

## Book Review

# An Innovative Approach to Teaching Innovation

Herbert Hovenkamp

## Innovation and Competition Policy: Cases and Materials—An Open Source Casebook

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Reviewed by Leon B. Greenfield and Hartmut Schneider

Herbert Hovenkamp's new casebook, *Innovation and Competition Policy*,<sup>1</sup> is an innovation in and of itself—and not only because it breaks with the age-old rule that law school casebooks must be heavy, expensive, and outdated almost from the moment of purchase. The book is available only as a collection of PDF files, so that its incremental weight for the ordinary laptop or iPad-carrying reader is zero. More importantly, the book is free to all, subject only to a modest use restriction. And the book hopefully will benefit from the near real-time amendments made possible by its electronic-only format. Professor Hovenkamp explains that it was the need for frequent updating and the “unacceptably high cost of law school casebooks” that drove his decision to depart from more traditional publication methods.<sup>2</sup>

Professor Hovenkamp's book also is a substantive innovation. Although there are several excellent casebooks and treatises on antitrust, intellectual property (IP), and their intersection, this new casebook adds a unique contribution to the literature. As Professor Hovenkamp explains, the casebook “differs from IP/antitrust casebooks in that it considers numerous sources of competition policy in addition to antitrust, including those that emanate from intellectual property laws themselves, and also related issues . . . .”<sup>3</sup> This is apparent in the discussion of patent doctrines that rarely find a prominent place in literature geared toward an antitrust audience<sup>4</sup> and also in the book's excursions into neighboring areas of the law, such as telecommunications.<sup>5</sup>

The author emphasizes that *Innovation and Competition Policy* is not an “‘IP/antitrust’ casebook because it adopts a broad perspective on competition and innovation.”<sup>6</sup> That means, among other things, that the book embodies a wide range of views on a longstanding question at the heart of both antitrust and intellectual property law: how should the law best maximize returns to society given the frequent tension between creating incentives for pioneering innovations and promoting

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**Leon B. Greenfield and Hartmut Schneider** are partners in the Antitrust and Competition Practice Group of WilmerHale in Washington, DC.

<sup>1</sup> HERBERT HOVENKAMP, INNOVATION AND COMPETITION POLICY, 2011–2012, <http://www.uiowa.edu/~ibl/InnovationCompetitionPolicyCasebook.shtml> [hereinafter INNOVATION AND COMPETITION POLICY].

<sup>2</sup> Herbert Hovenkamp, *Hovenkamp Discusses His New Open Source Antitrust-IP Casebook*, ANTITRUST & COMPETITION POL'Y BLOG, Nov. 14, 2011, [http://lawprofessors.typepad.com/antitrustprof\\_blog/2011/11/guest-post-by-herb-hovenkamp-hovenkamp-discusses-his-new-open-source-antitrust-ip-casebook-.html](http://lawprofessors.typepad.com/antitrustprof_blog/2011/11/guest-post-by-herb-hovenkamp-hovenkamp-discusses-his-new-open-source-antitrust-ip-casebook-.html) [hereinafter Hovenkamp blog].

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., Chapter 1 and its discussion of patent doctrines that determine the scope of the claim as a matter of patent law.

<sup>5</sup> See, e.g., *Talk Am., Inc. v. Mich. Bell Tel.Co.*, 131 S. Ct. 2254 (2011); INNOVATION AND COMPETITION POLICY, *supra* note 1, ch. 8, at 47–53 (discussing *Talk America* decision).

<sup>6</sup> Hovenkamp blog, *supra* note 2.

rivalry among firms? We see this conundrum in the separate realms of antitrust and intellectual property and when the two fields intersect. It is apparent that antitrust lawyers must know some intellectual property law, and intellectual property specialists must be conversant in antitrust to counsel clients and handle their disputes.

Professor Hovenkamp's book is organized into ten chapters, each available as a separate PDF file. Some chapters are relatively traditional in scope, such as the discussion of the law of tying involving intellectual property rights (Chapter 2), the chapter on intellectual property misuse (Chapter 7), and the chapter on post-sale and related distribution restraints involving intellectual property rights (Chapter 10). Other chapters reflect the book's more expansive scope, taking the reader deep into the law of intellectual property (e.g., Chapter 4, "Competition Policy and the Patent System," and Chapter 5, "Competition and Innovation in Copyright and the DCMA") or addressing conceptual or policy questions (e.g., Chapter 9, "The Innovation Commons"). Most chapters devote significant attention to the historical development of innovation and competition policy doctrines, and the book generally focuses on carefully edited original text with judiciously few author's notes. The book is a treasure trove of materials on innovation and competition policy that will appeal not only to students of antitrust, but also to practitioners in their daily work, who will benefit from easy access to foundational cases.

