Antitrust Outline
Fall 2006

1) Introduction
   a) The U.S. Statutory Framework: The Sherman Act (1890)
      i) § 1 Sherman Act: Collusion
         (1) Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.
      ii) § 2 Sherman Act: Monopolization
          (1) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .
             (a) Fine for corporation: $100,000,000
             (b) Fine for individual: $1,000,000; 10 years in prison
      iii) Clayton Act
           (1) Robinson-Patman Act (a): It shall be unlawful for any person engaged in commerce,… to discriminate in price between different purchasers of commodities of like grade and quality, …where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them
   b) Why Antitrust (Competition) Law?
      i) Hand—social and moral effect—good for economy to be diverse and everybody doesn’t have to work for somebody else. They can be creative and have the satisfaction of being one’s own boss. Looking at the pervasive impact on society, not consumer choice, efficiency.
      ii) Lande—economic but concerned about the distribution of wealth rather than efficiency (excessive prices). He was concerned about the transfer of wealth from consumers to producers (decrease consumer surplus/increase producer surplus).
      iii) Posner—monopolists may incur higher costs in order to maintain a monopoly → these costs do not go to benefit consumers but to maintain the monopoly. (lobbying costs, preventing others, etc.)
      iv) Bork—concern for consumer welfare and productive efficiency dominated the original intent of Congress in making competition laws.
      v) Pitofsky—believed Congresses intent was not purely economic, but that Congress feared that excessive concentration of economic power will breed antidemocratic political pressures; did not want private discretion by a few in the economic sphere to control the welfare of all.

2) Single Firm Conduct:
   a) Market Power: Monopolization and Abuse of Dominant Position
      i) Microsoft Litigation in the U.S.
         (1) U.S. v. Microsoft (monopoly maintenance [OS], attempted monopoly [IE], Tying [OS and IE])
            (a) Attempted monopoly
               (i) The offense of monopolization has 2 elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power. U.S. v. Grinnell Corp. (1966)
                  1. Monopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry
barriers (factors that prevent new rivals from timely responding to an increase in price above the competitive level).

a. Applications barrier to entry

(ii) § 2 violation proof structure:
1. Monopolists act must have an anticompetitive effect
2. P has burden of showing that the conduct has the requisite anticompetitive effect (harm competition, not just a competitor)
3. Δ may proffer a procompetitive justification for its conduct
4. If this justification goes unrebutted, P must show that the harm outweighs the procompetitive benefit

(iii) Causation
1. P doesn’t have to provide direct proof.
2. Causation may be inferred when exclusionary conduct is aimed at potential competitors.

(b) Attempted monopoly—P didn’t really make this case.

(2) Market Definition
(a) Market Definition Problem
(b) U.S. v. E.I. DuPont de Nemours & Co.
   (i) The relevant market includes all products reasonably interchangeable by consumers for the same purposes.
   1. Cellophane fallacy: opinion has been criticized for starting at the wrong cost benchmark for analyzing substitutionability. SC failed to consider the firm has already exercised monopoly power by raising the prices above the competitive level.
   (c) Eastman Kodak Co. v. Image Technical Services Inc. (1992)
      (i) A single brand can constitute a relevant market.

ii) Microsoft Litigation in the European Community
      (a) Article 81:
         (i) All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market shall be prohibited.
      (b) Article 82:
         (i) Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited

   (2) European Competition Law: The European Commission
      (a) Microsoft before European Commission (Sun Interoperability and WMP Bundling)
         (i) Market definition:
            1. Look at demand side sub (determined by products characteristics, prices, and intended use) and, when its effects are equal to those of demand sub in terms of effectiveness and immediacy,
            2. Consider supply side sub (suppliers can respond to SSNIP of the relevant product in the short term—SSNIP test and consider barriers to entry).
            3. Geographic market—the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because of the conditions of competition are appreciably different in those areas.
            4. Network effects
      (b) United Brands v. Comm’n (1978)
         (i) Dominant position—position of econ strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the
relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers.

(c) *Hoffman-la Roche & Co. v. Comm’n* (1979)
   (i) Dominant position different than a monopoly because it doesn’t necessarily preclude competition, but enables the undertaking to have a significant influence on the conditions under which competition develops.
   (ii) *AKZO*—market shares of 50% or more are evidence of a dominant position.

(d) *Europenballage Corporation v. Comm’n* (Continental Can) (1973)
   (i) ECJ reversed Commission decision for failing to take into account the ease of entry for other suppliers in the market (supply side sub)

b) Anticompetitive Conduct
   i) U.S.
      (1) *U.S. v. Aluminum Co. of America* (ALCOA)
         (a) The origin of a monopoly may be critical to determining its legality.
         (b) Must be active—can’t be punished for superior skill, foresight, and industry.
         (c) To fall within § 2, a monopolist must have both the power and the intent (but not specific intent because no monopolist monopolizes unconscious of what it is doing) to monopolize.

      (2) *U.S. v. Griffith*—a person has violated § 2 if it has (a) the power to exclude competition; and (b) has exercised it, or has the purpose to exercise it.

c) Tying
   i) *U.S. v. Microsoft* (IE tied to OS)
      (1) Examined § 1 tying violation under R of R rather than *per se* since it is a new technology.
         (a) R of R lets the Δ of newly integrated products show that an efficiency gain from its tie offsets any distortion of consumer choice.
      (2) 4 elements to a *per se* tying violation:
         (a) Tying and tied goods are two separate products
            (i) *Jefferson Parish* (consumer demand test)—there must be separate demand for the two products so that it may be efficient to offer the two separately.
               1. The less of a separate demand, the more it can be assumed that the tying arrangement increases efficiency (balancing against the reduction in consumer choice).
            (ii) Indirect cindustry custom test—look at firms who, unlike Δ, have not integrated the tying and tied goods and balance the efficiencies.
            (iii) The consumer demand test is backward looking, so it is not appropriate when new and innovative integration is in question.
         (b) Δ’s have market power in the tying product
         (c) Δ affords consumers no choice but to purchase the tied product from it; and
            (i) Either by literally only selling the two products together or through pricing.
            (d) The tying arrangement forecloses a substantial volume of commerce.

   ii) Microsoft before European Commission (WMP tied to OS)
      (1) 4 elements of tying Art. 82 violation:
         (a) 2 separate products;
            (i) Comm’n rejects MS’s integrative approach argument saying there are two separate markets where there are independent manufacturers of the two products indicating separate consumer demand and a distinct market.
            (ii) The non-insignificant consumer demand for media players overcame MS’s argument that this was a new innovation with unexplored efficiencies.
         (b) Dominance in the tying market;
Undertaking doesn’t give customers choice to obtain the products untied; and
(d) Tying forecloses competition.

