

P-509 - Antitrust and Intellectual Property Rights
 Winter Quarter 2020
 2020 READINGS FOR CLASSES (REVISED - 2/11/2020)

Tuesday, 10:30 am - 12:20 pm -- Room 116, UW Law School, Gates Hall
 Friday, 10:30 am - 12:20 pm -- Room 116, UW Law School, Gates Hall

Read only the specific sections, pages or provisions identified for each session’s assigned readings.

“Washington state law requires that UW develop a policy for accommodation of student absences or significant hardship due to reasons of faith or conscience, or for organized religious activities. The UW’s policy, including more information about how to request an accommodation, is available at [Religious Accommodations Policy \(https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/\)](https://registrar.washington.edu/staffandfaculty/religious-accommodations-policy/). Accommodations must be requested within the first two weeks of this course using the [Religious Accommodations Request form \(https://registrar.washington.edu/students/religious-accommodations-request/\)](https://registrar.washington.edu/students/religious-accommodations-request/).”

Date	Topics & Readings ¹
Jan 7	<p>Topics: Overview / Goals of Competition Policies / Differing Perspectives on Compatibility Between IPR and Competition Policies / Role of the Judiciary</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • U.S. Department of Justice/Federal Trade Commission Report, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), pp. 1-5 (“FTC/DOJ 2007 Report”). • Robert Pitofsky, Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy, Sections A - C and E - F (2001). • <i>F.T.C. v. Actavis</i>, 133 S. Ct. 2223, 2238-40 (2013)(C.J. Roberts dissent.). • <i>Verizon Communications Inc. v. Law Offices of Curtis V. Trinko</i>, 540 U.S. 398, 407-08, 414-15 (2004). (“Trinko”). • <i>Illinois Tool Works Inc. v. Independent Ink, Inc.</i>, 547 U.S. 28, 42-46

¹ We recommend but do not require H. Hovenkamp, *Antitrust* (Thomason-West Black Letter Outlines, 6th Ed. 2016) (“*Antitrust*”) as a summary of competition issues under U.S. law that we are addressing in this course. The reach of this summary is broader than the topics covered in this course. For each topic we do cover, you can read the applicable parts of the *Antitrust* book but they are not required readings.

	<p>(2006) (“<i>Illinois Tools</i>”).</p> <ul style="list-style-type: none"> • <i>U.S. v. Microsoft Corporation</i>, 253 F.3d 34, 62-64 (D.C. Cir. 2001) (en banc)(per curiam)(“<i>Microsoft</i>”). • U.S. Department of Justice / Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (2017) (para 1.0) (“<i>U.S. IP Guidelines</i>”). <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • Anti-Monopoly Law of the People’s Republic of China (2008) (Articles 1-2) (“<i>AML</i>”). • <i>Traffix Devices, Inc. v. Marketing Displays, Inc.</i>, 532 U.S. 23, 28-30 (2001).
Date	Topics & Readings
Jan 10	<p><u>Topic:</u> Basic Analytic Framework for Evaluating Antitrust Issues Involving the Exercise of IP Rights</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>Novell, Inc. v. Microsoft, Corp.</i>, 731 F.3d 1064 (10th Cir. 2013)(“<i>Novell</i>”). • <i>Intel Corp. v. European Commission</i>, Case C-413/14, :EU:C:2017:632 (C.J. Sept. 6, 2017) (“<i>Intel</i>”).
Jan 14	<p><u>Topic:</u> Market Definition in Markets with Intellectual Property Rights</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>U.S. IP Guidelines</i>, para. 8 – 14. • <i>Microsoft</i>, 253 F.3d 34 at 51-54. • <i>Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.</i>, 386 F.3d 485, 491,494,496-500 (2004) (“<i>Geneva Pharm.</i>”). • <i>Eastman Kodak Company v. Image Technical Services, Inc.</i>, 504 U.S. 451, 454-78, 481-82 (1992) (“<i>Kodak I</i>”). • AML, Article 12. • Case COMP/AT. 39740 -- Google Search (Shopping), (paragraphs 145 – 190) (June 27, 2017) (“<i>Google Search (Shopping)</i>”). <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • U.S. DOJ/FTC, Antitrust Guidelines for Collaborations Among Competitors (2000) (Preamble and Sections 1.1 and 3.32) (“<i>Joint Venture Guidelines</i>”). • <i>Hoffmann-La Roche v. Commission</i>, European Court of Justice, Case 85/76 [1979] E.C.R. 461, [WL 68574] ¶¶ 21-35, 38-41 and 48 (“<i>Hoffman-LaRoche</i>”).

