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Look at *eBay*, *MedImmune*, *KSR*, and
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Is the Supreme Court Importing Antitrust Economics into Patent Law? A Different Look at *eBay*, *MedImmune*, *KSR*, and *Quanta Computer*

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Is the Supreme Court's economics-intensive and generalist antitrust jurisprudence beginning to affect its view of patent law? It appears that the answer is yes. Patent law has long been the ultimate in technical statutes and specialist practice. Antitrust law, in contrast—although at one time it had a similar reputation—has developed essentially as common law, and in recent decades has come to emphasize broad and general “effects-based” analysis: an outcome-oriented, case-by-case method that grounds liability decisions directly in an analysis of conduct’s economic effects, and that generally eschews special rules and formalized tests.¹ The Supreme Court and the antitrust enforcement agencies have accelerated this process in the past three years, striking down many *per se* (automatic) rules of liability and conduct-specific tests. Now, there is some evidence that that Supreme Court’s skepticism of special antitrust rules, and emphasis on economic effects, is influencing the Court’s patent law decisions.

This article summarizes the recent movement of antitrust law away from rules and toward effects-based analysis, and explains how four recent Supreme Court patent

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¹Antitrust economics, of course, may be technical and expert-driven. My point here, as explained in more detail below, is that antitrust legal analysis often is not.

decisions—*eBay*, *MedImmune*, *KSR*, and *Quanta Computer*—can be seen as part of the same trend. Lawyers who practice patent law or law at the patent-antitrust intersection should take note. The Court may not be consciously importing antitrust principles into patent law; if the Court were doing so consciously, it likely would say so explicitly, and to date the Court has made no such statement. And it may be more accurate to say that the Court is interested in economics as economics, and applies economics to both antitrust law and patents, rather than one area of law to the other. But antitrust has come first. As the Chairman of the Federal Trade Commission has noted, the Supreme Court has been engaged for several decades in an evolutionary reform of U.S. antitrust law that grafts into antitrust the “double helix” of Chicago School and Harvard School economic thinking.² It is likely that the Justices (and following them, the Circuit Courts of Appeal) have become so comfortable with this mode of analysis that it will influence more than just antitrust jurisprudence. It should come as no surprise if patent law—which, like antitrust, is also concerned with monopolies, albeit lawful and often beneficial ones—is the next major legal regime to be affected.

I. COMPARING ANTITRUST’S EFFECTS-BASED APPROACH TO THE TECHNICAL INFRINGEMENT TESTS OF PATENT LAW

“Case-by-case, effects-based analysis,” in the words of a recent Antitrust Division policy deputy, “is familiar to all of us who practice U.S. antitrust law.”³ Under the

²See Statement of Chairman William E. Kovacic, Fed. Trade Comm’n, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act 2-3 (2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>.

³Gerald F. Masoudi, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, “Antitrust Enforcement and Standard Setting: the VITA and IEEE Letters and the ‘IP2’ Report,” address before the Spring Meeting of

“effects-based” approach, United States courts and antitrust enforcers generally avoid rigid rules and focus instead upon the ultimate question of whether a practice harms competition⁴ or “economic efficiency.”⁵ What does this mean in practice? The concept is best illustrated by first discussing a liability test that is *not* effects-based, such as that used in patent law.

A. Patent Law: A Divide Between Goals and Liability Analysis

Patent law is typical of U.S. statutory law in that it sets forth a series of goals rooted in the enhancement of social welfare but then uses liability tests that do not specifically depend on the advancement of such goals. This is not a criticism; rather, it is an observation about the way technical statutes often operate. Where a law assumes that an outcome X is beneficial but lawmakers do not trust fact finders to ask the ultimate question X in every case, that law often will split decision making into parts or ask fact finders to conduct a more limited inquiry as a proxy for X. Such an approach is common in criminal law. For example, selling certain drugs without a prescription is illegal regardless of whether the drug is good for a particular user or would have been prescribed if a doctor were present. The goal of the law is to protect users and correct prescribing but liability for sale without a prescription is *per se*; it is not effects-based in that liability does not hinge on whether a use is good or bad in a particular case. Similarly, patent law

the American Intellectual Property Law Association 9 (2007), available at <http://www.usdoj.gov/aatr/public/speeches/223363.htm>.