More than 580 pages of cases and notes are not easily summarized, but a brief review of some of the main subjects Professor Hovenkamp presents illustrates his approach.

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### **Innovation Versus Rivalry and the Boundaries of the Patent Right**

Professor Hovenkamp begins with a topic that could hardly be more fundamental to innovation and competition policy, but may be relatively unfamiliar to many antitrust lawyers: defining the scope of the claim as a matter of patent law. He includes a substantial excerpt from *Wright Co. v. Herring-Curtiss Co.*,<sup>7</sup> where the court gave a broad construction to patent claims of the Wright brothers to determine that Glenn Curtiss, an aggressive early rival, had infringed with his own aircraft—even though the “defendants have constructed their machine somewhat differently from [the Wright brothers’] and do not at all times and on all occasions operate the same on the Wright principle.”<sup>8</sup> In his notes following the case, Professor Hovenkamp explains that “[t]he granting of very broad patent rights can permit a pioneer patentee to exclude variations that build in some way on the pioneer’s patent.”<sup>9</sup> Although broad patent claims might be justified as a way to promote more innovation, “it seems fairly clear that broad patent grants reduce competition by permitting pioneers to exclude rival technologies; whether broader scope produces more innovation is very much an open question.”<sup>10</sup>

Antitrust lawyers and courts are used to struggling with questions of how to distinguish between a monopolist lawfully enjoying the fruits of its innovation and a monopolist misusing its power to exclude competition. Patent law encounters a different but similar question: how best to draw the boundary within which the patentee is granted the legal privilege to exclude? Drawing both types of lines in the right place is vitally important to maximizing society's innovation potential.

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<sup>7</sup> 204 F. 597 (W.D.N.Y. 1913).

<sup>8</sup> *Id.* at 614.

<sup>9</sup> INNOVATION AND COMPETITION POLICY, ch. 1, at 15.

<sup>10</sup> *Id.*

Providing incentives to innovate while avoiding undue stifling of rivalry has also been a common theme in courts' treatment of defenses to patent enforcement. In Chapter 4, the casebook presents the recent case of *Therasense, Inc. v. Becton, Dickinson and Co.*,<sup>11</sup> in which the Federal Circuit substantially raised the standards for proving that a patent is unenforceable because of inequitable conduct before the Patent and Trademark Office (PTO). In raising the showing required for both the patentee's bad intent and the materiality of misstatements, the court explicitly took into account the effects of the defense on patentees' incentives and ability to assert their patent rights. After observing that a finding of inequitable conduct is the "atomic bomb" of patent law,<sup>12</sup> the court cited a study showing that 80 percent of patent infringement cases involved claims of inequitable conduct. The court then wrote:

While honesty at the PTO is essential, low standards for intent and materiality have inadvertently led to many unintended consequences, among them increased adjudication cost and complexity, reduced likelihood of settlement, burdened courts, strained PTO resources, increased PTO backlog, and impaired patent quality. This court now tightens the standards for finding both intent and materiality in order to redirect a doctrine that has been overused to the detriment of the public.<sup>13</sup>

This is reminiscent of the concerns about over-intervention and its potential to deter innovation or hard competitive conduct that the Supreme Court has expressed in ruling for defendants in Section 2 cases, such as *LinkLine*, *Trinko*, and *Brooke Group*.<sup>14</sup>

Lest one believe that economic learning invariably influences the outcome of defenses to patent enforcement, Professor Hovenkamp addresses doctrines of per se patent misuse that owe more to (arguably misplaced) fears about a patentee extending the scope of any monopoly conveyed through the patent grant than to concerns about economic efficiency. A prominent example is the *Brulotte* rule,<sup>15</sup> which (with certain exceptions developed over time) prohibits a patentee from enforcing an agreement for the payment of royalties beyond the expiration of the patent. Judge Posner, among others, has pointed out that at least as a matter of economic logic, it is not clear why a patentee and licensee should be prohibited from structuring royalty payments to extend beyond the term of patent, if they believe doing so will maximize their collective gains from the transaction.<sup>16</sup> By collecting post-expiration royalties, the patentee cannot impermissibly extend the patent's duration or demand more for access to its invention than it could extract dur-

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<sup>11</sup> 649 F.3d 1276 (Fed. Cir. 2011).

<sup>12</sup> *Id.* at 1288 (citing *Aventis Pharma S.A. v. Amphastar Pharms., Inc.*, 525 F.3d 1334, 1349 (Fed. Cir. 2008) (Rader, J., dissenting)).

<sup>13</sup> *Id.* at 1290.

<sup>14</sup> See *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120 (2009) ("To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407, 413–14 (2004) (observing that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth," and that the "cost of false positives counsels against an undue expansion of § 2 liability"); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (noting the cost of erroneous antitrust intervention against low prices, which are often the "very essence of competition").