(2) MS got to offer procompetitive justifications, but they were not enough

(1) Tying case (nails to nail guns—one: many tying arrangement)
(a) The concern is mainly about metering prices.
(b) Preserved dominant position in nails by leveraging its dominant position in
nail guns.
(c) Allowed to present justifications, but still found in violation.

Exclusionary Practices and Abuses
i) Refusals to Deal—“essential facilities doctrine”: Single firms usually have an option
to choose whether and with whom to deal, but the essential facilities doctrine is a
(very narrow) exception to this rule; however concerted refusals to deal (“group
boycotts”) are presumed to be anticompetitive and thus subject to the per se rule
under § 1 Sherman Act.

(1) U.S. v. Colgate
(a) The Colgate Doctrine: “[I]n the absence of any purpose to create or
maintain a monopoly a manufacturer engaged in private business may
exercise his discretion as to parties with whom he will deal, and may refuse
to sell to those who will not maintain specified resale prices.”

(2) MS before EC (interoperability)
(a) Although the Commission did not explicitly state it, its decision that MS
abused its dominant position by refusing to provide information necessary
for competing server software providers to interact with Windows was based
on the “essential facilities doctrine.”

(3) U.S. v. Terminal Railroad Ass’n (1912)—Origin of the EFD
(a) Facts: Ass’n of 14 RR’s acquired access to all Mississippi River bridges, car
ferries, and terminal facilities at STL. Ass’n determined the conditions under
which access would be granted, but nonmember RR’s had not been excluded
or charged more.
(b) Claim: Gov’t sought dissolution of ass’n as a combination in restraint of
trade in violation of § 1 Sherman Act.
(c) Terminal Railroad “transcended its heritage as a combination (Section1)
case. It became the paradigm for essential facility duties… it had the duty to
grant reasonable access to competing railroads. If it denied such access, it
could only be to impose costs on competitors.”
(d) This case could have been a characterized as a “concerted refusal to deal” or
classic boycott case or as an unlawful combination (what the gov’t argued).

(4) Otter Tail Power Co. v. U.S.—EFD applied to single firm
(a) Public Utility was a natural monopoly (marginal costs declined over a
substantial range of output so that duplication of facilities would have raised
unit costs of output)
(b) OT’s lines were needed to transmit power into municipalities it wasn’t
serving; it refused to do so.
(c) Found in violation of § 2 holding access to those lines were necessary.

(5) Hecht v. Pro-Football, Inc.—first U.S. case in which the term “essential facility”
was actually used.
(a) Redskins RFK stadium case.
(b) “Within the "essential facility" doctrine, to be ‘essential,’ a facility need not
be indispensable; it is sufficient if duplication of the facility would be
economically infeasible and if denial of its use inflicts a severe handicap on
potential market entrants.”

(6) MCI Communication Corp. v. AT&T—first serious effort to delineate the
elements of this doctrine.
(a) Another natural monopoly case where AT&T denied MCI access to its lines
which were necessary to connect some of MCI’s users.
“Elements necessary to establish liability under the essential-facilities doctrine for a refusal to deal are: (1) control of the essential facility by a monopolist; (2) competitor's inability practically or reasonably to duplicate the essential facility (Hecht); (3) denial of the use of the facility to a competitor; and (4) feasibility of providing the facility to the competitor.”

“Monopolist's refusal to deal may be unlawful because its control of an essential facility can extend its monopoly power from one stage of production to another and from one market to another.”

Aspen Skiing Company v. Aspen Highlands Skiing Corporation

(a) “The offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.”

(i) First element not challenged by Aspen Skiing.
(ii) Second element: Ski Co’s “exclusionary” or "anticompetitive "predatory" act? Refusal to continue joint arrangement with competitor

(b) Lorain Journal Co. v. U.S.—discussing limitations to the (qualified) right of refusal to deal (newspaper advertising scheme): “The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act.” (Cf. Colgate Doctrine)

(c) Intent: “[E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as ‘exclusionary’ or ‘anticompetitive’--to use the words in the trial court's instructions--or ‘predatory,’” but, "no monopolist monopolizes unconscious of what he is doing."

(d) Rule from Aspen/Kodak: a firm with monopoly power violates Sherman Act § 2 if it excludes rivals from the monopolized market by restricting a complementary or collaborative relationship without an adequate business justification.

(i) This rule does not require proof of harm to competition; harm is inferred if the dominant firm exploits a complementary or collaborative relationship to exclude and the dominant firm's proffered business justification is insufficient.” (cf. predator pricing)

(e) Court says in FN: “Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the ‘essential facilities’ doctrine….”

Verizon Communications v. Trinko

(a) DOJ and FTC amicus brief supporting: “some courts of appeals have developed an ‘essential facilities’ doctrine divorced from traditional antitrust requirements, including proof of exclusionary conduct,”

(b) Distinguishes Aspen—in that case Δ unilaterally terminated voluntary (thus presumably profitable) course of dealing with rivals and were unwilling to renew the ticket even if compensated at retail price.

(i) “In Aspen Skiing, what the defendant refused to provide to its competitor was a product that it already sold at retail…. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public.”

(ii) Monopolists must engage in anticompetitive conduct to be found unlawful (but cf. MS interoperability issue in EC).

(iii) Court worried about lessening incentives to invest in economically beneficial facilities.