⁴Gerald F. Masoudi, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, “Intellectual Property and Competition: Four Principles for Encouraging Innovation,” address at the Digital Americas 2006 Meeting (2006), available at <http://www.usdoj.gov/aatr/public/speeches/215645.htm>.

⁵Thomas O. Barnett, Assistant Att’y Gen., U.S. Department of Justice, “Maximizing Welfare Through Technological Innovation,” address to the George Mason Law Review 11th Annual Symposium on Antitrust 14 (2007), available at <http://www.usdoj.gov/aatr/public/speeches/227291.htm>.

both splits decision making—between the Patent Office, judges, and fact-finders⁶—and limits the final inquiry into liability and defenses. This creates a potential divide between goals and trial decisions.

Patent law’s goal is clear. Patent law has its basis in the Constitution’s injunction to promote progress of science and the useful arts⁷ and, according to the Supreme Court, its ultimate goal is to bring new designs and technologies into the public domain through disclosure,⁸ promoting “‘Progress[,]’ ... with all that means for the social and economic benefits envisioned” by the founding fathers.⁹ What, then, is the analysis used for patent infringement (liability) or anticipation or obviousness (key defenses)—does an infringement or defenses inquiry require a finder of fact to consider “progress,” encouragement of public disclosure, or social and economic benefits? Typically, the answer is no, not directly. The statutory sections for infringement, 35 U.S.C. § 217 (all 1400 words of it), anticipation/novelty, 35 U.S.C. § 102 (400 words), and obviousness, 35 U.S.C. § 103 (another 500 words), are highly technical, and do not discuss such concepts. Neither do model jury instructions for infringement, anticipation, and obviousness.¹⁰ Broad economic inquiry about whether a particular patent is a good thing for the economy—and expert economic testimony of any type—typically does not form

⁶The Patent Office issues a patent in the first instance. If there is a jury trial, a judge in a pretrial Markman hearing establishes the major outlines of patent’s claim interpretation. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996). The jury then decides remaining issues of liability and defenses.

⁷U.S. Const. Art. 1 sec. 8.

⁸Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 151 (1989).

⁹Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980).

¹⁰*See, e.g.,* KEVIN F. O’MALLEY, JAY. E. GREINIG, & THE HON. WILLIAM C. LEE, FEDERAL JURY PRACTICE & INSTRUCTIONS chs. 158.01, 158.20, 158.22 (infringement), 158.65 (obviousness), 158.68 (anticipation) (5th ed. 2001).

any part of the patent liability determination. Historically, the Supreme Court has believed that it is for Congress, and Congress alone, to determine whether the patent system is effectual or ineffectual in promoting the useful arts.¹¹

B. Antitrust Law: Goals and Liability Analysis, Closely Linked

Antitrust law's main liability tests, in contrast, cut immediately to the question of whether a finding of liability would advance the ultimate goals of the antitrust laws: enhancing competition and consumer welfare. And importantly, although it is subject to motions practice and expert testimony, that question can be put squarely in the hands of the ultimate trier of fact. For example, a leading model instruction on the antitrust "rule of reason," which is used to evaluate whether civil non-merger agreements are anticompetitive, reads:

In determining whether or not a particular restraint is reasonable or unreasonable, you [the jury] may consider the nature of the restraint, and its *effect*, actual and probable You will make your determination from consideration of all the evidence in the case, including the *effect* on the industry and the *economic effects* upon *competition*.¹²

Thus, competition, economic effects, and the enhancement of consumer welfare are not only the *goals* but also the analytical *tests* of U.S. antitrust law. In an antitrust liability inquiry, the ultimate question is frequently the *only* question.

C. In Recent Years, the Shift from Per Se Rules to Effects-Based Analysis Has Accelerated in Antitrust Law

Readers may pause at this point and think: antitrust is effects-based? What about antitrust's famous *per se* rules? True, the *per se* rule against criminal price fixing and

¹¹See *Bonito Boats, Inc.*, 489 U.S. at 168.

