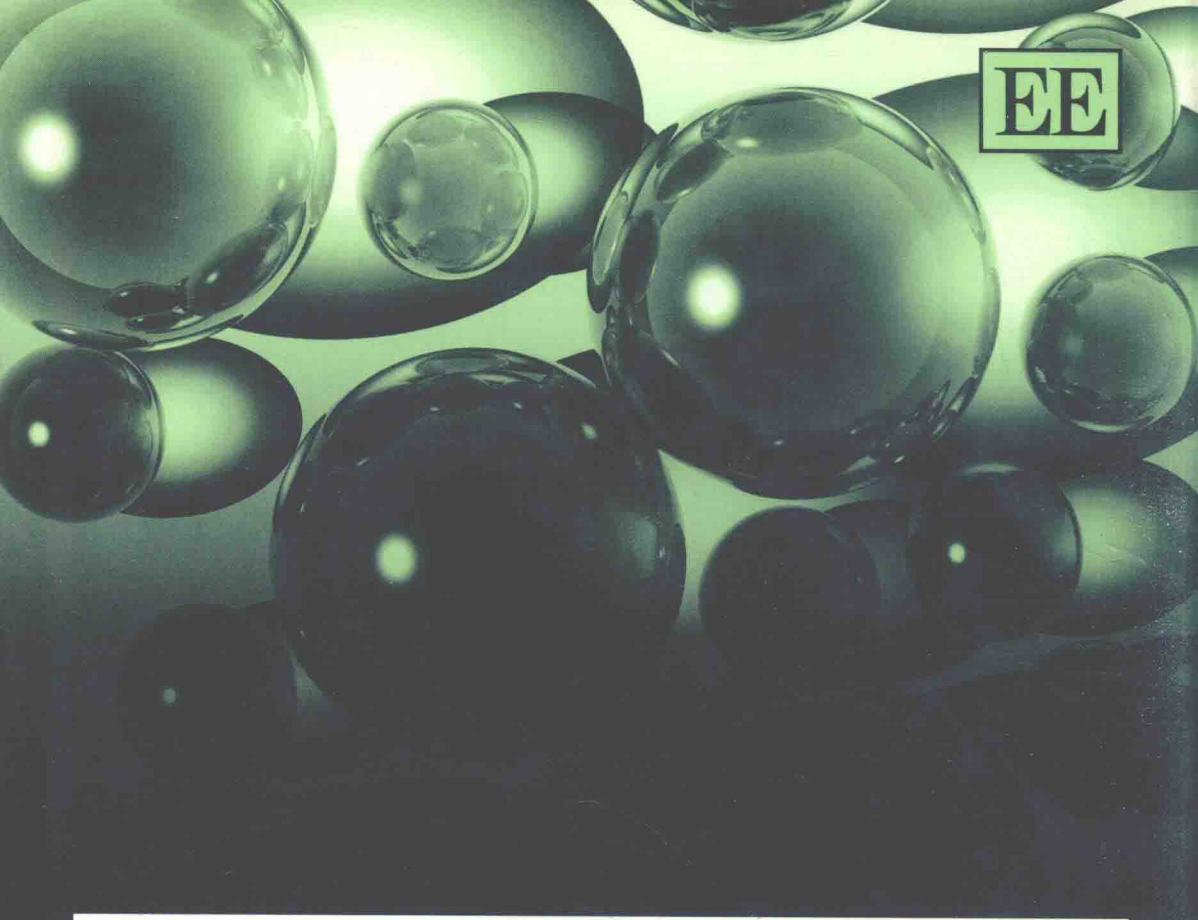

ANTITRUST, PATENTS and COPYRIGHT

EU and US Perspectives

Edited by
FRANÇOIS LÉVÊQUE and HOWARD SHELANSKI

NEW HORIZONS IN COMPETITION LAW AND ECONOMICS

Antitrust, Patents and Copyright

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He is the author, along with Douglas Baird and Thomas Jackson, of *Security Interests in Personal Property: Cases, Problems and Materials* (3rd edition, Foundation Press, 2002). Professor Picker is probably best known for his work *Game Theory and the Law*, co-authored with Douglas G. Baird and Robert Gertner. His recent publications include 'The Digital Video Recorder: Unbundling Advertising and Content' (2003), *The University of Chicago Law Review*; 'Copyright as Entry Policy: The Case of Digital Distribution' (2002), *The Antitrust Bulletin*; *Ninth Circuit Addresses Image Hyperlinking* (2002); *European Union Database Developments: An Update on the Status of Intellectual Property Protections for Factual Compilations* (with Alan C. Raul, 2001).