(c) Put EFD on life support: “We have never recognized such a doctrine… and we find no need either to recognize it or to repudiate it here.”
(9) Refusal to Supply in the EU
   (a) Microsoft: Interoperability issue: MS abused dominant position by refusing to provide the information necessary for competing server software providers to interact with Windows.
      (i) Did not use term “EFD” but relied on case law embodying it
      (ii) MS’s refusal to supply constituted a disruption of previous levels of supply.
         1. Two key elements of MS’s behavior being anticompetitive:
            a. MS enjoys a position of extraordinary market strength;
            b. Access to the supply in question is of significant competitive importance in this market (there are no substitutes).
            c. (Not necessary probably, but important) Refusal to deal enabled MS to gain a dominant position in the w-g server market.
   (b) Commercial Solvents
      (i) Abuse of dominant position if:
         1. Has a dominant position; and
         2. Refusal to supply risks eliminating all competition on the part of the person that is being refused.
   (c) Magill (see Antitrust and IP below)
ii) Predatory Pricing
(1) United States
   (a) Barry Wright Corp. v. ITT Grinnell Corp. (1st Cir.)
      (i) Facts: Snubbers; looking at whether Pacific maintained its monopoly position against the threat of Barry’s entry through improper means (exclusionary conduct).
         1. Barry points to Pacific’s: (1) offer of special discounts to Grinnell; (2) its insistence on a long-term large-volume contract; (3) and its inclusion of the special non-cancellation clause--which it claims show that Pacific acted in an exclusionary manner.
      (ii) Predatory Pricing
         1. The difficulty in measuring costs, discerning intent, and predicting future market conditions makes it difficult to detect predatory price cutting.
         2. Separating goats from sheeps
         3. A firm has incentive if it knows (1) that it can cut prices deeply enough to outlast and to drive away all competitors, and (2) that it can then raise prices high enough to recoup lost profits (and then some) before new competitors again enter the market.
      (iii) Intent—The standard is not in intent but the relation of the suspect price to the firm's costs; modern antitrust courts look to the relation of price to "avoidable" or "incremental" costs as a way of segregating price cuts that are "suspect" from those that are not.
         1. When costs of additional unit > price, clearly low price cannot be maintained and equally efficient competitors cannot permanently match this price and stay in business.
         2. Wouldn’t do this unless thought could recoup losses.
      (iv) If prices are above both AC and MC they are lawful. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc. (9th Cir.)—exception to this rule: price cut is unlawful if made to discipline or eliminate competition and enhance the firm's long-term ability to reap the benefits of monopoly power.
         1. \( p < \text{avc} \Rightarrow \) presumption predatory
         2. \( p > \text{avc}, < \text{atc} \Rightarrow \) P must show by preponderance of the evidence that Δ’s pricing policy is exclusionary
         3. \( p > \text{atc} \Rightarrow \) plaintiff clear & convincing exclusionary
            (Transamerica)
a. Not followed here: “law is an administrative system the effects of which depend upon the content of rule and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients”; i.e. even though there is an economically based argument, it is likely procompetitive price cuts could be struck down (circuit split—see FN in Brook Group SC opinion sounds like it is still over turning the 3rd element of Inglis)
b. Above-cost price cuts are typically sustainable, normally desirable, and the “disciplinary cut” is difficult to distinguish in practice; so Sherman Act doesn’t make this unlawful.

(v) Court concerned with restricting price cutting too much since low price levels (competitive prices) is part of the aim of antitrust law.

1. Birds in the hand v. birds in the bush

(b) Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

(i) Facts: generic v. branded cigarettes; Brooke file § 2(a) (Robinson-Patman Act) claim alleging B&W’s volume rebates were illegal price discrimination that had a reasonable possibility of injuring competition.

1. Allegedly violated § 2(a) of the Clayton Act (R-P Act)
2. Price discrimination within the meaning of this provision is merely a price difference, but the R-P Act condemns price discrimination only to the extent that it threatens to injure competition, hence these defenses:
   a. difference in price based on differences in costs;
   b. changing conditions affecting the market for or the marketability of the goods concerned; or
   c. conduct undertaken in good faith to meet an equally low price of a competitor

(ii) Price discrimination v. predatory pricing

1. Primary-line injury—harming direct competitors of the discriminating seller.
2. Utah Pie Co. v. Continental Baking Co. (antitrust zombie)—often interpreted to permit liability for primary-line price discrimination on a mere showing that Δ intended to harm competition or produced a declining price structure; was just an early inquiry in this area.
   a. Since Utah Pie courts have decided primary-line competitive injury under R-P is of the same general character as predatory pricing injury under § 2 Sherman
   b. Differences between PD and PP: § 2 Sherman condemns PP when it poses a dangerous probability of actual monopolization (Spectrum Sports, Inc. v. McQuillan), while R-P requires on reasonable probability of substantial injury to competition before its protections are triggered.
   c. Essence under each statute: firm priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain an exercise control over prices in the relevant market.

(iii) 2 prerequisites for claim alleging PP under § 2 or primary-line PD under the R-P Act. P must:

1. Prove prices are below an appropriate measure of costs to establish competitive injury.
   a. Exclusionary effect of prices > relevant measure of cost either likely indicates competition on the merits or it is beyond the practical ability of a court to control without chilling legitimate price-cutting.
2. Demonstration $\Delta$ had a reasonable prospect (R-P), or a dangerous probability ($\S$ 2) of recoupment (not going to enhance consumer welfare).

(iv) Role of oligopoly:
1. Even in an oligopolistic market when price cuts are made to punish, it would often be unwise to punish these price cuts, because this may be one of a few ways to break down oligopoly pricing.
2. Interdependent pricing by an oligopoly may provide a means for achieving recoupment and form the basis of a primary-line injury claim. (still need to show two steps)

(c) *U.S. v. AMR Corp.*: See PowerPoint
(d) *WEYERHAEUSER CO.*: See PowerPoint
(i) Predatory buying

(2) EU
(a) *AKZO Chemie v. Comm’n*
(i) $\Delta$ prohibited from applying different prices to rivals’ customers in order to obtain their business, but $\Delta$ can apply different prices to different categories of customers, which reasonably and objectively reflect differences in production and delivery costs.
(ii) Importance of intent: Article 82 doesn’t make costs the decisive criterion for determining whether price reductions by a dominant undertaking are abusive. This would not give adequate weight to the strategic aspect of price-cutting behavior. There can be an anticompetitive object in price-cutting whether or not the aggressor sets its prices above or below its own costs, whatever the manner in which those costs are understood.
(iii) When costs are determinative: The exclusionary consequences of a price-cutting campaign might be so evident that no evidence of intention to eliminate a competitor is necessary.
1. Prices $< \text{AVC (MC)}$ must be regarded as abusive (per se?).
2. Prices $< \text{AVC but} > \text{AVC}$ must be regarded as abusive if they are determined as part of a plan for eliminating a competitor.