¹²O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS ch. 150.21 (emphasis added).

cartel behavior is arguably as strong now as it has ever been. The Department of Justice (“DOJ”) repeatedly has obtained record fines and yearly incarceration totals in the past five years, both via settlements and through contested litigation. On the civil enforcement side, however, courts and the antitrust agencies have cut down much of the forest of other rules and tests that characterized early U.S. law in this area. The Supreme Court’s first swing of the axe may be traced either to *Continental T.V., Inc. v. GTE Sylvania Inc.* in 1977, where the Court overruled a *per se* prohibition of non-price vertical restraints in view of “substantial scholarly and judicial authority supporting their economic utility,”¹³ or to *State Oil Co. v. Khan* in 1997, where the Court overruled a *per se* prohibition of maximum resale price maintenance in light of the “insufficient economic justification for *per se* invalidation.”¹⁴ Regardless of the exact beginning of the trend, it is indisputable that the hatchets have been particularly active in the past several years, as the Supreme Court issued decisions striking *per se* rules in *Texaco Inc. v. Dagher* (rejecting the *per se* rule against price fixing, when done in the context of a lawfully-constituted joint venture),¹⁵ *Illinois Tool Works Inc. v. Independent Ink, Inc.* (rejecting the presumption of market power in patent tying cases, and thus effectively rejecting the *per se* rule against patent tying),¹⁶ and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*¹⁷ (overruling the 94-year-old *per se* rule against minimum resale price maintenance agreements).

The antitrust enforcement agencies also have been chopping away. DOJ and the

¹³433 U.S. 36, 57-58 (1977).

¹⁴522 U.S. 3, 18 (1997).

¹⁵547 U.S. 1 (2006).

¹⁶547 U.S. 28 (2006).

¹⁷55 U.S. 877 (2007).

Federal Trade Commission (“FTC”) rejected a number of presumed *per se* prohibitions in the intellectual property context in their joint 2007 “IP2” Report¹⁸ (including the prohibition on *ex ante* patent licensing negotiations in standard setting),¹⁹ and DOJ went a step further in its 2008 Single-Firm Conduct Report,²⁰ in which it concluded that tying in general should not be *per se* illegal.²¹ The *per se* rule against criminal cartel behavior appears safe, since fixing of prices, bids, output, and markets by cartels has no plausible efficiency justification, but antitrust law now evaluates nearly all other conduct on a case-by-case basis, explicitly analyzing economic effects.

Per se rules are not the only rules to earn the Supreme Court’s disdain: the Court also has been rejecting practice-specific special rules of analysis in favor of more general and economic tests. In 2007 in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,²² the Court rejected the attempt to treat “predatory bidding”²³ as different from “predatory pricing.”²⁴ It applied its longstanding *Brooke Group* test,²⁵ which requires a showing of below-cost pricing (an otherwise economically irrational action) coupled with

¹⁸U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT & INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 17, 2007), available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf> (hereinafter “IP2 Report”). The shorthand title “IP2” is used to distinguish this from an earlier report issued by the FTC: FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003) (hereinafter “IP1 Report”), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

¹⁹*Id.* at 53.

²⁰U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) [hereinafter Single-Firm Conduct Report], available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

²¹*Id.* at 87.

²²549 U.S. 312 (2007).

²³Bidding too high (by some measure) for inputs, in order to deny the inputs to rivals or raise rivals’ costs.

²⁴Pricing too low (by some measure) for outputs, in order to deny customers or profits to rivals.

²⁵*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

a dangerous probability of recoupment—an effects-based test. In 2009 in *Pacific Bell Tel. Co. v. linkLine Commc'ns, Inc.*,²⁶ the Court rejected an attempt to create a special antitrust rule for a “price squeeze” claim,²⁷ ruling that relevant conduct must instead be analyzed under the existing and general tests for predatory pricing under *Brooke Group* and refusals to deal under *Trinko*.²⁸ This trend toward broader rules and injection of economics has made its way even into the arcane world of complaint pleading and motions to dismiss: in 2007 in *Bell Atlantic Corp. v. Twombly*,²⁹ the Court required that an allegation of antitrust conspiracy must be economically “plausible,” and the Court “retired” the famous 1957 “no set of facts” pleading standard of *Conley v. Gibson*³⁰ not just for antitrust cases, but for all cases.

