Differing Shades of Meaning

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Abstract

The relationship between patent law and antitrust law has challenged legal minds since the emergence of antitrust law in the late 19th century. In reductionist form, the two concepts pose a natural contradiction: One encourages monopoly while the other restricts it. To avoid uncomfortable dissonance, the trend across time has been to try to harmonize patent and antitrust law. In particular, harmonization efforts in recent decades have led Congress and the courts to engage in a series of attempts, some aborted and some half-formed, to graft antitrust doctrines onto patent law. These efforts have failed to resolve the conflicts.

This piece argues that the deviations between patent law and antitrust law run far deeper than courts and commentators recognize. The problem isn't just that one encourages monopoly while the other limits it. Rather, patent law and antitrust law often use the same concepts and terminology with differing meanings and contexts. In other words, it may appear that they are talking about the same things, and yet, they are not.

Our tendency to assume parallel meanings threatens any attempt to reconcile the two bodies of law. Most importantly, ignoring asymmetries can lead to both under protection and overprotection of patent rights, as well as the improper application of antitrust laws. To highlight the problem, this piece explores a number of examples of differing meanings in hopes of promoting a more subtle understanding of the patent/antitrust terrain.

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The relationship between patent law and antitrust law has challenged legal minds since the emergence of antitrust law in the late 19th century. In reductionist form, the two concepts pose a natural contradiction: One encourages monopoly while the other restricts it. The inherent tension can be framed in the following manner: Can a body of case law that grants monopoly opportunities be reconciled with a body of case law that curtails monopolization.

To avoid uncomfortable dissonance, the trend across time has been to try to harmonize patent and antitrust law. Since the 1930s, for example, the Supreme Court has ruled that antitrust law operates only when patent holders reach beyond the boundaries inherent in the patent grant. It is an inspired attempt at reconciling the two bodies of case law. Unfortunately, no one has been able to determine what boundaries are inherent in the patent grant, a confusion that has spawned almost a century of consternation and conflict over what exercise of power lies within the patent grant and what lies outside.

In recent decades, harmonization efforts have led Congress and the courts to engage in a series of attempts, some aborted and some half-formed, to graft antitrust doctrines onto patent law. These efforts, too, have failed to resolve the conflicts.

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Our tendency to assume parallel meanings threatens any attempt to reconcile the two bodies of law. Most importantly, ignoring asymmetries can lead to both under protection and overprotection of patent rights, as well as the improper application of antitrust laws. To highlight the problem, this piece explores a number of examples of differing meanings in hopes of promoting a more subtle understanding of the patent/antitrust terrain.

The relationship between patent and antitrust is particularly important at this moment in time. Patent law is experiencing a moment in the sun, both in the courts and in the public eye. In particular, after accepting relatively few patent cases over the last decade, the Supreme Court accepted a record number of patent cases last term and this term, including ones that touch on the boundaries of the exercise of power permitted to patent holders. The Supreme Court also has accepted an unusually large number of antitrust trust cases. As both patent and antitrust law enjoy the spotlight of focus, it is

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particularly important to develop a more nuanced understanding of the shades of meaning in patent law and how those differ from antitrust.

I. The History of the Relationship

Tension between patent and antitrust law erupted almost from the inception of antitrust law in the late 19th and early 20th century. 6 This tension was not surprising. It was inevitable that courts would have to navigate the boundary between the two areas, given that patent law encourages monopoly and antitrust law opposes monopolization.

Note, I did not say that antitrust opposes monopoly, but only monopolization. It is true that some early antitrust strains manifested an inclination to go after anything considered too big. Modern antitrust law, however, has no problem with a monopoly earned the good old-fashioned way. The problem is not being bigger or stronger than everyone else, if that strength is gained through legitimate competition. Rather, antitrust law focuses its wrath on companies that try to gain or maintain monopoly power by inappropriately suppressing competition. It is this behavior that one can think of as monopolization, and it is this behavior that patent law abhors.