(b) *Companie Maritime Belge Transport v. Comm’n*
(i) Collective dominance: (Art. 82 “one or more undertaking” implies…) a dominant position may be held by two or more economic entities that present themselves as a collective entity on a particular market from an economic point of view.
(ii) The list of abusive practices in Art. 82 is not exhaustive.
(iii) Decision depends on intent a lot—$\Delta$’s said in court that they matched the price of their competitor to eliminate it from the market.
(iv) Art. 81 & 82 to can both be applicable to a firm’s conduct AND a grant of exemption under Art. 81(3) does not prevent application of Art. 82.

e) Horizontal Restraints—Foundations (Looking at prohibitions of multi-firm conduct under § 1 Sherman and Art. 81)

i) Analysis: (1) Was there an agreement?; (2) did the competitors agree to setting price or output (or certain tie-ins, collective refusals to deal, and territorial allocations)?; (3) Look for structural characteristics (*Northwest Wholesale Stationers*); (4) Should this type of agreement always be considered per se unlawful?

ii) Early U.S. Horizontal Restraint Cases
(1) *U.S. v. Trans-Missouri Freight Ass’n.* (1897)
   (a) Facts: group of RR’s formed an association and agreed upon the rates that members would charge.
   (b) SC first wrestles with the meaning of “every contract, combination…, or conspiracy in restraint of trade….”
   (c) Determines that all K’s that restrain trade are unlawful, not just unreasonable restraints on trade. Court recognizes this is a problem.
(2) *U.S. v. Joint Traffic Ass’n* (1898)
SC retreats from breadth of its previous interpretation: “the statute only applies to those contracts whose direct and immediate effect is a restrain upon interstate commerce….”

The effect upon commerce must not be indirect or incidental only.

(3) *U.S. v. Addyston Pipe & Steel* (1898)

(a) Seems to be setting up *per se* illegality.

(b) No conventional restraint on trade can be enforced unless the covenant embodying it is *merely ancillary to the main purpose of a lawful K*, and *necessary* to protect the covenantee in the enjoyment of the legitimate fruits of the K, or to protect him from the dangers of an unjust use of those fruits by the other party.

(c) Where the sole object of the parties is merely to restrain competition, it would seem there was nothing to justify the restraint and therefore would be void.

(i) There is no question of reasonableness open to the courts with reference to such a K.

(ii) The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.

Development of Rule of Reason & *per se* illegality in U.S.

(1) *Standard Oil v. U.S.* (1911)

(a) Justice White establishes the rule of reason and says reasonableness should be determined by the standard used at common law.

(b) However, what Standard Oil was doing was inherently unreasonable, so the contours of the rule of reason were developed subsequently.

(c) Concern that this decision undermined the effectiveness of the Sherman Act led to adoption of Clayton Act (1914).

(2) *Chicago Board of Trade* (1918)

(a) “The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”

(b) Importance of history and intent: “The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.”

(3) *U.S. v. Socony Vacuum Oil Co.* (1940)

(a) “[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.”

(b) § 1 price fixing violation *per se* unlawful: “Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.”

(4) Subsequently, U.S. courts have extended the *per se* rule to a variety of other conduct (horizontal and vertical).

(a) Horizontal: agreements allocating territories or customers, collusive boycotts, price fixing, etc.

(b) Vertical: agreements with purchasers as to prices they would charge (RPM), restrictions as to territories or customers served by purchasers, tie-in sales, etc.

(c) More recently courts have been applying the R of R more frequently to this kind of conduct, but horizontal price-fixing remains the paradigm of *per se* illegality (*but, see, BMI*) horiz 1 PP

Establishing European Community Competition Law
(1) Article 81
   (a) *Per se*
      (i) Violations of Art. 81 “automatically void”
      (ii) Art. 81 also lists specific examples of what would be a violation
   (b) Is there a basis for R of R in European competition law?
      (i) Art. 81(3) provides a list of exceptions for agreements otherwise
          condemned.

(2) Regulation 17
   (a) Implemented Art.’s 81 and 82 with an enforcement procedure that included a
       “negative clearance” process.
   (b) Commission created “block exemptions” to deal with large number of filings.
       Agreements meeting specified conditions were exempted from scrutiny and
       not required to be filed.
   (c) Reg 17 now replaced by Council Regulation 1/2003: negative clearance
       procedure abandoned and more power and responsibility given to
       enforcement authorities in the member states.

v) Early EU Horizontal Restraint Cases
(1) *ACF Chemiefarma v. Comm’n* (Quinine/Malaria Drug Case)
   (a) Facts: Δ’s had overt cartel and then entered into a series of agreements to
       reserve their home markets for themselves and to fix prices and quotas for
       exports to all other countries. Created a “gentleman’s agreement” before
       Reg. 17 in force. Question is whether they were still operating under that
       agreement after Reg. 17.
   (b) Although Δ’s said they ended the agreement, but their behavior
       (communication and conduct on the market) indicated otherwise, so the
       Comm’n found them per se violating Art. 81.

(2) *Imperial Chemical Industries Ltd. v. Comm’n* (Dyestuff)
   (a) Oligopoly charged with price-fixing due to pattern of price leadership.
   (b) Oligopoly behavior—tendency of oligopolists to act interdependently
       because of the structure of the market.
      (i) Parallel behavior (uniform prices) by itself is not enough to show
          concerted practice, but it may provide strong evidence of it if it leads to
          conditions of competition which do not correspond to the normal
          condition of the market (given the context of that market).
      (ii) In this case the court thought the circumstances of the parallel behavior
          made it implausible that they could occur absent an agreement
          (widespread price increases in a short period of time across
          geographically diverse markets).
      (iii) Firms are allowed to take into account the present or foreseeable conduct
          of its competitors, but it may not cooperate in a way designed to replace
          the risks of competition and the hazards of competitors’ spontaneous
          reactions by cooperation constituting a concerted practice prohibited by
          Art. 81.
          1. Can’t coordinate in order to ensure success by prior elimination of all
             uncertainty as to each other’s conduct re: amount, subject matter,
             date, and place of the increases).

(3) Wood Pulp Case
   (a) Δ’s charged for concerting on price announcements and price (prices always
       quoted in $’s).
   (b) “Concerted practice”: a form of coordination between firms w/o a formal
       agreement being made that knowingly substitutes for the risks of competition
       practical cooperation between them.
      (i) Each economic operator must determine independently the policy which
          he intends to adopt.
   (c) Without documented evidence of concertation, you need to assess whether
       the indirect evidence constitutes firm, precise, and consistent evidence.
(i) Parallel conduct cannot constitute concertation unless there is not other plausible explanation for the conduct.

