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## Intellectual Property Experimentalism By Way of Competition Law

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Intellectual Property Experimentalism  
by Way of Competition Law

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# Intellectual Property Experimentalism By Way Of Competition Law

BY TIM WU<sup>1</sup>

Competition law and Intellectual Property have divergent intellectual cultures—the former more pragmatic and experimentalist; the latter influenced by natural law and vested rights. The US Supreme Court decision in *Federal Trade Commission v. Actavis* is an intellectual victory for the former approach, one that suggests that antitrust law can and should be used to introduce greater scrutiny of the specific consequences of intellectual property grants.

One day at the Athenaeum club in London, an unnamed attorney said something along these lines:

“We know that the laws only penalize agreements that restrain competition. Given the existence of a valid patent, the market belongs to the drug manufacturer, and there is, therefore, no possibility of restraining competition.”

“You’re saying generic drug makers and pharmaceutical companies aren’t competitors,” said someone, with an air of disbelief.

“Of course not,” said the attorney, “because as an owner of a patent, they have been given the market, so there is no competition.”

“I can’t sit here and listen to this,” said someone else.

THE COMPETITION LAW IS MORE PRAGMATIC IN ORIENTATION, AND, BORROWING FROM THE NORMS OF ECONOMISTS, STRONGLY INTERESTED IN THE CONSEQUENCES OF THE LAW’S OPERATION. MEANWHILE THE INTELLECTUAL PROPERTY LAWS RETAIN A DOMINANT CULTURE CLOSER TO A NATURAL LAW RIGHTS TRADITION, TAKING THE PRIMARY DUTY OF LAW AS THE CREATION AND PROTECTION OF VESTED RIGHTS, WITH LESS REGARD FOR THE SPECIFIC EFFECTS OF RIGHTS GRANTED.

The exchange of words above, one of many heated exchanges during that day, may seem like nothing more than a typical clash between those who happen to take different views of a case. But disagreements can sometimes reveal something deeper, and what comes across here is a fundamental intellectual divide between practitioners in the intellectual property and competition law fields. While sometimes said to share “a common purpose of promoting innovation and consumer welfare,”<sup>2</sup> those with any experience in the two fields know how different the thinking in each can be. The competition law is more pragmatic in orientation, and, borrowing from the norms of economists, strongly interested in the consequences of the law’s operation. Meanwhile the intellectual property laws retain a dominant culture closer to a natural law rights

tradition, taking the primary duty of law as the creation and protection of vested rights, with less regard for the specific effects of rights granted.

While I'm hardly the first to write about the distinctive intellectual traditions of the two regimes,<sup>3</sup> in this paper I want to try to take a new look at the intellectual divide, and in particular, how it yields different approaches to a key issue, namely, how the law reacts to changing conditions and unintended consequences.

I am not neutral party in this debate. I believe that the IP laws in general, and the patent laws in particular, need to be better attuned to their actual effects on commerce. Stated differently, I think we need a more *experimentalist* intellectual property regime, that is, one that views the laws as an ongoing project in constant need of improvement.<sup>4</sup> As a practical matter, however, such regime change seems unlikely to emerge organically. One means for introducing a more error-sensitive intellectual property system is increased use of the competition laws as an oversight regime.

That's a task that competition enforcers have already been taking seriously, and the Supreme Court's 2013 decision in *Federal Trade Commission v. Actavis* can be read (perhaps generously) as a blessing of such efforts. The decision effectively approved more than a decade of efforts by the Federal Trade Commission to stop "pay-for-delay" patent settlements that it considered anticompetitive. At a more general level, it approved of an ongoing examination of the actual consequences of patents using the antitrust laws, and as such the details of the decision are less important than its approach. Of course, implicit in the grant of a patent is accepting anticompetitive consequences, but in *Actavis* the Court viewed that fact merely as another factor for antitrust analysis. In other words, one job of the competition laws is improving the patent system and perhaps intellectual property more generally.

## I. EXPERIMENTALISM

Experimentalism is not a word that attorneys use very often. At its most general, the idea of legal experimentalism is to apply the scientific method of hypothesis, experiment, and observation of consequence to challenging legal and policy problems. It is, as such, closely related to a "pragmatist" legal philosophy.<sup>5</sup>

John Dewey is usually credited with laying a philosophical foundation for policy experimentalism in his writings in the 1910s and 1920s. Dewey, whose background was in education, believed that a successful democracy needed the capacity to learn and improve itself. The key to learning, he believed, was the processing of experiences, or in his words the "reconstruction or reorganization of experience which adds to the meaning of experience and which increases ability to direct the course of subsequent experience."<sup>6</sup>

As relevant to the legal system, Dewey thought policy and "proposals for social action" should be subject to the experimental method. Policy-making, he said, should be a constant process of learning from experience, rather than relying on rigid or foundational truths. "Policies," Dewey argued, should be "experimental in the sense that they will be entertained subject to constant and well-equipped observation of the consequences they entail when acted upon, and subject to ready and flexible revision in the light of observed consequences."<sup>7</sup>

As understood here we can describe legal experimentalism as comprising three main principles. First, for the experimentalist, laws are simply instruments meant to achieve some end and useful only to the extent they do so. A law has no intrinsic value, and its existence should not necessarily count in favor of its retention.