Nor did I say that patent law necessarily grants monopolies. As will be discussed below, patent law grants only a negative right, the right to exclude. That right brings the possibility of obtaining a monopoly in a given market, but a patent is certainly no guarantee of a monopoly, and the vast majority of patents result in no such thing. What patent law does grant is the opportunity for developing a monopoly by excluding others.

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6 For a more extensive discussion of the history of the intersection between patent and antitrust law, see Feldman, Insufficiency of Antitrust Analysis, supra note x,
Thus, one could say that patent law grants the right to exclude competition while antitrust law takes aim at some of those who do.

Clashes between two bodies of law arose almost from the inception of antitrust law in the late 19th Century. Early cases tried to separate the two domains, concluding that patents, and agreements related to patents were simply beyond the reach of antitrust laws.\(^7\) This approach posed both practical and theoretical problems. It cannot be that a patent holder can choose any terms at all. For example, the law is unlikely to look kindly upon a patent holder who insists that anyone who wants to license his invention must agree to murder his mother-in-law. Courts had to find some limits to the power of a patent, not just because of uncomfortable hypotheticals, but also because patents were turning into a handy way to avoid the antitrust laws. As one German witness commented during Senate hearings, there was no reason to view American antitrust law as an impediment because one could simply do the same things through patent licensing.\(^8\)

By the 1930s and 40s, the Supreme Court had rejected isolation of patents from antitrust law. In an inspired attempt to reconcile the two bodies of law, the Court reasoned that antitrust law is free to operate when patent holders reach beyond the boundaries inherent in the patent grant.\(^9\) Thus, antitrust law could be applied to behavior by patent holders, but only when those patent holders tried to exceed the power of the

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7 The logic flowed from the patent holder’s power to refuse to license. If a patent holder can find that no terms are acceptable, surely a patent holder should be able to choose any term desired. Under this theory, the greater right to refuse to license must necessarily encompass the lesser right to insist on any specific terms. See Henry v. A.B. Dick, 224 U.S. 1, 29-30 (1912) overruled by Motion Picture Patents Co., v. Universal Film Mfg., 243 U.S. 502 (1917); Heaton Button-Fastener Co v. Eureka Specialty Co., 77 Fed. 288, 294-95 (6th Cir. 1896); see also Stait v. Harrow, 51 F. 819, 820 (N.D.N.Y. 1892) (arguing for the separation of patent and antitrust law by analogy to real property law).


9 See Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942); Leitch Mfg. v. Barber Co., 302 U.S. 458 (1938); Carbice Corp. v. Am. Patents Dev. Corp., 283 U.S. 27 (1931); see also, Motion Picture Patents Co., v. Universal Film Mfg., 243 U.S. 502 (1917) (setting the stage for the later cases).
patent grant. The solution would have been quite satisfying if patent theory had a robust concept of the boundaries inherent in the patent grant. It did not, and the concept would elude courts and scholars in the century to follow.

The operative question is simply how one should delineate the boundaries of acceptable behavior by patent holders? Does one find those boundaries by applying patent law, antitrust law, or both?

In particular, Patent Misuse, the doctrine in which patent law punishes inappropriate behavior by patent holders, has been the focal point of much of the debate. Must behavior violate the antitrust laws to constitute Patent Misuse?

The trend since the late 1980s has been to try to harmonize patent and antitrust by folding antitrust law doctrines into patent law. These harmonization movements have advanced and retreated, but the rough trend is clearly toward subsuming patent under antitrust law.

In 1986, for example, the Federal Circuit rewrote Patent Misuse so that it would essentially follow antitrust law. In the Windsurfing\footnote{See Windsurfing Int’l Inc. v. AMF, Inc., 782 F.2d 995, 1001 (Fed. Cir. 1986).} case, the court held that Patent Misuse required not only a finding that the patent holder tried to reach beyond the time or scope of the patent grant but also a finding of anticompetitive effect. Nine months later, the court retreated, noting that such a change would require Supreme Court or Congressional action.\footnote{See Senza-Gel Corp. v. Seiffert, 803 F.2d 661, 665 n.5 (Fed. Cir. 1986)} Answering the call two years later, the Senate passed a bill that would have prohibited finding patent misuse unless the patent holder’s actions would violate the antitrust laws.\footnote{See Jere M. Webb & Lawrence A. Locke, Intellectual Property Misuse: Developments in the Misuse Doctrine, 4 HARV. J. L. & TECH. 257, 264 (describing the Intellectual Property Antitrust Protection Act of}
much narrower. It affected only one type of patent misuse claim and only one element of that claim. Specifically, the final Act declared that a patent holder could not be guilty of Patent Misuse based on a claim of tying unless the patent holder had market power.¹³