(ii) Degree of transparency in a market can effect this analysis.

vi) Defining Agreement and the Oligopoly Problem

(1) U.S. Cases: anterior question to determining whether there was an K in restraint of trade: was there an agreement at all?

(a) Interstate Circuit v. United States

(i) Facts: movie theatre manager demanded film distributors not sell their product to theatres pricing movie tickets below a certain price or offering double feature options.

(ii) Distributors found in violation of § 1 for entering into an unlawful agreement that they know would result in an unreasonable restraint on commerce.

(b) Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.

(i) Facts: P alleged Δ’s (movie produces and distributors) conspired to restrict “first run” pictures to downtown Baltimore theatres.

(ii) “This Court has never held that proof of parallel business behavior conclusively establishes agreement…” while circumstantial evidence of consciously parallel behavior may be significant in a court’s analysis “conscious parallelism has not yet read conspiracy out of the Sherman Act entirely.”

1. Still need to show there is a conspiracy, and CP can be evidence of it, but showing CP alone is not enough to establish a § 1 violation.

(c) U.S. v. Container Corp.

(i) Δ’s had 95% of market and were sharing pricing information.

(ii) Even though prices were going down, still found a violation because prices could have gone down further due to the state of the market—sharing prices presumed to be bad.

(d) Toys “R” Us, Inc. v. FTC

(i) TRU found to be the “ring master” of a horizontal conspiracy among toy manufacturers.

(ii) Case involved: direct evidence of communication and a decision by the manufacturers to stop dealing with customers with whom they used to deal, denying themselves a profitable sales outlet.

(iii) The only condition on which each manufacturer would agree to TRU’s demands was if it could be sure its competitors were doing the same thing.

vii) Horizontal Restraints—Contemporary Understanding

(1) U.S. Cases (Exceptions to per se horizontal restraint (price fixing) rule

(a) Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (1979)

(i) Facts: P alleged fees charged for blanket licenses constituted price fixing. SC held this does not constitute per se unlawful price fixing and should be examined under the R of R.

(ii) Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints.

(iii) It is only after considerable experience with business practices that courts classify agreements or practices as per se violations of the Sherman Act.

(iv) Analyze conduct that is allegedly per se rule based on whether the effect (and when it tends to show effect) the purpose of the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, or whether the practice appears designed to increase economic efficiency and competition.
(v) Blanket licensing is not a "naked restraint" because it accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use (arose out of the practical situation in the market).

(vi) **Quick look doctrine?**

(b) *Texaco Inc. v. Dagher*

(i) Facts: SC looking at whether it is *per se* illegal under § 1 Sherman for an economically integrated joint venture to set the prices at which the joint venture sells its products. A: No.

(ii) "Per se liability," under Sherman Act § 1, is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of industry is needed to establish their illegality.

   1. Accordingly the SC has been reluctant to adopt per se rules where the economic impact of certain practices is not immediately obvious.

(iii) Ancillary restraint doctrine: determine whether the restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.

   1. Doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities.

   2. SC says has no application here since a core activity of the joint-venture itself is being questioned.

(iv) Joint ventures: When would be competitors pool their capital and share the risks of loss/opportunities for profit, they are regarded as a single firm competing with other sellers in the market.

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viii) Horizontal Non-Price Restraints

(1) Collective Refusals to Deal

(a) *Associated Press v. United States*

   (i) Facts: AP joint venture by-laws prohibited the sale of AP news to nonmembers.

   (ii) SC held the by-laws on *their face* constitute a restraint on trade.

      1. Doesn’t matter they haven’t yet resulted in a restraint.

      2. An agreement or combination to follow a course of conduct which will *necessarily restrain or monopolize* a part of trade or commerce may violate the Sherman Act, whether it be ‘wholly nascent or abortive on the one hand, or successful on the other.’

(b) *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*

   (i) Facts: P appliance dealer alleged a neighboring department store conspired with manufacturers not to sell to it or to sell only at discriminatory prices/unfavorable terms.

   (ii) Group boycotts or concerted refusals to deal are per se unlawful.

(c) *Fashion Originators’ Guild of America, Inc. v. FTC*

   (i) Facts: Δ’s refused to deal with retailers who sold unauthorized copies of their creations: per se unlawful.

   (ii) Even if copying designs were an acknowledged tort by every state, that situation would not justify Δ’s actions.

(d) *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*

(e) Facts: cooperative buying agency expelled a member w/o providing any procedural means for challenging the expulsion (joint activity that is susceptible of being characterized as a concerted refusal to deal): not per se unlawful

(f) Pp. 168-169: pros & cons of per se rule.

(g) Antitrust laws don’t impose on joint ventures a requirement of process, so this case turns on whether the decision to expel is properly viewed a group boycott mandating per se invalidation under § 1.
(i) "[T]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine."

(ii) For per se rule to apply, must present a threshold that the challenged activity falls into a category likely to have predominantly anticompetitive effects, and mere allegation of concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.

(iii) Cases to which this Court has applied the per se approach have generally involved joint efforts to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle."

(h) NCAA v. Board of Regents of University of Oklahoma—per se treatment was inappropriate because horizontal restraints on competition was essential if the product was to be available at all in this industry.

(i) Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.

(j) Jefferson Parish—absent indication of market power, tying arrangement does not warrant per se invalidation.

(3) Vertical Restraints
   a) U.S. Approach to Vertical Restraints Under Sherman Act § 1
      i) Retail Price Maintenance (Minimum)
         (1) Dr. Miles Medical Co. v. John D. Park & Sons (1911)
            (a) Facts: Consignment fixing prices at the retail and wholesale levels: effect—agreement on price.
            (b) RPM is per se illegal.
               (i) Vertical price restrictions are viewed as the equivalent of horizontal restrictions among dealers.
         (2) U.S. v. Colgate (1919)
(a) Manufacturer has limited freedom to unilaterally refuse to deal, thereby enforcing RPM (Colgate Doctrine).

(3) *U.S. v. GE* (1926)
(a) RPM ok in agency Ks (limited by *Simpson*).

(4) *Simpson v. Union Oil Co.*
(a) Limits RPM in agency Ks to patented products.

ii) Retail Price Maintenance (Maximum)
(1) *Albrecht v. Herald Co.* (1968)
(a) Maximum RPM is also *per se* illegal.
(b) Maybe this was a lesson for the court to turn to the one quick look doctrine for new things.