Perhaps most instructive (although in lower courts) is what has occurred when the FTC attempted to buck the anti-rule trend in matters that became the 2005 case *Schering-Plough Corp. v. FTC*³¹ and the 2008 case *Rambus Inc. v. FTC*.³² In *Schering*, the FTC confronted a situation in which the Hatch-Waxman Act³³ created a unique incentive for generic-drug challengers to sue to invalidate the patents of branded-drug incumbents: the

²⁶--- U.S. ---, 129 S. Ct. 1109 (2009).

²⁷Raising one’s wholesale price or reducing one’s retail price so that a rival that purchases one’s wholesale product or service but competes at retail cannot make a sufficient (by some measure) margin on the wholesale-resale differential.

²⁸*Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

²⁹550 U.S. 544 (2007).

³⁰355 U.S. 41, 45-46 (1957) (“In appraising the sufficiency of the complaint we follow ... the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

³¹402 F.3d 1056 (2005).

³² 552 F.3d 456 (2008).

³³Formally known as the Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (as amended).

generic-drug challengers could merely file a new drug application asserting invalidity, and need not incur any potential patent infringement liability before triggering a suit that could devastate the incumbent through loss of its patent. Generic-drug challengers responded by filing many such applications, as the law intended, and incumbents often responded with something the drafters of the law apparently did not anticipate: “reverse payment” settlements, under which money or other benefits flowed from the patent holder to the potentially infringing challenger (the “reverse” of the normal direction), accompanied by the challenger’s promise to stay out of the market for a period of time. The FTC alleged that Schering-Plough had engaged in reverse-payment settlements that constituted unlawful restraints of trade. The FTC’s theory evolved over time³⁴ but a constant was that the FTC attempted to use the alleged presence of a reverse payment as a proxy for anticompetitive effects. The FTC refused to evaluate in detail the question of whether the patent rights involved were in fact valid and infringed, which under the defense’s view of the case would have been key to answering the ultimate question of whether the challenged settlements could cause economic harm.³⁵

In *Schering*, the 11th Circuit, in a harshly worded opinion, rejected the FTC’s approach and held that review of such a patent settlement requires analysis of “(1) the scope of the exclusionary potential of the patent; (2) the extent to which the agreements

³⁴Through proceedings before an administrative law judge, in an appeal to the full Commission, and finally to the Court of Appeals for the 11th Circuit.

³⁵*See, e.g.,* Opinion of the Commission, In the Matter of Schering-Plough Corp. et al., No. 9297, at 30 (“[Schering argues that since] the holder of a valid patent has the right to exclude infringing products entirely for the life of the patent, the settlement agreement was procompetitive because it permitted generic entry some five years *before* the expiration of Schering’s patent. We reject this argument for a number of independent reasons ... we believe that an inquiry into the merits of the patent case would not be conclusive in most of our antitrust cases anyway.” (emphasis in original)), available at <http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf>.

exceed that scope; and (3) the resulting anticompetitive *effects*” before an antitrust rule of reason inquiry could even begin.³⁶ The FTC ran into a similar problem in *Rambus*, where the D.C. Circuit found that the FTC had not proven an antitrust violation because it did not demonstrate that a defendant’s alleged deception in a technology standard setting affected the ultimate choice of technology that embodied that defendant’s patent:

“[d]eceptive conduct—like any other kind—must have an anticompetitive *effect* in order to form the basis of a monopolization claim.”³⁷

II. POSSIBLE IMPLICATIONS FOR PATENT LAW

Should a patent lawyer pay attention to antitrust law’s effects-based revolution and the decline of special rules? That question might be answered, in part, with another: Would it be reasonable for patent lawyers to assume that Supreme Court Justices, having displayed such a strong preference for general tests and economic effects in the antitrust context, will clear that preference from their minds when considering issues of patent law?

Recent Supreme Court patent cases suggest that the Court is moving away from special rules for liability and key defenses, and toward general tests that focus to some degree on effects, in patent law just as it is in antitrust. A chart (*see* Annex 1) of the key patent and antitrust cases since 2006 helps to illustrate this trend. What follows is a bit more detail.