Other language proposed for the 1988 Patent Act would have found that there is no presumption of market power in antitrust cases concerning patents. Such a provision would have put patent holders on the same footing as other commercial actors facing antitrust scrutiny. The language, however, was not adopted, and Congress has failed to adopt similar language introduced at other times.

In the years since the 1988 Patent Act, the courts have taken up the mantle that Congress failed to adopt. Ignoring its earlier retreat after *Windsurfing*, the Federal Circuit added back the *Windsurfing* language in a 1992 case, *Mallinckrodt v. Medipart.*¹⁴ Citing *Windsurfing* but not the retreat from *Windsurfing*, *Mallinckrodt* found that patent misuse requires not only a finding that the patent holder tried to reach beyond the patent grant but also a finding of anticompetitive effect. Later cases have tried to harmonize *Mallinckrodt* with Supreme Court precedent, leaving the Federal Circuit doctrine somewhat confused.¹⁵

Although the Supreme Court has not waded into the messy *Mallinckrodt* area of Patent Misuse, the Court has moved forward on another front. In the 2006 *Independent*
Ink case, the Supreme Court held that there is no presumption of market power in an antitrust case concerning patents.\textsuperscript{16}

All of these developments, in Congress and the Courts, are in the spirit of harmonizing patent and antitrust law, generally in the direction of subsuming patent law under antitrust law. From the perspective of clarity and certainty for those who are the targets of patent and antitrust suits, harmonization has much appeal. Nevertheless, true harmonization of patent and antitrust will require a far more subtle understanding of the two areas than is often evidenced.

The problem isn’t only that different doctrinal requirements exist for each or even that one encourages monopoly while the other limits it. A deeper problem is that patent and antitrust law use similar concepts and terminology with differing meanings and contexts. Thus, although harmonization seems tantalizingly close, the divide is far greater than it appears. Successful harmonization of the two areas will require a far more nuanced understanding of their differing shades of meaning.

II. The Concept of Exclusivity

The most important conceptual divergence between patent and antitrust law concerns the notion of exclusivity. In antitrust law, the notion of exclusivity takes on its ordinary meaning of permitting one party to the exclusion of all others. For example, exclusive dealing agreements, which may come under scrutiny in antitrust laws, are agreements in which a party promises to deal only with one firm and not with that firm’s


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competitors. In other words, the antitrust notion of exclusion is based on an image of occupying a competitive sphere and policing that sphere to prevent the incursion of potential rivals. Of course, implicit in that image is the fact that the firm has the power to exclude its rivals. We are less likely to worry about behavior that is destined to fail. Thus, the antitrust image of exclusion is based on the notion that a firm with power in a competitive sphere keeps out those who would enter the sphere to compete.

One might imagine that this notion of exclusivity would translate quite well into patent law, and the language of many antitrust cases assumes that it does. In particular, antitrust law describes patents as granting exclusive rights, and analyzes patents as if those rights keep everyone out of the sphere defined by the patent.

A patent does indeed grant the right to exclude, but the patent notion of exclusion is quite different from the antitrust notion. As a starting point, it is important to understand that a patent is a negative right, rather than a positive right. Contrary to much sloppy language, a patent does not grant the right to make, use and sell the invention. A patent does not confer any affirmative rights at all. Rather, a patent gives the right to exclude others from making, using and selling the invention, with the caveat that some of those others may have their own right to exclude.

In particular, a patent grants the right to exclude others, but that does not give one an exclusive sphere – not even in the space defined in the patent itself. I am not talking about the notion that patent holders don’t necessarily have a monopoly because there may be other substitutes for their invention. I am talking about something far more fundamental.