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Introduction

François Lévêque and Howard Shelanski

Why a book on 'Antitrust, Patents and Copyright'? One reason is that the intersection of intellectual property law and competition policy, a question that has attracted debate and scholarly attention for a long time, has become even more salient as the global economy has become increasingly affected by industries in which technological innovation is a central dimension of performance. Indeed, in the United States, government reports have credited productivity growth driven by technological change with stimulating the major economic expansions of the 1960s, 1980s, and 1990s.[1] Although accurate estimates of the percentages of economic output or growth that can be attributed to innovation are elusive, policy makers and economists strongly agree that innovation is a critical component of long-run economic health. It is no accident that policy makers' concern with fostering innovation grew over the 1980s and 1990s, a period during which those industrial sectors typically defined as 'high technology', such as aerospace, telecommunications, biotechnology, software, and computers, increased their combined share of manufacturing output by more than 50 percent.[2]

Today's wide recognition of innovation as an important driver of economic welfare has spread to antitrust policy. Competition enforcement officials now readily accept that investment in research and the diffusion of innovations are among the most important dimensions of market performance. One prominent US official observed that 'the more important that innovation becomes to society, the more important it is to preserve economic incentives to innovate'.[3] Another stated that, 'as important as price competition is to us, a second major and possibly even greater concern is maintaining competition for innovation'.[4] To be sure, antitrust and intellectual property policies for the most part are complementary. They share common goals of promoting innovation and economic welfare. But in some cases their distinct approaches, one based on competition and the other on exclusion, come into tension. As antitrust authorities focus increasingly on ensuring that firms do not interfere with innovation by rivals or impede the pace of technological progress in an industry, they necessarily must confront

difficult questions about the strength and scope of intellectual property rights. When should private property rights give way to public competition objectives? When is it appropriate to remedy anticompetitive outcomes through access to protected intellectual property? How does antitrust enforcement or competition itself affect incentives to innovate? These questions have sparked renewed interest not just by scholars, but by policy makers themselves. In December 2001, the European Commission released its 'Evaluation Report on the Transfer of Technology Block Exemption', which strove to strike a complementary balance between competition policy and intellectual property rights. In October 2003, the US Federal Trade Commission (FTC) released 'To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy', a sweeping report and set of proposals on the relationship between patent law and competition policy. As these reports make clear, there is considerable ferment in policy towards intellectual property rights and their relationship with antitrust.

The economic salience of innovation and the increasing interest by enforcement officials in the relationship between intellectual property and innovation are reason enough for the scholarly attention exemplified in this volume. But there are two additional motivations for the chapters that follow. First, innovation and competition are increasingly conducted on a global scale. This book and the conference on which it was based[5] provided an occasion to bring together scholars, practitioners and enforcement officials from the United States and the European Union. The differing perspectives they offer can help to shed new light on the complex problems our topic raises. Second, this book expands a discussion that has mostly focused on patents to the realm of copyright policy. The growing importance of rights to digital content in a world of competitive media platforms has made copyright of increasing importance to competition policy in several industrial sectors. The debate over the scope of patent rights exemplified in the EU and FTC reports mentioned above has moved to questions about the appropriate scope of copyright in the face of concerns about competition and innovation. Hence, several of the chapters below bring copyright and its unique considerations into the discussion of the relationship between competition policy and intellectual property.

This book does not strive to offer a comprehensive treatment of the myriad issues relating to the intersection of intellectual property and antitrust or of competition and innovation.[6] It instead aims to advance the current debate by presenting a set of contributions by leading economists and lawyers engaged in relevant fields of research, practice, and policy making. Those contributions, introduced below, help to answer questions already under debate and raise new questions for future inquiry.

OVERVIEW OF CHAPTERS

Chapter 1, by William Kovacic, argues that the traditional litigation and enforcement functions of antitrust agencies are poorly suited to producing effective competition policy for intellectual property rights. He finds that the prosecution model fails to account for the effect of other government agencies on the balance between antitrust and intellectual property and overlooks other methods that antitrust agencies themselves could use to better understand the relationship between the two policy spheres. The author describes the special challenges intellectual property rights can pose for antitrust and suggests several steps for moving beyond litigation in meeting those challenges. The author's suggestions, whose combined effect is to shift antitrust agencies more towards policy making, include hiring more experts in intellectual property at the agencies, institutionalizing ongoing research on the relationship between competition and innovation, and establishing more coordinated relationships with intellectual property agencies in the formulation of policy.

In Chapter 2, Herbert Hovenkamp, Mark Janis, and Mark Lemley move to a more specific problem that highlights the kinds of challenges discussed broadly in Chapter 1. They examine unilateral refusals to license intellectual property in the United States and discuss the conditions under which such refusals might in some cases conflict with antitrust principles. They begin by discussing the long-standing general principles of American law that the owner of intellectual property has no obligation to use or license its rights. They then discuss the conditions under which those principles might give way to antitrust consideration and examine the feasibility of requiring licensing to alleviate anticompetitive outcomes. They follow their discussion with an analysis of how US courts have wrestled with the boundaries between antitrust and intellectual property rights in the context of refusals to license.