³⁶402 F.3d at 1065-66 (emphasis added).

³⁷552 F.3d at 464 (emphasis added).

A. *eBay, MedImmune, KSR, and Quanta Computer*

In *eBay Inc. v. MercExchange, L.L.C.* (2006),³⁸ the Court rejected the imposition of an automatic permanent injunction following a successful patent infringement claim, and instead applied the four-factor injunction test that federal courts traditionally use regardless of the substantive law at issue. The Court’s terse opinion remanding the case gave little additional guidance; however, Justice Kennedy wrote a concurrence, joined by Justices Stevens, Souter, and Breyer, stating that “courts should bear in mind that in many instances the nature of the patent being enforced and the *economic function* of the patent holder present considerations quite unlike earlier cases.”³⁹ Justice Kennedy also referred to the “suspect validity” of some modern patents—an odd consideration for the remedy stage (where, by definition, a patent must already have been found valid and infringed) unless, at the back of the Justice’s mind, he was considering making remedy analysis in some sense part of the liability inquiry.

Such a link between remedy and liability would echo the Court’s recent antitrust decisions in *Trinko*, *Weyerhaeuser*, and *linkLine*, where the Justices (with no dissents, albeit with some concurrences) stated strongly that liability should not attach where a court cannot articulate an effective remedy.⁴⁰ In *eBay*, Justice Kennedy also cited the FTC’s “IP1 Report”⁴¹ on patent quality, which itself discussed the economic value of the patent system and compared the goals of the patent and antitrust regimes. Thus, in rejecting the special patent injunction rule, Justice Kennedy, and to a lesser extent the full

³⁸547 U.S. 388 (2006).

³⁹ *Id.* at 396 (emphasis added).

⁴⁰*Trinko*, 540 U.S. 414-15; *Weyerhaeuser*, 549 U.S. at 319; *linkLine*, 129 S. Ct. at 1120.

⁴¹IP1 Report, *Supra* n. 18.

Court in *eBay*, echoed the generalized methods of analysis found in antitrust cases.

In *MedImmune, Inc. v. Genentech, Inc.* (2007),⁴² the Court rejected a special rule of patent practice under which a patent licensee was required to terminate or breach its patent license agreement prior to seeking declaratory judgment of a patent's invalidity. In so doing, the Court echoed its rejection of special rules in the antitrust cases *Dagher* and *Illinois Tool*, and anticipated its rejection of special rules in the antitrust cases *Weyerhaeuser*, *Leegin*, and *linkLine*.

In *KSR Intern. Co. v. Teleflex Inc.* (2007),⁴³ the Court rejected the Federal Circuit's "teaching, suggestion, or motivation" test for obviousness and held that obviousness must be judged by an "expansive and flexible approach." "When a court transforms the general principle into a rigid rule that limits the obviousness inquiry," held the Supreme Court, "it errs."⁴⁴ Substitute "economic" for "obviousness" and this sentence would sum up thirty years of Supreme Court antitrust jurisprudence. This was another instance of rejecting special rules; in addition, the Court explicitly linked the obviousness test back to the goals of the patent laws, saying "[w]ere it otherwise patents might stifle, rather than promote, the progress of useful arts," and citing the Constitution's patent clause.⁴⁵ This is not quite an effects-based test but it comes close.

Finally, in *Quanta Computer, Inc. v. LG Electronics, Inc.* (2008),⁴⁶ the Court rejected an argument that the exhaustion test for a method patent should be a special rule

⁴²549 U.S. 118 (2007).

⁴³550 U.S. 398, ---, 127 S. Ct. 1727, 1739 (2007).

⁴⁴*Id.* at 1741.

⁴⁵*Id.* at 1746.