	<ul style="list-style-type: none"> • European Commission Guidelines for Horizontal Cooperation (2011) ¶¶ 111-26 (“EC Horizontal Guidelines”).
Date	Topics & Readings
Jan 17	<p><u>Topic:</u> Market Power in Dynamic Markets</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>Kodak I</i>, 504 U.S. 451, 454-78, 481-82 (1992). • <i>Image Technical Services, Inc. v. Eastman Kodak Co.</i>, 125 F.3d 1195, 1200-1202, 1206-08 (9th Cir. 1997) (“<i>Kodak II</i>”). • <i>Microsoft</i>, 253 F.3d 34 at 54-57. • <i>Geneva Pharm.</i>, 386 F.3d 485 at 500-501. • <i>Google Search (Shopping)</i>, para. 264 – 330. • AML, Article 18. <p><u>Resources / Optional Reading:</u></p> <ul style="list-style-type: none"> • European Commission Guidance on the Commission’s Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings 2009 O.J. (C. 45) 07, pp. 5-8 (“<i>EC Art. 82 Abusive Exclusionary Conduct Guidance</i>”).
Jan 21	Preparation for Upcoming Problem #1 Presentations
Jan 24	Presentations on Problem #1
Jan 28	<p><u>Topics:</u> Post-Presentation #1 Critique / Rule of Reason Review / Refusals to License IPRs</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • Review sections of <i>Novell 10th Circuit</i> opinion and <i>Intel EU</i> decisions that set forth the general principles for application of the rule of reason in single firm conduct cases in the US and EU. • <i>Trinko</i>, 540 U.S. 398, 403-14. • <i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i>, 472 U.S. 585, 600-611 (1985) (“<i>Aspen</i>”). • <i>Kodak I</i>, 504 U.S. 451, 454-78, 482-86. • Review sections of <i>Novell 10th Circuit</i> decision relating to refusals to license IPRs. • <i>Independent Service Organizations Antitrust Litigation</i>, 203 F.3d 1322, 1325-28 (Fed.Cir. 2000), cert. denied, 531 U.S. 1143 (2001) (“<i>CSU v. Xerox</i>”). • <i>Microsoft E.U.</i>, Case T-201/04, ¶¶ 319-35, 560-63, 643, 650-65, 688-703. • <i>IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co.KG</i>, Case C-