18 See cases cited infra at note x.
There is a common misconception that a patent creates the right to keep all others out of the space defined in the patent grant. While that is frequently true, it is not always true. Even within the circle of what is specifically covered in the patent, there still may be others standing in the circle. This constraint reveals much about the limited nature of the patent grant.

For example, consider an inventor who creates a substance that can be used as an industrial cleaner. Having identified a use for the substance, the inventor can get a patent on that substance. The patent covers any use of the patent, not just the industrial cleaning use identified in the patent application.

Suppose another inventor, Mary, discovers that the substance cures breast cancer. Mary can get a patent covering the use of the substance for the specific purpose of treating breast cancer.

At this point, the original inventor holds a patent that covers any use of the product. Mary holds a patent covering a particular use of the product. Each can exclude the other, and anyone who wants to use the product to treat breast cancer must negotiate with both patent holders. Moreover, neither patent holder can use the product to treat breast cancer without consent of the other. In other words, the original inventor may be standing in a big circle of rights, but someone else can be standing in a part of that circle as well.

Improvement patents have the same effect. Suppose an original inventor holds a patent on an invention, and Mary receives a patent on an improvement to that invention. Perhaps the original invention was a method of making gasoline, and Mary creates an improvement on the basic method. The most appealing commercial space would be the
one occupied by the improved method. In other words, all things being equal, a buyer should prefer to purchase the improved method. Once again, both the original inventor and Mary hold rights in that space, and neither one can operate without the agreement of the other.

For all practical purposes, patent law’s “right to exclude” still leaves patent holders negotiating with others who have overlapping rights to exclude. That is a far less powerful concept than the idea that you can claim complete control of the space covered by your patent. Antitrust courts and commentators fail to notice this limitation, treating patents as if they were some all-powerful right to lock others out of the space granted in the patent. Commentators themselves fall prey to the same confusion.

The problem is more than a confusion of semantics. The misperception of the power of the patent grant leads court to give too much deference to agreements related to patents. One can see language in recent decisions suggesting that markets related to patent rights should be treated more gently under antitrust laws, because such markets are likely to be dominated anyway. It is an eerie throwback to court language in the early 1900s, when patents were considered sacred, and courts originally thought that antitrust laws could not apply to agreements related to patents.

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20 See, e.g., Henry C. Su, Intellectual Property Rights and Market Power, PATENTS, COPYRIGHTS, TRADEMARKS, & LITERARY PROPERTY COURSE HANDBOOK SERIES 557, 135, 144 n.2 (Sept. 21-22, 2006) (noting that “[h]istorically, patents and copyrights have garnered the most attention from the standpoint of antitrust law because they literally comprise a bundle of exclusive rights”).

The tendency towards overprotection of patents flows from general
misconceptions about the power of the patent grant, both in terms of the fact that a patent
is not necessarily exclusive and, as I will describe below, in terms of the economic power
that comes with a patent grant.

III. The Patent Monopoly

In antitrust terms, the notion of a monopoly is based on a firm that has sufficient
power to raise prices and restrict output. Antitrust law measures such power by looking
at a firm’s share of a properly defined market. Early cases assumed that a patent confers
a monopoly in the antitrust sense of the word. Courts spoke explicitly in terms of “the
patent monopoly” and held that the existence of a valid patent was sufficient to establish
market power in certain antitrust cases.\(^2\)\(^2\)

A patent, however, is no guarantee of power in a properly defined market. There
may be substitutes available for the patented product in a given market or there maybe
sufficient cross-market elasticity. The holder of a patent on margarine, for example, must
still compete with those who sell butter.

