

# Antitrust Law for Intellectual Property Attorneys

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# Today's Agenda

- Overview of the U.S. Antitrust System
- Agreements
- Break
- Monopolization and Attempts
- Mergers

# The U.S. Antitrust System

- The Status Quo Before 1890
- The U.S. Antitrust Statutes
- The Goals of U.S. Antitrust Law
- The Evolution of Doctrine and Policy
- The Core Concepts of Antitrust Today

# Status Quo Before 1890

- Common Law Framework
  - Formative concepts: Rule of Reason
  - Sanction: Non-enforcement of contracts
- National Laws: Canada 1889
- State Constitutions and Statutes
  - Antitrust
  - Corporations

# The U.S. Antitrust Statutes

- Sherman Act (1890): Sections 1, 2
- Clayton Act (1914, 1936, 1950): Sections 2, 3, and 7
- Federal Trade Commission Act (1914): Section 5

# Key Characteristics

- Open Texture
- Decentralized Enforcement
- Criminal and Civil Sanctions

# Open Texture

- Key Terms of Statutes are Open-Ended
  - Sherman Act Section 1: “restraint of trade”
  - Sherman Act Section 2: “monopolize”
  - Clayton Act Section 7: “may be substantially to lessen competition”
  - FTC Act Section 5: “unfair methods of competition”

# Implications

- **Consciously Evolutionary Scheme**
  - Some fixed points of reference
  - Receptivity to new learning
  - Unique role for economics, social science
- **Central Role for the Courts**

# Decentralization

- Department of Justice (Executive)
- FTC (Administrative)
- State Governments
- Customers, Suppliers, Competitors
- *See also:* Sectoral Regulators
- Upward Ratchet?
- Rationalizing Influence: Courts

# Criminal and Civil Sanctions

- Preserving Legitimacy of Criminal Sanctions
- Bright Lines versus Reasonableness Tests

# Goals: Possibilities

- Economic Efficiency
- Wealth Transfers
- Economic Decentralization
- Political Decentralization
- Local Autonomy
- Others?

# Evolution of Policy

- 1890-1914: Early Implementation
- 1914-1936: Ascent of the Rule of Reason
- 1936-1972: Structuralism and Per Se Rules
- 1973-1991: Ascent of the Chicago School
- 1992-Present: Toward a Post-Chicago Synthesis?

# Formative Era: 1890-1914

- Doctrine
  - *Standard Oil* (1911): Rule of Reason and remedies
  - Criminal enforcement endorsed
- Institutions
  - Federal Trade Commission

# Rule of Reason 1915-1936

- Doctrine
  - Section 2: repose
  - Rule of reason: *Chicago Board of Trade* (1918)
- Institutions
  - National experiments with coordination and planning
  - Seeds of exemptions

# 1937-1972

- Doctrine
  - Per se rules: Horizontal restraints, RPM, tying
  - Structuralism: Concentration begets collusion and rarely is explained by efficiency
- Institutions
  - Celler-Kefauver Act of 1950: Mergers
  - Private Actions: Electrical Equipment Cases

# 1973-1991: Chicago School

- Intellectual Debates: Ideas/Institutions
- Doctrine: The Revolution of 1977
  - *Sylvania, Brunswick, Illinois Brick, Fortner II.*
- Institutions
  - 1982 Federal Merger Guidelines
  - Criminal Enforcement
  - The States
  - HSR

# 1992 to Present

- Intellectual Developments: Post-Chicago (Ideas and Institutions)
- Doctrine and Policy
  - Mergers: Drawing the line at 4-3, 3-2, 2-1
  - Single-Firm Conduct
- Institutions
  - Federal Guidelines: Mergers and IP
  - Public Enforcement Triad

# Core Concepts Today

- Market Power
- Anticompetitive Hypotheses
  - Collusive Effects
  - Exclusionary Effects
- Efficiencies

# Monopolization and Attempts

- Overview
  - The Statutory Framework
  - Historical Trends
  - Market Definition/Market Power Measurement
  - The Conduct Element
  - Remedies

# Statutory Framework

- Sherman Act Section 2
  - Monopolization
    - Monopoly Power
    - Improperly obtained or maintained
  - Attempted Monopolization
    - Intent
    - Improper conduct
    - Dangerous probability of attaining monopoly

# Historical Trends

- 1890 to 1914: The Early Monopoly Cases
- 1938 to 1956: *Alcoa* and the New Section 2
- 1969 to 1982: Resurgence
- 1995 to Present

# Market Power

- Direct Evidence
  - Measure demand elasticities
  - Actual price effects or actual exclusion
  - Presumption from IP rights??
- Circumstantial Evidence
  - Market shares in relevant market
  - Profits or price-cost ratios

# Relevant Market

- Product Dimension
  - Demand perspective
  - Supply perspective
- Geographic Dimension

# Special Problems

- Technological Dynamism: Measuring Capability
  - *Standard Oil of Indiana* (1931)
  - *DuPont (Cellophane)* (1956)

# Key Role of Assumptions

- *Alcoa* (1945)
  - Recycled goods
  - Internal Consumption
  - Imports
  - Results: 33, 64, 90

# Aftermarkets

- *Kodak (1992)*
  - Original equipment: copiers
  - Aftermarket: parts and service
  - Lock-in
  - Information imbalances

# Conduct

- Improper Exclusion
- Broad Perspective
  - *Alcoa and United Shoe Machinery*
- Narrower Perspective
  - *Matsushita*

# Conduct: Modern Formula

- *Microsoft* (D.C. Cir. 2001)
  - Monopoly Power
  - Anticompetitive Effects
  - Justifications
  - Balancing

# Forms of Conduct Claims

- Predatory Pricing: *Utah Pie to Brooke*
- Refusals to Deal: *Lorain*, Essential Facilities, and Withdrawal of Cooperation
- Product Design and Development
  - *Berkey, Xerox, and Microsoft*
- Abuse of Administrative Process

# Remedies

- Controls on Conduct
- Structural Relief
  - Licensing
  - Divestiture
- Civil Recovery
- Institutional Capability