	<p>418/01[2004] E.C.R. I-5039</p> <ul style="list-style-type: none"> • AML, Art. 17(iii). <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • <i>Kodak II</i>, 125 F.3d 1195, 1206-20. • EU Art. 82 Abusive Exclusionary Conduct Guidance, ¶¶ 75-90. • <i>U.S. IP Guidelines</i> para. 2.1 • FTC/DOJ 2007 Report, Chapter One (pp. 15-32).
Date	Topics & Readings
Jan 31	<p><u>Topics:</u> Sham Litigation & Fraud on PTO</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>Walker Process Equip., Inc. v. Food Mach. and Chem. Corp.</i> 382 U.S. 172 (1965). • <i>Nobelpharma AB v. Implant Innovations, Inc.</i>, 141 F.3d 1059 (Fed. Cir. 1998) (background and section B of opinion). • <i>In the Matter of Dell Computer Corporation</i> 121 F.T.C. 616, Consent Order Statement of FTC, pp. 5-7 (1996). • <i>In the Matter of Union Oil Company of California</i>, F.T.C. Docket No. 9305 (2004), 2005 WL 2003365, Consent Order Statement of FTC, pp 5-6. • <i>Broadcom Corp. v. Qualcomm, Inc.</i>, 501 F.3d 297, 303-17 (3d Cir. 2007). • <i>Apple v. Samsung</i>, N.D. Cal 11-1846, October 18, 2011 Order, pp. 1-9. <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • <i>Rambus Inc. v. FTC</i>, 522 F.3d 456 (D.C. Cir. 2008). • <i>Handgards, Inc. v. Ethicon, Inc.</i>, 743 F.2d 1282, 1285, 1288-91, 1293-95 (9th Cir. 1984).. • JFTC IP Guidelines, Part 4, Sections 1 and 2
Feb 4	<p><u>Topic:</u> Product Development - Predatory “Innovation”</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • Review sections of <i>Novell</i> 10th Circuit decision relating to alterations of products. • <i>Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP</i>, 592 F.2d 991, 993-95, 998-1003 (9th Cir. 2010). • <i>Microsoft</i>, 253 F.3d 34, 64-67, 74-80. • <i>New York v. Actavis PLC</i>, 787 F.3d 638, 652-59 (2nd Cir. 2015)(product hopping). • <i>Microsoft EU</i>, ¶¶ 850-70, 912-44, 966-76, 1031-90, 1144-67 Case T-

	<p>201/04.</p> <ul style="list-style-type: none"> • <i>United States v. Microsoft Corp.</i>, 147 F.3d 935 (D.C. Cir. 1998) (parts I, IV, VI and Wald, J. dissenting opinion). <p><u>Resources / Optional Reading:</u></p> <ul style="list-style-type: none"> • <i>IBM Corp. v. Commission of the European Communities</i>, E.C.R. 2639 [1981] [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8708 (1981) (“<i>IBM E.U.</i>”) (predisclosure obligation).
Date	Topics & Readings
Feb 7	Presentations on Problem #2
Feb 11	<p><u>Topics:</u> Post Presentation #2 Critique / Licensing Restraints</p> <ul style="list-style-type: none"> • FTC/DOJ 2007 Report, Chapter 4 (pp. 87-102), Chapter 6, Part 1 (116-119). • Antitrust Guidelines for the Licensing of Intellectual Property (2017), US IP Guidelines, Sections 2.3, 3.1, 3.2, generally 3.4 and 4, 5.2, 5.6. • <i>Bayer AG v. Housey Pharmaceuticals, Inc.</i>, 228 F. Supp. 2d 467 (D. Del. 2002), Parts I, II, and IV (A-C). • <i>Mallinckrodt, Inc. v. Medipart, Inc.</i>, 976 F.2d 700 (Fed. Cir. 1992). • <i>U.S. v. Microsoft Corporation</i>, Final Judgment and Competitive Impact Statement, 59 Federal Register 42845-02, 1994 WL 445194 (August 19, 1994) (“<i>Microsoft 1995 Consent Decree</i>”). • Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements (2014) (E.U. Technology Transfer Guidelines) (“<i>TT Guidelines</i>”), Section 4.21. <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • <i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i>, 551 U.S. 877; 930 of 1220 (2007). • See generally, commentary on Rainbow Dist. v. Johnson & Johnson, Shanghai High Peoples Court 2013.
Feb 14	<p><u>Topics:</u> Tying / Bundling</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>Illinois Tool</i>, 547 U.S. 28, 31, 33-40, 43-46. • US IP Guidelines, Sections 5.3 and 5.4. • TT Guidelines, ¶¶ 191-195, 221.