The vast majority of patents create no monetary return for the patent holder.\(^2\)\(^3\)
Even patents that become highly valuable may confer no market power, although some

\(^{22}\) See, e.g., U.S. Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 619 (1977);
International Salt Co. v. United States, 332 U.S. 392; United States v. Loew's Inc., 371

\(^{23}\) See studies cited in Nat’l Inst. on Indus. & Intellectual Prop., *The Value of Patents and Other legally
Protected Commercial Rights*, 53 ANTITRUST L.J. 535, 547 (1985) (“Statistical studies suggest that the vast
majority of all patents confer very little monopoly patent. . . .”).
parties have tried to argue that value translates into power. For example, the patent for the chemical compound in Ibuprofen may have been extremely valuable, but the patent holder still faced competition from those who produced acetaminophen and aspirin products. Apple computer may hold extremely valuable patents in its operating system but it does not have power in the operating system market given Microsoft’s 90% market share. The relevant question is not whether a patent has value but whether there are substitutes available.

Most importantly, a patent itself is no more than the grant of an opportunity. There is no guarantee that anyone will be interested in the invention or that the inventor will be successful in capturing that interest. Under ordinary circumstances, an incompetent monopolist will create opportunities for others to enter and compete, a process that can lead to erosion of the monopoly and more effective competition. With patents, however, we tolerate foolish and failed patent holders, at least for the term of the patent.

Even with brilliant inventions and competent inventors, there is no guarantee that the market will recognize the value of the invention or that the inventor will be able to capture that value during the patent term. The true genius of an invention and its many applications may not be known until long after the patent has expired. Similarly, the market may not be able to calculate the value of an invention within the patent term.

25 See Microsoft, (D.C. Cir) (quantifying Microsoft’s share of the operating system market even accounting for portions controlled by Apple and Linux).
26 See Insufficiency, supra note x, at 437.
Research tool patents are the perfect example of patents whose value cannot always be
adequately measured and captured during the patent term.\(^27\)

Modern courts have finally begun to recognize that a patent does not grant market
power in the antitrust sense of the phrase. In 2006, the Supreme Court held that a patent,
by itself, is insufficient to create a presumption of market power for the purposes of a
tyin claim.\(^28\) Prior to the Supreme Court opinion, some lower courts had begun to
acknowledge that patents do not necessarily confer market power, although the
conclusion was not applied uniformly and marked a sharp detour from earlier Supreme
Court cases.

In particular, the Supreme Court in the 1962 Loew’s case had concluded the
following: Given that one of the objectives of the patent laws is to reward uniqueness,
the existence of a patent establishes enough distinctiveness for a finding of sufficient
power to create anticompetitive consequences.\(^29\) As described above, modern courts and
commentators have come a long way since the 1960s in concluding that patents do not
grant market power in the antitrust sense. There is still insufficient recognition, however,
of why a patent does not confer that power and how the patent may be limited and
indistinct, even in its own domain. The sphere that a patent holder can occupy is
circumscribed by prior art, shared with those who have overlapping patent rights,
frustrated by limitations of the market, and ultimately, truncated by the passage of time.
These limitations are essential elements of the patent grant that keep its power in check.

In the context of antitrust, a vision of the patent as all-powerful misinterprets the nature

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\(^27\) Id. at 444-46 (arguing that while reach-through royalties for tool patents solve a market evaluation
problem, they violate basic notions of time and scope limitation in patent law).


\(^29\) See United States v. Lowe’s Inc., 371 U.S. 38 (46) (1962); see also Fortner Enters., Inc. v. U.S. steel
of the patent grant and leads courts to amplify those powers by staying the hand of antitrust law.

IV. What is a Product?

The question of “what is a product” in the context of a patent provides tremendous challenges for the patent/antitrust interface. Antitrust law certainly has faced its own challenges in this arena. Nevertheless, patents provide additional complexities to the question.

The product notion touches on one of the most important and hotly debated areas of antitrust theory. For almost a century, antitrust scholars have argued about the competitive implications of behavior in which one firm tries to combine – or tie -- two products together. Many ways of combining products may be perfectly innocent, not to mention quite desirable for consumers. Consumers, for example, are unlikely to be grateful for a rule requiring the sale of automobiles separate from their electrical wiring.

In an effort to keep antitrust law from trampling over perfectly acceptable combination activity, courts have developed the separate products rule. The rule provides that tying cannot be a violation of antitrust law unless it involves two separate products.