⁴⁶--- U.S. ---, 128 S. Ct. 2109 (2008)

that differs from the Court’s existing test for exhaustion of a device patent. Clearly, the Court yet again rejected a special rule in favor of a broader approach. Less clear, but apparent to a careful reader, was the Court’s apparent frustration with an attempt to extend “the scope of the patent monopoly”⁴⁷ beyond what the Court considered to be an economically reasonable intrusion into the “stream of commerce.”⁴⁸ When the Court found that a licensee’s sale of component computer parts that substantially embodied method patents was “authorized,” such that the patent rights at issue were exhausted—despite the patentee’s insertion of contract language directly intended to prevent exhaustion—it expressed that frustration in language that would take only a small tweak to become an effects-based test, balancing the value to competition of patent rights and innovation incentives, on the one hand, against exhaustion and unfettered downstream competition, on the other. It is interesting to note that if the Court was thinking along such lines, it was not alone: the Solicitor General’s brief as *amicus curiae*, which successfully argued in favor of exhaustion and the general rule, explicitly discussed competition and economic issues and featured a cover-page appearance that was unusual for a patent case: an appearance, on brief, by the Assistant Attorney General of the Antitrust Division.⁴⁹

In fairness, not every case fits the anti-rule trend. In *Microsoft Corp. v. AT&T Corp.*,⁵⁰ a 2007 patent decision, the Court held that computer software copies made

⁴⁷*Id.* at 2122.

⁴⁸*Id.* at 2118 n.5.

⁴⁹See Brief for the United States as Amicus Curiae, *Quanta Computer, Inc. v. LG Electronics, Inc.*, --- U.S. ---, 128 S. Ct. 2109 (2008) (No. 06-937), available at <http://www.usdoj.gov/osg/briefs/2007/2pet/6invt/2006-0937.pet.ami.inv.html>.

⁵⁰550 U.S. 437 (2007).

overseas were not “components” supplied from the United States, and therefore did not lead to U.S. patent infringement liability. The Court treated the question as one of pure statutory interpretation and did not discuss economics. A month later in an antitrust case, *Credit Suisse Securities (USA) LLC v. Billing*,⁵¹ the Court ruled in another statutory-interpretation case that particular securities laws were incompatible with, and preempted, antitrust claims. In *Credit Suisse*, the Court did discuss economics, but only in the larger context of potential chilling effects and disruption of the securities regulatory regime if antitrust liability were to apply. These cases demonstrate an uncontroversial point—that statutes and other policy considerations still matter—but it should be noted that another month later, the Court was back to the larger trend with *Leegin*, followed in the next two terms by *Quanta Computer* and *linkLine*. So, the economic approach is not the Supreme Court’s only tool, but it is an increasingly important one.

B. Convergence Between Antitrust and Patent Law

There already exists a broad consensus that the basic goals of antitrust and intellectual property law are aligned,⁵² and a broad body of writing that discusses the interactions among antitrust, competition, and innovation.⁵³ Ultimately, the patent laws share the antitrust laws’ focus on promoting innovation and enhancing consumer welfare.⁵⁴ A convergence of goals is not news; what *is* news, or, more cautiously, may be underway in the Supreme Court, is a convergence not only of goals but also of liability

⁵¹551 U.S. 264 (2007).

⁵² IP2 REPORT, *Supra* n.18, at 2.

⁵³*E.g.*, IP1 REPORT and IP2 REPORT, *Supra* n.18, at 2; U.S. DEP’T OF JUSTICE AND FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>; Illinois Tool, 547 U.S. 28.

⁵⁴ ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY at 2.

analysis. The Court already has taken a tentative step toward making effect-on-competition considerations into a part of patent remedy analysis, via its *eBay* decision. The logical next step may be to make such considerations a part of the inquiry into whether a patent is infringed, anticipated, or obvious.

It is difficult to believe that the Supreme Court would create a true, antitrust-like effects-based test for patent law liability. A true effects-based test might look something like this:

In determining whether or not a particular patent is *infringed, anticipated, or obvious*, you [the jury] may consider the nature of the *patent*, and its effect, actual and probable, on “*Progress*” of the *useful arts*. You will make your determination from consideration of all the evidence in the case, including the effect on *future innovation incentives, the ultimate goal of bringing new designs and technologies into the public domain through disclosure*, and the economic effects upon competition.

(The foregoing starts with the antitrust jury instruction quoted above, and adds the italicized language derived from the Supreme Court’s patent cases.)