<sup>15</sup> *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

<sup>16</sup> *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014 (7th Cir. 2002). Although the court sharply criticized the *Brulotte* rule, it ruled for the licensee because it determined it was duty bound to apply the Supreme Court's decision on the facts of the case.

<sup>17</sup> *Id.* at 1017–18; see also European Commission, Guidelines on the Application of Article 81 of the EC Treaty to technology transfer agreements, 2004 O.J. (C 101) 2, ¶ 159 ("[T]he parties can normally agree to extend royalty obligations beyond the period of patent validity . . . without falling foul of Article 81(1). Once these rights expire, third parties can legally exploit the technology in question and compete

ing the life of the patent.<sup>17</sup> Another example is *Zenith Radio Corp. v. Hazeltine Research, Inc.*,<sup>18</sup> which holds that it will often constitute per se misuse for a patentee to charge royalties on all products that a licensee produces, whether or not a particular product embodies the technology covered by the licensed patents. Again, one can fairly question why parties that find it most efficient to structure royalty payments in this way—e.g., because it promotes ease of reporting and monitoring for royalty collection purposes—should be prohibited from doing so, at least absent a finding that the structure had a tendency to exclude rival technologies that outweighs any procompetitive benefits from the arrangement.

### Defining the Limits of the Privilege to Exclude

Defining how antitrust law shapes the boundaries of the statutory right to exclude—and therefore the balance between innovation and rivalry—can be particularly complex where intellectual property rights convey monopoly power and disputes arise about whether the IP owner must give access by licensing third parties. In Chapter 8, Professor Hovenkamp focuses on this tension between the privilege to exclude inherent in IP rights and potential antitrust liability for exclusion. The casebook actually begins this discussion with the opposite question: might it violate the antitrust laws to provide intellectual property *to everyone for free*, and under licensing conditions that perpetuate access free of charge? In his unsuccessful attack on open source licensing for the Linux operating system, Daniel Wallace argued that it did—claiming in a nutshell that he was foreclosed from competing with Linux because Linux is available at an “unbeatable price.”<sup>19</sup> The court quickly dismissed Mr. Wallace’s claim, rejecting, among other theories, a predatory pricing argument for ignoring that software available for free will not lead to monopoly prices in the future.<sup>20</sup>

Professor Hovenkamp then turns to more traditional arguments, presenting the familiar monopoly leveraging cases in which defendants were alleged to have used intellectual property to extend monopoly positions in one market to another: the 9th Circuit’s 1997 decision in *Image Technical Services v. Eastman Kodak Co.*;<sup>21</sup> the Federal Circuit’s 2000 decision in *In re Independent Service Organizations Antitrust Litigation (Xerox)*;<sup>22</sup> and the European Court of First Instance’s 2007 decision in *Microsoft Corp. v. Commission*.<sup>23</sup> These cases highlight not only the challenges that U.S. courts have faced in applying Section 2 where alleged exclusion results, at least in part, from the exercise of intellectual property rights, but also the continued divergence between U.S. and European antitrust and competition law on this question. Whether this divergence continues has vital implications, particularly given the recent parallel reviews in the United States, Europe,

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with the parties to the agreement. Such actual and potential competition will normally suffice to ensure that the obligation in question does not have any appreciable anti-competitive effects.”).

<sup>18</sup> 395 U.S. 100 (1969).

<sup>19</sup> Wallace v. IBM Corp., 467 F.3d 1104, 1106 (7th Cir. 2006).

<sup>20</sup> *Id.*

<sup>21</sup> 125 F.3d 1195 (9th Cir. 1997) (upholding Section 2 claim where defendant failed to offer valid business justification for refusal to license intellectual property).

<sup>22</sup> 203 F.3d 1322, 1327 (Fed. Cir. 2000) (declining to follow *Image Technical Services* and holding that the patent holder “may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws” so long as there is no indication of illegal tying, fraud, or sham litigation).

<sup>23</sup> Case T-201/04, 2007 E.C.R. II-3601 (Ct. First Instance), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004A0201:EN:HTML> (analyzing Microsoft’s refusal to license interoperability information to competing manufacturers of server operating systems under European competition law and agreeing with the Commission that Microsoft’s conduct was exclusionary).

and Asia of conduct that potentially implicates both competition and patent laws—especially in the telecommunications area.<sup>24</sup>

### Remedies: A Fine Balance

Once questions about the scope of the patent and its interaction with antitrust principles have been resolved, remedies become the next focus of the competition and innovation debate. Chapter 3 of the book is devoted to remedies and how to compensate inventors for unauthorized use of their inventions without over-detering legitimate innovation that has some connection with the infringement. Professor Hovenkamp uses *Andreas v. Volkswagen of America, Inc.*<sup>25</sup> to illustrate that unauthorized use of intangible property does not typically result in physical damage or may not even diminish enjoyment by the owner. This can present unique challenges in determining the appropriate remedy for infringement: if the property is unharmed and the owner suffers no immediate detriment, is it appropriate to compensate at all? And if the answer is “yes” because society wants to prohibit free riding and preserve incentives to innovate, how does one compensate the owner for infringement?