The rule presupposes an understanding of what constitutes a product, an issue that has been reasonably straight-forward in some antitrust cases and tremendously difficult in others. Patents, however, do not fit well into traditional notions of a product, and provide challenging twists on the product notion.
One might expect the notion of a product to translate reasonably smoothly into the patent domain. One could conceptualize “the product” as the patent itself, an item which can be sold or upon which licenses can be based.

Alternatively, one could conceptualize “the product” as the finished item embodying the invention. For example, if an inventor holds a patent on the chemical formula for a drug, the product could be the pill embodying the chemical formula. Neither concept, however, fully captures the dynamics of a patent. The variations are critical for the ways in which we apply antitrust law.

Consider the notion that the product is the patent itself. One cannot engage in a full analysis of a patent by looking at the patent as a single entity. In many circumstances, it is the interaction among patents that gives a patent its power and capacity, and the full implications of patents can be understood only when patents are considered in combination.

Consider defensive patenting, which is standard practice for many inventors. With defensive patenting, a patent holder tries to anticipate and patent all potential variations of the patented product. This is not behavior that exists within all types of products or even with all types of intellectual property. When an author writes a novel, for example, the author does not try to write every similar expressions of the idea to control all alternatives, yet that is classic behavior in patenting.

One could argue that defensive patenting is an understandable behavior. It may respond to flaws in the patent system that make it difficult to properly control the invention and its equivalents. On the other hand, one could argue that defensive patenting is essentially an attempt to monopolize a market that includes each of the
patented alternatives. From that perspective one could then argue about whether the behavior falls within the bounds of permissible patent behavior. Regardless of the conclusions of these questions, one cannot properly analyze any of the patents in a defensive grouping without thinking about its relationship to the group.

Some patents can stand alone. Nevertheless, in order to do anything effective with most patents, they must be used in combination with other patents. In fact, the true value of a patent may emerge only as part of a portfolio. For example, biotech firms may hold numerous patents on approaches to different problems. The firm may choose to hold many in reserve while working on a few at a time. That choice may be perfectly rational from a competitive standpoint, but the value of those patents and the appropriateness of the competitive behavior related to those patents can be understood only by looking at the portfolio as a whole.

Under antitrust law, we would not allow a firm to buy up all firms that sell potential substitutes. Would we, however, allow a firm to build a patent portfolio by buying up all of the potential substitutes? If we find empire by portfolio to be a troubling phenomenon, how do we draw the line between that and a firm that patents as many substitutes as possible? The point is simply that the notion of an individual product, implicit in much antitrust law, cannot capture the full implications of patents. Without understanding patents as inter-related, the law cannot contemplate what short-term competitive harm may be contemplated by patent law and what behavior falls outside of those bounds.

Similar issues arise with patent pools. A number of scholars have commented on both the pro-competitive and anti-competitive potential of patent pools. It is at least
worth noting, nevertheless, that understanding the multiplicity effects of patents requires thinking about patent combinations among firms, as well as within a single firm.

The issue of multiplicity has arisen in some areas of antitrust, but its appearance has been limited. Some antitrust scholars, for example, have described the potential for market actors, under certain limited circumstances, to use the power of multiple markets in anticompetitive ways. With patents, however, the power of multiplicity is far more important, perhaps even intrinsic to their operation in modern markets.

In short, patent portfolios and patent pools may be effective vehicles for overcoming market imperfections or they may be effective vehicles for anticompetitive behavior and collusion among competitors. Nevertheless, patents frequently exist in such combinations, and they must be analyzed in the context of those combinations, not as analogous to individual products. One cannot conceptualize a patent as an individual product, would missing much of the operation of patents in a modern marketplace.

Taking a completely different approach, one could try to conceptualize the product as the finished item that embodies the patented invention. In other words, if the patent covers a method for making a stronger version of plastic, the product would be the stronger plastic.