Such an instruction would be a radical departure and might require prior congressional action to alter the statutory sections for infringement, anticipation, and obviousness. But such a radical step is not the only step available to the Supreme Court, nor would it fit the Court’s normally incremental and cautious *modus operandi*. Instead, the Court is likely to continue to adjust the margins of patent practice to consider to a larger degree the value of a particular patent within the goals of the patent laws and the competitive system.

Exactly what further adjustment might look like is hard to predict. Several factors will affect it. One is case selection. The Supreme Court hears only a small number of

cases, and does not control which issues come before it on petition for *certiorari*. Another is reform of the patent system itself. The Patent Office has begun a number of projects to respond to the perception that patent quality is not optimal and Congress recently has considered bills that would make substantial changes. The Federal Circuit has taken note of its recent reversals in the Supreme Court; the Federal Circuit's Chief Judge, Paul Michel, even made an unusual plea for patience during these reform efforts: "I am not against [reform] legislation," he stated in a January 2009 speech, "but I would omit litigation issues when courts are making desirable adjustments in a fine-tuned way."⁵⁵ Whether through such bottom-up reforms or the top-down injection of competition principles from the Supreme Court, a closer tethering of patent goals to patent litigation seems likely, and is probably a good thing. The trick will be to move cautiously and keep the ultimate goals of consumer and social welfare closely in mind. At any rate, patent lawyers should be on notice of the trend, and may want to pay close attention to Supreme Court antitrust law developments.

⁵⁵Nate Raymond, A Full-Court Press for Patent Credibility, *Legal Times* (Mar. 16, 2009), available at <http://www.law.com/jsp/dc/PubArticleFriendlyDC.jsp?id=1202429005600> (subscription required).

III. ANNEX

Case	Date	Subject	Holding
Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 129 S. Ct. 1109	Feb. 25, 2009	antitrust	Rejects special antitrust rule for above-cost "price-squeeze" claim; claim must be analyzed as Trinko refusal to deal or Brooke Group predatory pricing
Quanta Computer, Inc. v. LG Electronics, Inc., 128 S. Ct. 2109	June 9, 2008	patent	Rejects argument that exhaustion test for method patent differs from that for device patent; licensee's sale was "authorized," exhausting patent rights
Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877	June 28, 2007	antitrust	Rejects per se rule against minimum resale price maintenance agreements, overruling Dr. Miles Medical Co.
Credit Suisse Securities (USA) LLC v. Billing, 551 U.S. 264	June 18, 2007	antitrust	Securities laws at issue ruled incompatible with, and preemptive of, antitrust claims
Bell Atl. Corp. v. Twombly, 550 U.S. 544	May 21, 2007	antitrust	Antitrust claim must be economically "plausible"; parallel business conduct and bare allegation of conspiracy does not suffice to state a claim
KSR Intern. Co. v. Teleflex Inc., 550 U.S. 398	Apr. 30, 2007	patent	Rejects Fed. Cir.'s "teaching, suggestion, or motivation" test for obviousness; obviousness must be judged by "expansive and flexible approach," and "when a court transforms the general principle into a rigid rule that limits the obviousness inquiry, ... it errs"
Microsoft Corp. v. AT&T Corp., 550 U.S. 437	Apr. 30, 2007	patent	Computer software copies made overseas are not "components" supplied from the United States
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312	Feb. 20, 2007	antitrust	Rejects "fairness" inquiry and special rule for predatory bidding claims; applies Brooke Group predatory pricing test, requiring showing of otherwise economically irrational action and dangerous probability of recoupment
MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118	Jan. 9, 2007	patent	Rejects rule under which patent licensee was required to terminate or breach license agreement prior to seeking declaratory judgment of patent invalidity
eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388	May 15, 2006	patent	Rejects automatic permanent injunction in patent case; generally applicable four-factor injunction test applies, and patent plaintiff must prove its entitlement
Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28	Mar. 1, 2006	antitrust, patent	Rejects presumption that a patent conveys market power in context of a patent-tying antitrust claim
Texaco Inc. v. Dagher, 547 U.S. 1	Feb. 28, 2006	antitrust	Rejects per se rule against price fixing in context of a lawfully constituted joint venture