(a) Facts: fired independent carriers b/c wanted to directly deliver.
(b) Forward integration ok even though results in uniform prices of newspapers and reduces competition because of “optimum monopoly pricing and the unique nature of the newspaper’s revenues not outweighed by minimal anticompetitive effect of eliminating potential competition….”
(c) Dissent is a good example of U.S. being concerned about protecting competitors.

(3) *State Oil Co. v. Kahn* (1997)
(a) Vertical maximum RPM should be evaluated under R of R, not *per se* (overturns *Albrecht*). (Posner said it, SC did it.)

iii) Territorial and Customer Restraints
(1) *U.S. v. Arnold, Schwinn & Co.* (1967)
(a) Vertical territorial restraints do not restrain interbrand competition, but harm intrabrand competition and are *per se* unlawful. Once manufacturer departs dominion over a product, it can’t control the conditions of its resale (overturned by *Sylvania*).
(b) Court applies R of R to restrictions on consignments when the manufacturer maintains some dominion and risk with respect to the products.

(2) *Continental T.V. Inc. v. GTE Sylvania Inc.* (1977)
(a) Facts: limited number of franchisees granted for any given area and required each franchise to sell his Sylvania products only from the location at which he was franchised (vertical customer restriction).
(b) *Northern Pac. Ry. v. U.S.* set high standard to be met before applying *per se* rule, and *Schwinn* announced a sweeping *per se* rule without even a reference to *Northern Pac. Ry.*
(c) Impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition.
(i) Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers.
(ii) Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products.
(iii) These restrictions should be analyzed under the R of R.
1. BUT SC does not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. Ry.*, but must be based on demonstrable economic effect rather than *Schwinn* analysis.

b) EC Approach to Vertical Restraints Under Article 81
i) *Consten & Grundig v. Comm’n* (1966)
(1) Vertical territorial restraints
(2) ECJ finds vertical territorial restraints of this kind do not fall within Art. 81(3) exemption if firms cannot show that improvements are indispensable by
presenting noticeable objective advantages such as to compensate for the inconveniences resulting there from on the level of competition.

(3) Seems to be a higher standard for vertical nonprice restraints.

ii) Leclerc v. Comm’n

(1) Selective distribution systems are in conformity with Art. 81(1) if:
(a) The characteristics of the product in question necessitate a selective distribution system, in the sense that such a system constitutes a legitimate requirement having regard to the nature of the product concerned, in particular its high quality or technical sophistication, in order to preserve its quality and ensure its proper use
(b) That resellers are chosen on the basis of objective criteria of a qualitative nature which are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion
(c) That the system in question seeks to achieve a result which enhances competition and thus counterbalances the restriction of competition inherent in selective distribution systems
(d) That the criteria laid down do not go beyond what is necessary

(2) Seems more stringent/less flexible than R of R used in U.S. (Europeans remain more suspicious of vertical restraints than the U.S.)

iii) BMW v. ALD Autoleasing

(1) Facts: dealers were prohibited by BMW from selling to lessees outside of their contract territory; claimed they were allowed to do so by a block exemption (Regulation 123/85).
(2) Provisions in a block exemption which derogate from the general principles prohibiting anticompetitive agreements laid down in Article 81 cannot be interpreted widely and cannot be construed in such a way as to extend the effect of the regulation beyond what is necessary to protect the interests which they are intended to safeguard.


(1) Regulation interpreted narrowly because don’t want to go against the general principles of Art. 81.
(2) New block exemption regulation.
(3) Good example of R of R analysis:
(a) + Prevented parallel trade;
(b) + $$$ went to & D;
(c) Court weighs the gain of efficiency in intrabrand competition (+) against the loss in efficiency of interbrand competition (-).


(1) Rule of Reason analysis applied to 81(1). Treated differently because it is a franchise
(2) Art. 81 cannot apply unless the franchise agreement involved goes involve restrictions on the contracting parties that go beyond those demanded by the nature of the franchise system.
(a) Advantage of vertical restrictions is you can present homogenous face of the product to customers.
(b) Franchisor must be able to communicate his know-how to the franchisees and provide them with the necessary assistance without risking that his know-how and assistance will aid his competitors, even indirectly
(c) Must be able to take appropriate measures to preserve the identity and reputation of the network which is symbolized by the mark.
(d) Increases competition by letting this person compete who otherwise wouldn’t be able to (increase number of competitors).

vi) Metropole Television v. Comm’n (2001)

(1) In order for an Art. 81 violation to be reviewed under R of R, it must fall into one of the Art. 81(3) exemptions.
(a) Must be indispensable to the objective and not eliminate competition.
   (1) Tying case (nails to nail guns—one: many tying arrangement)
       (a) The concern is mainly about metering prices.
       (b) Preserved dominant position in nails by leveraging its dominant position in nail guns.
       (c) Allowed to present justifications, but still found in violation.