Mr. Andreas alleged that Audi infringed copyrights by using copyrighted text in a voice-over to the TV launch commercial for the Audi TT Coupe. The district court agreed, and a jury awarded Mr. Andreas \$570,000, or 10 percent of Audi’s profits from domestic sales of the TT Coupe during the time that the allegedly infringing commercial aired. On appeal, Audi argued that the damages were speculative: Mr. Andreas suffered no immediate harm, and it was impossible to determine whether Audi TT buyers were swayed by the use of Mr. Andreas’s copyrighted work or something else, e.g., the engineering or design of the car. The Eighth Circuit disagreed, holding that Congress placed the burden on the infringer to establish the portion of profits attributable to factors other than the infringement.<sup>26</sup> Because Audi had failed to carry this burden, the court allowed the jury award to stand.

Two recent cases at the end of Chapter 3 carry forth the theme of how best to define the scope of patent remedies, this time in the context of the ongoing innovation and competition debate pitting “pure” rights holders—entities that do not practice the inventions they own—against manufacturers that use patented technologies.<sup>27</sup> *Ricoh Co. v. Quanta Computer, Inc.*<sup>28</sup> reflects the trend among lower courts since the Supreme Court’s decision in *eBay Inc. v. MercExchange*<sup>29</sup> to deny injunctions to non-practicing entities (NPEs) for fear that the threat of an injunction provides NPEs

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<sup>24</sup> Cf., e.g., Press Release, U.S. Dep’t of Justice, Statement of the Department of Justice’s Antitrust Division on Its Decision to Close Its Investigations of Google Inc.’s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research In Motion Ltd. (Feb. 13, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/280190.htm](http://www.justice.gov/atr/public/press_releases/2012/280190.htm); Press Release, European Comm’n, Mergers: Commission Approves Acquisition of Motorola Mobility by Google (Feb. 13, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/129&format=HTML&aged=0&language=EN&guiLanguage=en>; Joaquin Almunia, Speech Before the Internal Market and Consumer Protection Committee (Feb. 28, 2012), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/131&format=HTML&aged=0&language=EN&guiLanguage=en> (noting complaints against licensing practices by Motorola).

<sup>25</sup> 336 F.3d 789 (8th Cir. 2003).

<sup>26</sup> *Id.* at 799.

<sup>27</sup> See, e.g., Tom Ewing & Robin Feldman, *The Giants Among Us*, 2012 STAN. TECH. L. REV. 1; Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297 (2010).

<sup>28</sup> Case No. 06-cv-462-BCC, 2010 WL 1607908 (W.D. Wis. Apr. 19, 2010).

<sup>29</sup> 547 U.S. 388 (2006).

“undue leverage in negotiations” with parties seeking to practice their inventions.<sup>30</sup> And the discussion in *IP Innovation v. Red Hat, Inc.*<sup>31</sup> of royalty calculation where the claimed invention was only “one of over a thousand components included in the accused products” is a good example of the thorny issues involved in calculating reasonable royalties for patent infringement.<sup>32</sup>

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Professor Hovenkamp’s collection of cases and materials is both thought provoking and extraordinarily useful—and the price cannot be beat. His casebook should be on the shelf (or e-reader) of every practitioner who deals with issues of innovation and the legal and economic doctrines related thereto, and would be a great basis for students learning about those issues. ●

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<sup>30</sup> *Id.* at 396 (Kennedy, J., concurring).

<sup>31</sup> 705 F. Supp. 2d 687 (E.D. Tex 2010).

<sup>32</sup> *Id.* at 690. NPEs are typically not entitled to ordinary damages because they do not practice their inventions. In *IP Innovation*, the plaintiff alleged that a “workspace switching feature” of Red Hat’s and Novell’s Linux-based operating system infringed certain of its patents. The plaintiff’s damages expert had included in his proposed royalty base all of Red Hat’s and Novell’s revenues from subscriptions to the accused operating system, despite evidence that the claimed invention was only one among more than a thousand components, that users did not buy operating systems based on their workspace switching feature, and that the plaintiff’s expert’s starting royalty rate was significantly above existing royalty rates for licenses to the patents-insuit. For these and other reasons, the court excluded the expert’s testimony on *Daubert* grounds.