer of standards is a direct third party beneficiary who has standing to enforce contractual obligations of the patent holder.

      (b) Patent holder does not have to start the negotiations on RAND terms, but rather the parties negotiate toward a license agreement on FRAND terms.
b) October 10, 2012 opinion (2012 WL 4827743 at *10, see http://www.wiwd.uscourts.gov/opinions/pdfs/11-C-178-C-10-29-12.PDF) decided that there will be a trial to decide the RAND royalty terms: “[a]ccordingly, the court declines to adopt Motorola’s proposal that the November 13 trial consist of Microsoft’s breach of contract claim. Instead, the November 13 trial will resolve two discrete issues: (1) a RAND royalty range for Motorola's standard essential patents; and (2) a RAND royalty point for Motorola's standard essential patents. Adjudication of both of these issues is necessary to resolve disputes in this litigation, and Motorola agrees that these issues are within the authority of this court to decide. Determination of a RAND royalty range will provide the jury guidance in deciding whether Motorola’s October 21 and 29 Letters breached Motorola’s duty to make offers for its standard essential patents in good faith. Additionally, determination of a RAND royalty range will provide the court guidance in determining a precise RAND royalty (a specific request contained in Microsoft’s complaint), which necessarily must fall within that range…. Based on the foregoing, the court DENIES Motorola’s motion for partial summary judgment dismissing Microsoft’s claim that the court create a license agreement for Motorola's standard essential patent.”

c) April 2013, Judge Robart set a both FRAND rate and range per unit for the Motorola’s video coding and wireless networking patents, for the purpose of helping the jury to determine whether Motorola had breached its FRAND commitment, available at http://www.scribd.com/doc/138032128/13-04-25-Microsoft-Motorola-FRAND-Rate-Determination


On the issue of third party determination of FRAND rates:
- For a discussion of these decisions, see Damien Geradin, The Meaning of ‘Fair and Reasonable’ in the Context of Third-Party Determination of FRAND

- On determination of FRAND terms by arbitration, see:

C. EU litigation

We will not cover EU litigation in this class.

D. EU antitrust


VI. The FTC / Google Consent Decree

A. The Consent Decree


2. In the Matter of Motorola Mobility LLC, a limited liability company, and Google Inc., a corporation - FTC File No. 121 0120
   d) Analysis of Proposed Consent Order To Aid Public Comment, available at
e) Statement of the Commission, available at
f) Separate Statement of Commissioner Rosch, available at
  g) Dissenting Statement of Commissioner Ohlhausen, available at

B. Comments on the Consent Decree