4) Mergers
   a) Clayton Act
      i) Came after *Standard Oil* (1911) where the SC created the R of R (and had previously determined only unreasonable restraints on trade were prohibited). Public outcry demanded greater market protections, so Clayton Act was passed (1914). § 7 provides the DOJ and the FTC with a way to regulate mergers.
      ii) Prohibits the acquisition of all or any part of another firm where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”
          (1) Horizontal acquisitions—firms at the same level of production/distribution in the same market;
          (2) Vertical acquisitions—firms at different levels of production/distribution in the same market; and
          (3) Conglomerate acquisitions—firms in different product or geographic markets.
      iii) Concerns about mergers focus on reduction of competition.
   b) “Classic” U.S. Cases
          (1) Market definition: determined by the reasonable interchangeability of use or cross-elasticity of demand between the product and its substitutes.
              (a) There can be markets and submarkets.
          (2) SC concerned about trend toward concentration in this market.
              (a) Legislative intent: It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business.
          (1) SC looked at the size of the market share the merged entity would posses and the increase in concentration of that market if the merger took place.
          (2) SC said anticompetitive effects in one market can’t be justified by procompetitive consequences in another.
          (1) Blocked the merger because of concern about concentration trends in the market even though the market shares of the merging entity and the resultant concentration of that market were not that great “arresting a trend toward concentration in its incipiency.”
          (1) Acquisition didn’t violate even though market shares looked a lot like those in *Von’s Grocery*.
              (a) Vertical merger—SC looked to “other pertinent factors” to decide whether the acquisition would result in substantial lessening of competition.
              (b) Due to market structure and the weakness of the competitor (merging firm), the merger was approved.
   v) Merger Guidelines
      (1) Uncertainty for firms: *Brown Shoe* and *Von’s Grocery* left the impression that practically no merger was safe from government attack.
      (2) 1968 merger guidelines created two categories: “highly concentrated markets” and “less highly concentrated markets.” Then it stated the market percentage of the acquiring (larger) firm and the acquired (smaller) firm in each category for which the government will ordinarily challenge mergers.
      (3) Revised in 1982 and this structure has been maintained through the 1992 and 1997 amendments.
EC Merger Regulations
i) 2004 Merger Regulations
   (1) Looked at: (1) increase in concentration (including difference in size between the firms in question compared to other firms on the market), (2) demand elasticity (including brand loyalty/brand image), (3) the fact that technology is mature and R&D play no major role, (4) market transparency, (5) lack of competitive constraints (see 1), and (6) barriers to entry.
   (2) Required concessions before allowing the merger to take place.
iii) GE/Honeywell before European Commission
   (1) Commission determined merger was incompatible with the Common Market
      (a) Concerned with the combination of GE’s financial strength and vertical integration into aircraft purchasing, financing, and leasing with Honeywell’s leading positions on various markets such as corporate jet engines, avionics, and non-avionics products.
      (b) Markets
         (i) GE:
            1. Aircraft engines
            2. Appliances
            3. Information services
            4. Power systems
            5. Lighting
            6. Industrial systems
            7. Medical systems
            8. Plastics
            9. Broadcasting
            10. Financial services
            11. Transportation systems
         (ii) Honeywell:
            1. Aerospace products and services
            2. Automotive products
            3. Electronic materials
            4. Specialty chemicals
            5. Performance polymers
            6. Transportation
            7. Power systems
            8. Home, building, and industrial controls
   (c) Conglomerate merger affected 2 broad categories of industrial sectors:
      (i) Aerospace products
         1. Jet engines
         2. Avionics
         3. Non-avionics
         4. Engine starters
      (ii) Industrial systems
         1. Small marine gas turbines
   (2) US had approved the merger (as modified with the remedies that the DOJ ordered)
      (a) Found that the merger would enhance competition by offering better products and services at lower prices
      (b) U.S. thinks E.U.’s stance shows their concern for other market participants and marks a divergence from U.S. policy of protecting competition not competitors.
   (1) Commission blocked the merger, not because it thought a dominant position would arise from the merger itself, but because it was concerned that it would arise from foreseeable (future) conduct of the merged entity (leveraging).
(a) CFI & ECJ found Commission did not produce enough evidence to support this prospective analysis:
   (i) Need convincing evidence, must look at all of the circumstances that might determine that conduct (not just incentives for that conduct but also the factors likely to reduce or eliminate those incentives.
   (ii) Art. 82 prohibition on abuse of dominant position creates deterrent effect.
(2) ECJ interprets Art. 2(3) of the 2004 Merger Regulations:
   (a) A concentration that (1) creates or strengthens a dominant position resulting in (2) effective competition being significantly impeded must be declared incompatible with the common market.
   (b) A concentration that does not meet these two conditions must be approved.
(3) Conglomerate mergers (firms that essentially have no pre-existing competitive relationship, vertical or horizontal)
   (a) These mergers cannot be presumed to have an anticompetitive effect
   (b) Must be authorized if it passes test in (2)(a) above.
   (c) Prospective required for mergers—conglomerate mergers can still be blocked if they do not meet (1) of the above test if the Commission can show by convincing evidence that the firm will create or strengthen a dominant position within a foreseeable period.
   (i) Prospective analysis requires envisaging various chains of cause and effect with a view of ascertaining which are the most likely.
(4) ECJ interprets Art. 2(1):
   (a) Factors to consider when assessing the compatibility of a concentration with the common market:
      (i) Structure of the relevant markets;
      (ii) Actual or potential competition from firms;
      (iii) Position of the firm concerned and their economic/financial power;
      (iv) Possible options available to suppliers and users;
      (v) Barriers to entry; and
      (vi) Trends in supply and demand.
   (b) Having a dominant position in itself is not enough.
   (1) 1989 ECMR uses same 2 part test as 2004.
d) Contemporary U.S. Merger Cases
   i) U.S. v. Rockford Memorial Corp. (7th Cir. 1990)
   (1) Facts: merger between nonprofit enterprises an issue of first impression at the appellate level
   (2) Gov’t contested merger based on § 7 Clayton and § 1 Sherman
      (a) § 7 Clayton:
         (i) Argue doesn’t fall under first provision of § 7 because doesn’t have stock or share capital
         (ii) Argue doesn’t fall under second provision because they are not a “company or association… organized to carry on business for its own profit or that of its members.”
            1. Read as a whole, the statute doesn’t exempt nonprofits, it was only to show that FTC wouldn’t regulate mergers that it left to other commissions to regulation (see p. 271). Gov’t doesn’t make this argument, so it waives it.
            2. NCAA v. Board of Regents rejects an implicit exemption of nonprofits from antitrust laws.
         (iii) § 7 forbids mergers that are likely to hurt consumers by making it easier for the firms in the market to collude, expressly or tacitly, ad thereby force price above or farther above the competitive level.
            1. Cf. Merger Guidelines 0.1, ¶4
2. Mergers & price fixing: Hospital Corporation of America v. FTC—The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations under § 1, which forbids price fixing.