Analyzing the product as the finished item that embodies the patented invention, however, does not solve multiplicity problems. These problems just appear in different forms. For example, consider the pharmaceutical company that was facing imminent

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30 See Herbert Hovenkamp, Antitrust Policy After Chicago, 84 MICHIGAN L. REV. 213 269 (1985) (describing how a monopolist can use a price squeeze against smaller vertical rivals’ with higher sunk costs to effectively transfer to itself the smaller firm’s return on the fixed-cost part of the investment); Janusz A. Ordover et al., NonPrice Anticompetitive Behavior by Dominant Firms Towards Producers of Complementary Products, Discussion Paper in Economics #67, Woodrow Wilson School of Public and International Affairs 8-9, 10-11 (1984) (describing a complex strategy that a monopolist can use when rivals making inferior substitutes block full exploitation of the monopoly).
generic entry as the patent on its drug expired. The company struggled mightily to get FDA approval for a chewable version of the pill, essentially adding aspartame, which would then be patented. Using various maneuvers related to approval for generics, the company could use the “new” product to block generic any generic entry of the old pill. For the purposes of identifying anticompetitive behavior that might raise antitrust concerns in this example, one cannot look simply from the perspective of the finished product embodying the patent. From that perspective, there would be two separate patents – one on a chewable pill and one on a swallowable pill – and therefore two separate products. The company is not forcing anyone to buy both a chewable pill and a swallowable pill, and therefore the company arguably is not leveraging sales from one market into another. Nevertheless, it is the relationship of the two products that allows the company to block entry beyond the expiration of the patent. One has to think beyond the notion of the finished item embodying a particular patent to properly analyze the behavior.

In addition to multiplicity problems, thinking of the product as the finished item embodying the invention poses its own set of problems in the context of the separate products doctrine. As described above, the separate products doctrine tries to help distinguish between benign combination behavior and anti-competitive combinations. For example, selling shoes combined with shoe laces might be perfectly reasonable.

This problem is not unique to patents. One could certainly try to craft two products into one without ever applying for a patent. Nor is the problem entirely new to antitrust. Nevertheless, for the markets in which many patents operate, the boundaries of

a product are remarkably malleable. With modern technologies, inventions can be combined or altered to adjust the number of so-called products.

For example, in 2005, a pharmaceutical house announced a plan to combine an existing drug, which was losing market share, with a new blockbuster drug. The two drugs would be sold solely as a combined formulation.\(^\text{32}\) The company agreed to sell the two separately only after considerable public outcry.

The example is troubling for the following reasons. Suppose the company sold the two drugs as separate pills but required that consumers who bought one pill also had to purchase the other. In that circumstance, the company could have faced charges of illegal tying under antitrust law. Reconfiguring the drug as a combined formula potentially creates only one product on the shelves, although it may have the same anticompetitive effect.

The notion of a product may become even more amorphous in the biotech world. Suppose inventions are bioengineered so that they can only be used effectively in combination with each other? Or suppose inventions are bioengineered so that they combine two of the company’s inventions. In circumstances such as these, what is the product and how many products do we have?

In short, the confluence of antitrust law’s under-developed notion of a product with the patent realm of invention may serve to magnify the problem of “what is a product.” In the patent field, where the goal is to invent and the practice is to invent around things, courts and agencies must grapple with efforts to invent around the antitrust laws. Separating these efforts from legitimate, competitive inventions will require

\(^{32}\) See http://www.laleva.org/eng/2005/03/pfizer_plans_to_sell_heart_drugs_only_as_pair.html.
development of a much more nuanced analysis of “what is a product” than currently exists in antitrust law.

V. Monopolization

Modern antitrust law does not condemn a firm for gaining or maintaining monopoly power through skill, luck or hard work.\(^{33}\) Rather, antitrust law defines certain types of behavior that is forbidden on the road to domination. This behavior is described as monopolization or attempted monopolization.\(^{34}\)

Modern courts and commentators differ on what measurements to use to define the forbidden conduct.\(^{35}\) The varying tests, however, are all aimed at identifying behavior that seeks to keep rivals from entering the competitive sphere and competing on the merits.