Chapter 3 is directly complementary to Chapter 2. John Temple Lang examines a very similar question – that of treating intellectual property as an essential facility that must be licensed to competitors – but from the perspective of European Union law. He offers a detailed critique of the relevant EU case law, extending his analysis to the particular circumstances of vertical leveraging and of standard licensing. The author concludes that the case law provides insufficient guidance for the conditions under which intellectual property should have to be licensed for competition purposes, and comments on the hazards that can flow from the lack of a clear rule. He then proposes general principles on foreclosure and the remedies for it.

In Chapter 4, Daniel L. Rubinfeld and Robert Maness broaden the discussion and examine how a firm might use patents strategically to leverage power among markets, to create anticompetitive barriers to entry, or to

facilitate collusion. They offer an economic analysis that focuses on how patents – and package licensing of those patents – might be used to raise rivals' costs and promote anticompetitive results. Looking at both theory and data from actual cases, the authors demonstrate the harms that can result from under-enforcement of antitrust in the face of strategic abuses of intellectual property rights, but at the same time demonstrate the difficulty of determining where exactly the tradeoffs between competition and innovation should be made.

Chapter 5 further explores the theme of how properly to delimit the scope of intellectual property rights and their use for competitive advantage. François Lévêque revisits the question of intellectual property as an essential facility and as a tool for the leveraging of market power through an analysis of the European Microsoft case. He provides an economic critique of the Commission's test for the exceptional circumstances that could warrant compulsory licensing, and also examines the economic conditions under which the Commission will conclude that intellectual property can be used for anticompetitive leveraging. The author then analyzes the remedy of non-discriminatory licensing and methodologies for calculating royalty payments for such licenses.

Chapter 6 presents an exploration by Richard Watt of whether the current 'one-size-fits-all' protection regime of intellectual property law can be improved upon to provide more efficient incentives to create. This question is quite important and contributes to our understanding of the tradeoffs for innovation that could be involved if intellectual property protections give way in some cases to the interests of competition policy. The author uses the economics of mechanism design to arrive at the counterintuitive result that stronger creations, defined as those that provide larger advances over current technology and that are less likely to be easily replaced, can be efficiently induced with less intellectual property protection than is needed efficiently to induce weaker innovations. The chapter draws on this result to develop a proposal for a more nuanced and efficient regime of intellectual property protection.

In Chapter 7, this volume turns its attention to copyright. Neil Weinstock Netanel examines the meaning and effects of market power in the context of copyright protection. The author begins by describing an important distinction between patent and copyright; namely that, unlike patent law, copyright law's fundamental purposes extend well beyond innovation and into the realms of media, communication, and free speech policy. The 'market power' that may be important in assessing the balance of antitrust and copyright will therefore extend to power of expression and political discourse and not be limited to more conventional antitrust concerns of power of price, and output. The author thus argues that innovation and efficiency

considerations are not alone sufficient to determine the appropriate scope of copyright protection, and that the tradeoff between competition and copyright should not be considered solely within the confines of competition and innovation policy.

In Chapter 8, Randal C. Picker focuses more specifically on how copyrights can be used for competitive strategy in the digital environment, particularly in the United States under the Digital Millennium Copyright Act of 1998. He argues that in more markets than might at first appear evident, copyright can be used not so much to preserve property rights as to create barriers to entry by competitors. The author analyzes a series of examples that demonstrate how copyright protections might enable the rights holder to create 'market locks' through enforcement, or threat of enforcement, against infringers. The chapter then demonstrates that such market locks do not always warrant condemnation but describes the conditions under which the copyright protections do give rise to competitive concerns that competition authorities should remedy.

Finally, in Chapter 9, P. Bernt Hugenholtz addresses the potential anticompetitive abuses of database property rights in the EU under the European Database Directive of 1996. He explains why, though analogous to copyright, database rights are from an economic perspective potentially both stronger and broader because they can both cover otherwise non-copyrightable material and be very hard to create around. Therefore, the author explains, database rights might confer much greater product market power than copyrights typically do. The chapter examines how the European courts have addressed the potential competitive harms of the database rights and concludes that, although some of the potential for abuse has been curtailed, the courts have not yet seriously addressed the substantial potential for anticompetitive uses of database protection that still exist under EU law. He thus proposes an amendment of the Database Directive that would incorporate a compulsory licensing remedy, arguing that such a remedy would reduce competitive harms and serve the Directive's purpose of promoting innovation.

The chapters in this volume present a diverse set of analyses and specific policy proposals that bear directly on how policy makers in the EU and the US should balance the various objectives of competition policy, patent rights, and copyright law. While in some cases the proposals or considerations raised apply more to one jurisdiction than the other, they for the most part transcend geography and provide commentary that is relevant on both sides of the Atlantic Ocean, if not globally. If this volume succeeds in its mission, the arguments and proposals it presents will both advance the ongoing debates over antitrust and intellectual property rights and encourage research that will take those debates in new and increasingly productive directions.