(b) § 1 Sherman:
   (i) Standard for judging lawfulness under § 1 and § 7 pretty much the same.
   1. § 1 violation: restrains trade; § 7 violation: effect may be substantially to lessen competition.
   2. Statutory formulations have both required judicial interpretation, and as a result have converged.
   (ii) Since the competitive consequences of mergers are ambiguous, courts look to proof of market power (define product/geographic market and look at elasticity).
   1. Immense shares in a reasonably defined market create a presumption of illegality.
   2. Regulatory limitations in this industry increase the propensity to collude by preventing entry of competitors to take advantage of increases in price.

   ii) FTC v. Staples, Inc. (1997)
   (1) § 13(b) FTCA allows FTC to seek preliminary injunctions
   (a) “in a suit for preliminary relief, the FTC is not required to prove, nor is the Court required to find, that the proposed merger would in fact violate Section 7 of the Clayton Act. . . .”
   (b) Whenever the Comm’n has a reason to believe a firm is violating/about to violate § 7, it may seek a PI to prevent a merger pending its administrative adjudication of the merger’s legality.
   (c) Two part analysis for whether to grant an injunction:
   (i) Ct must determine FTC’s likelihood of success on the merits under § 7; and
   1. Means... there is a reasonably probability that after full admin trial on the merits, FTC will prove the merger may be substantially to lessen competition or tend to create a monopoly in violation of § 7.
   2. Analysis:
      a. Define the markets (SSNIP test, elasticity)
      b. Consider the probably effects of the merger
      i. HHI or similar test
      ii. Barriers to entry
      iii. Efficiencies (see Merger Guidelines § 4) (Δ’s must rebut with credible evidence)
   (ii) Ct must balance the equities.
   1. Δ advanced both public and private equities (concern about shareholders)

5) Antitrust and Intellectual Property
   a) United States Developments
      i) History
         (1) DOJ ATD used to be hostile toward IP rights (Jefferson Parish p. 287)
         (2) By 1995 it took the view that: “the IP laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.”
         (1) SC disavowed dictum in Jefferson Parish
         (2) A patent does not necessarily confer market power (look to substitutes).
   iii) IP issues that give rise to antitrust violations:
         (1) Enforcing a patent obtained through knowing and willful fraud on the patent office—Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.
Infringement suit a sham to cover up an attempt to interfere directly with the business relationships of a competitor—*Easter R.R. Presidents Conference v. Noerr Motor Freight, Inc.*

iv) *Schering-Plough Corporation v. Federal Trade Comm’n* (11th Cir. 2005)
- Facts: FTC ordered Δ’s cease and desist from being parties to any agreement settling a patent infringement lawsuit, in which a generic manufacturer either: (1) receives anything of value; or (2) agrees to suspend R & D, manufacture, marketing, or sales of its product for any period of time…
- *Valley Drug*: monetary payments made to an alleged infringer as part of a patent litigation settlement doesn’t constitute a *per se* violation.
  a) Although market allocations are typically held unlawful, the court in *Valley Drug* allowed this type of settlement because one of the parties owned a patent.
  b) Can’t punish patent holders for creating anticompetitive effects that are no more broad than the patent’s own exclusionary power.
- Don’t use *per se* or R of R for antitrust patent cases—by their nature patents create an environment of exclusion. Must look to the extent to which antitrust liability might undermine the encouragement of innovation and disclosure, or the extent to which the patent laws prevent antitrust liability for such exclusionary effects.
  a) Proper analysis of antitrust liability requires an examination of:
    i) The scope of the exclusionary potential of the patent;
    ii) The extent to which the agreements exceed that scope; and
    iii) The resulting anticompetitive effects.

- FTC argues that it is a fundamental rule of antitrust law that it is unlawful to enter into an agreement in which potential competitors agree to stay out of a market.

b) EU view of Antitrust and IP
- Microsoft
  1. MS’s patent argument didn’t succeed because Court felt exercising this right blocked creativity that should be stimulated for the public good, and wouldn’t decrease MS’s incentive to innovate.
  2. A refusal by an patent holder to grant a license may, under exceptional circumstances, be contrary to the general public good by constituting an abuse of a dominant position with harmful effect on innovation and on consumers.
- *Magill* (see Antitrust and IP below)
  1. Not licensing copyright an abuse because of met exceptional circumstance:
    1. Dominant position;
    2. No actual or potential substitute;
    3. Refusal prevented appearance of a new product;
    4. No justification for the refusal; and
    5. By refusing, they reserved to themselves a secondary market.

6) Antitrust Enforcement
- a) Public Enforcement
  1. *U.S. v. Andreas* (Lysine case)
    a) Δ’s appeal whether “volume of commerce” includes all sales or some subset of all sales affected by the conspiracy—they argued that “affected commerce” should include only the quantity sold at the targeted price (sales made within the scope of the conspiracy).
    b) Court disagrees—“affected” should be interpreted broadly and all sales during the period of the conspiracy have been affected by the illegal agreement, since economic factors cannot be held in strict isolation.
  2. Leadership roles in a conspiracy enhancement:
(a) Sentence enhanced for an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive (manager or supervisor also gets enhanced sentencing just not as much).
(b) Doesn’t require participants be “drones working for their queen”; court looked at coercive power exercised (court used fact based analysis).

ii) **Microsoft**

b) Private Enforcement

i) **Brunswick Corp. v. Pueblo Bowl-o-mat, Inc.** (1977)

1. Facts: Δ below sought writ of cert to review whether damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.
2. § 7 is a preventative measure to state the consequences of a firm’s conduct before they harm the market; § 4 is a remedial provision, which provides treble damages to a person injured by a violation of antitrust laws.
   (a) To recover damages, P’s must show more than that Δ violated § 7 (only shows injury may result)
   (b) P must prove antitrust injury: injury of the type AT laws were meant to protect and that flow from that which makes Δ’s acts unlawful.

ii) **Campos v. Ticketmaster Corp.** (8th 1998)

1. Standing case
2. **Illinois Brick Co. v. Associated General Contractors**—only direct purchasers from a monopoly supplier can sue for 3x damages under § 4; indirect purchasers generally lack standing.
   (a) Indirect purchaser: one who is not an immediate buyer from the alleged antitrust violator or who does not purchase the monopolized product directly from Δ.
   (b) Reason: full cost born by the direct buyer cannot be passed on to the indirect purchaser.
3. Exceptions:
   (a) “Cost-plus” contract;
   (b) Indirect purchasers owns or controls the direct purchaser;
   (c) Direct purchaser conspired or was otherwise a party to Δ’s violation.
4. Court doesn’t change its analysis even though the direct buyer profits from the arrangement.


1. Cornerturning case—up to this point there had been movement to expand the extraterritorial reach of U.S. antitrust laws.
2. FTAIA excludes from the Sherman Act’s reach much anticompetitive conduct that causes only foreign injury.
   (a) SA “shall not apply to conduct involving trade or commerce… with foreign nations."
   (b) Exception: when that conduct significantly harms imports, domestic commerce, or American exporters. This exception applies where conduct:
      (i) has a direct, substantial, and reasonably foreseeable effect on domestic commerce; and
      (ii) such effect gives rise to a SA claim.