	<ul style="list-style-type: none"> • AML, Art. 17(5). • <i>Princo Corp. v. International Trade Commission</i>, 616 F.3d 1318 (Fed. Cir. 2010). • <i>Microsoft</i>, 253 F.3d 34, 64-97. • <i>LePages Inc. v. 3M Co.</i>, 324 F.3d 141, 143-45, 154-62 (3d Cir. 2003) [11]. • <i>Allied Orthopedic Appliances Inc</i>, 592 F.3d 991, 996-98. • <i>Brantley v. NBC Universal, Inc.</i> 675 F.3d 1192, 1195-97, 1199-2003 (9th Cir. 2012). <p><u>Resources / Optional Reading:</u></p> <ul style="list-style-type: none"> • KFTC Decision regarding unbundling of Microsoft Operating Systems.
Date	Topics & Readings
Feb 18	<p><u>Topics:</u> Loyalty Rebates / Reciprocity / Exclusive Dealing</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • Review <i>Allied Orthopedic Appliances Inc</i>, supra. • Review sections of the Intel EU decision referenced in Lecture Two readings, Intel Corporation v. European Commission, ¶¶ 11, 16, 129-147 (ECJ, 6 September 2017). • <i>In the Matter of Intel Corporation</i>, Dkt. No. 9341, FTC Consent Order Statement of FTC, ¶¶ 1-5. • Bundeskartellamt Preliminary Legal Assessment – Facebook (December 19, 2017, and related background information on the Facebook proceeding). • US IP Guidelines, Sections 5.4. • TT Guidelines, ¶¶ 189, 226. • AML, Art. 17(5). •
Feb 21	Presentations on Problem #3
Feb 25	<p><u>Topics:</u> Post Presentation #3 Critique / Introduction to Collusive Horizontal Restraints</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • US IP Guidelines, Sections 3.4 and 5.1. • TT Guidelines, ¶¶ 15, 197, 204, 208, 216. • AML, Art. 15. • Hovenkamp et al. IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law 3rd edition, 2017, (“Hovenkamp, IP and Antitrust”), Chapter 30, Sections 30.01 – 30.04.

Date	Topics & Readings
Feb 28	<p><u>Topic:</u> Joint Ventures Involving IPRs -- Overview</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>Yamaha Motor Co., Ltd. V. F.T.C.</i>, 657 F.2d 971 (8th Cir. 1979). • <i>Polygram Holding v. F.T.C.</i>, 416 F.3d 29 (D.C. Cir. 2005). • <i>National Collegiate Athletic Ass’n v. Board of Regents of University of Oklahoma</i>, 468 U.S. 85, 94-98, 103-08, 113-20 (1984). • US IP Guidelines, Sections 4.1 – 4.2, 3.4.
March 3	<p><u>Topics:</u> Cross Licensing / Patent Pools</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • <i>In re Summit Technology</i>, Consent Decree and “Analysis”, Dkt. No. 9286. • <i>Standard Oil Co. (Indiana) v. United States</i>, 283 U.S. 163, 165-67, 175-79 (1931). • <i>Broadcast Music v. CBS</i>, 441 U.S. 1, 4-8, 16-26 (1979). <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • US IP Guidelines, Sections 5.5. • TT Guidelines, ¶¶ 129- 32, 244. • EU Horizontal Guidelines, Sections 2 and 4.
March 6	<p><u>Topic:</u> Standard Setting Organizations</p> <p><u>Readings:</u></p> <ul style="list-style-type: none"> • US IP Guidelines, Section 5. • EU Horizontal Guidelines, <i>see generally</i> Section 7. • Business Review Letter relating to UHF RFID Standards (Letter from Thomas Barnett to William Dolan, October 21, 2008 (RFIP Letter). • Business Review Letter relating to Remote SIM Provisioning (Letter from Makan Delrahim to Timothy Cornell, GSM Association), November 27, 2019 (GSM Letter). <p><u>Resources / Optional Readings:</u></p> <ul style="list-style-type: none"> • Business Review Letter relating to 3G Wireless Standards (Letter from Charles A. James to Ky P. Ewing, November 12, 2002). • Take It to the Limit: Respecting Innovation Incentives in the Application

	of Antitrust Law (Speech by Assistant Attorney General Makan Delrahim at the USC Gould School of Law's Center for Transnational Law and Business Conference, November 10, 2017).
March 10	Presentations on Problem #4
March 13	Post-Presentation Critique (VOLUNTARY)