Antitrust law has a fairly robust notion of what it would mean to compete on the merits and what a competitive market would look like. One can argue about whether harm to that ideal should be measured in terms of harm to consumer surplus or producer surplus, or how one should measure long-run consumer welfare, or whether and how potential innovation could be added into the calculation. One can also argue about the extent to which fully competitive markets actually exist. Nevertheless, antitrust law has a robust notion of the competitive ideal from which to begin debating what an intolerable deviation might look like.

\(^{33}\) See Sherman Act Section 2; Grinnell at 570-71; Aspen Skiing; Popofsky at 438 (noting it is settled that Section 2, as applied to rival-impeding conduct, condemns only “exclusionary” conduct and does not invalidate monopoly power acquired or maintained through superior skill, foresight, or industry).

\(^{34}\) See sources cited in prior note.

\(^{35}\) See Popofsky; Melamed; Baker; Hovenkamp; \textit{cf.} ABNY.
Patent law lacks such a robust concept. In some circumstances, we can be reasonably confident that the behavior would push beyond the bounds of the patent, however those bounds are conceived. Nevertheless, it is difficult to measure deviation, even in the abstract, without an agreed upon norm.

We do not have a clear conception of how broadly the footprint of a patent should reach or how much market damage is contemplated in the context of a patent grant, as optimally conceived. Unless we can fill this conceptual void, we cannot talk coherently about the limits of acceptable behavior by patent holders, irrespective of whether the doctrinal rules for the discussion flow from antitrust or patent law. Thus, even if we were to more fully harmonize patent and antitrust law by finding that patent holder behavior is acceptable unless there are anticompetitive effects, our problems would not be solved. If we do not have a robust notion of what economic effects are anticipated with a patent, how can we know what effects reach beyond what is contemplated and into the realm of anticompetition? The concept itself has insufficient meaning in patent law and theory.

One other variation is important to acknowledge in any effort to compare the competitive harms contemplated in the patent grant to those tolerated in a monopoly setting. Within the concept of a monopolist in the antitrust setting, it is implicit that some consumers are enjoying the benefit of the product. When a monopoly exists, the price may be so high that not all consumers who would purchase the product do purchase the product. Nevertheless, it is assumed that a product exists.

In contrast, patent law does not implicitly assume that consumers will get anything. Rather, patent law traditionally has allowed patent holders to suppress their inventions, with the result that consumers will get nothing, at least for the term of the
patent. Thus, the notion that a patent holder is like a monopolist, which is frequently bandied about, underestimates the amount of damage that we would allow from a patent holder.

One could argue that this discrepancy suggests we should give more leeway to patent holders under antitrust law in light of the greater short-term damage contemplated in the image of a patent than in the image of a monopolist. Thus, we might not allow a monopolist to stifle innovation towards a potential substitute but we might allow a patent holder, who has patented a variety of approaches to a given problem, to pursue only one of those approaches and suppress the rest.

In contrast, one could argue that the suppression discrepancy suggests we should be strict about the behavior of patent holders given the enhanced short-term harm of patents. This might be particularly true for behavior that could extend or enhance the patent. One cannot properly evaluate patent behavior in an antitrust setting, however, without fully considering the implications of the suppression discrepancy.

This issue will become more important because the suppression doctrine is in flux. In 2006, the Supreme Court in *eBay v. MercExchange* rejected the general rule that a patent holder is automatically entitled to an injunction, instructing lower courts to apply the four factor test traditionally used to determine equitable relief in other types of cases.\(^{36}\)

At this point, it is unclear how broadly the exception to injunctions will be applied. Thus, identifying the harms permitted by the patent grant will be challenging not only because we lack a robust concept of the ideal, but also because that ideal is changing.

VI. Conclusion

The intersection of patent and antitrust has frustrated courts and scholars since the inception of antitrust law more than a century ago. The trend across time has been to try to harmonize the two, most recently in the direction of subsuming patent doctrines under antitrust doctrines. Harmonization in any direction, however, is far more challenging that it has appeared. Difficulties are enhanced by the fact that the two fields use concepts with similar terminology but with differing meanings, contexts, and implications. Understanding these different shades of meaning will be critical for navigating the intersection between patent and antitrust. Trying to slide blithely between the two without understanding the divergences, could distort the essence of each.