Second, every law should be thought of as an ongoing experiment. That is to say, every enactment, regu-

lation or judicial opinion must be seen as that moment's best guess as to what a rule should be, in light of imperfect information and human fallibility. Borrowing Dewey's language, policies should be thought of as a "working hypothesis, not as programs to be rigidly adhered to and executed."<sup>8</sup> Given the imperfect nature of law-making, policy should be subject to revision when faced with new information or changed conditions. The law must also be able to learn and improve itself based on observation of consequences, intended or otherwise.

Third, in service of the first two principles, the relevant institutions should be designed to learn and improve the law through an experimental process. There are, actually, many ways this could be achieved.<sup>9</sup> But to actually perform something that resembles an experiment, its most important structure is some tolerance for legal diversity, coupled with a centralized mechanism for evaluating the results of different approaches to the same problem.

## II. COMPETITION LAW

Over the last few decades, legal regimes that are experimentalist by design have emerged in discrete areas of regulation, such as mine safety or in the use of drug courts. As Professors Charles Sabel<sup>10</sup> and Bill Simon put it, these are institutions that achieve a "decentralization of operative control with central coordination of the evaluation of results."<sup>11</sup> But it is also possible for legal experimentalism to arise organically, particularly when scattered lawmakers confront similar problems repeatedly. Arguably, for example, a form of serial experimentalism has been going on for centuries within the framework in the common law tradition, where diverse judges work through cases, continually reassessing old precedent and occasionally discarding rules that no longer work.<sup>12</sup>

ARGUABLY, FOR EXAMPLE, A FORM OF SERIAL EXPERIMENTALISM HAS BEEN GOING ON FOR CENTURIES WITHIN THE FRAMEWORK IN THE COMMON LAW TRADITION, WHERE DIVERSE JUDGES WORK THROUGH CASES, CONTINUALLY REASSESSING OLD PRECEDENT AND OCCASIONALLY DISCARDING RULES THAT NO LONGER WORK.<sup>12</sup> WHILE COMPETITION LAW ISN'T FORMALLY EXPERIMENTALIST, I SUGGEST THAT THE COMPETITION AND ANTITRUST LAWS TEND TOWARD SUCH INFORMAL EXPERIMENTALISM.

While competition law isn't formally experimentalist, I suggest that the competition and antitrust laws tend toward such informal experimentalism. It is, first, evident that the competition law has long been considered an instrument for achieving goals, not recognizing abstract rights. The law's goals are general to a fault: once upon a time in the United States, "to eliminate the evil of bigness;"<sup>13</sup> in more recent decades, the less colorful goal of "encourage[ing] competitive markets to promote consumer welfare."<sup>14</sup> Even if the goals of the law have evolved, the idea that the law is only really understood as valuable to the degree it promotes those goals has not.<sup>15</sup> None of this is to say that antitrust attorneys never get fixed in their views, but that isn't usually seen as an attractive trait.

Structurally, over the last several decades, the geographic spread of competition laws has created a natural experimentalist structure. The exact same legal problem is often faced by the European authorities, the two American agencies (Department of Justice and the Federal Trade Commission), and hundreds other national competition authorities, American states, and individual American judges in private lawsuits. Furthermore, within the large agencies, individual staff attorneys often have a surprising discretion to begin informal investigations.

That experimentalist structure has been preserved, because, despite the obvious potential for international conflict, there is no serious movement toward a single, uniform competition law, and there is no global competition law treaty. As Hugh Hollman, Bill Kovacic and Andrew Robertson put it, “complete uniformity is probably unattainable and undesirable” for it would impede experimentation.<sup>16</sup> As we shall see, that’s an attitude sharply at odds with the position taken in the intellectual property community.

Finally, for more than a century in the United States, and for decades in Europe and the rest of the world, the law has undergone ongoing tinkering and serial experimentation by legislatures, agencies, and courts. That is true both within regimes and across them. Consider, for example, the specific history of Section 2 of the Sherman Act, which has gone through various peaks and valleys not unlike a long-running cardiogram. Based on then-current opinion, the law has gone from being close to a no-fault deconcentration rule<sup>17</sup> to something very close to dead (during the second Bush administration).<sup>18</sup> Or consider that there have been six versions of the American merger guidelines since 1968.

THE GLOBAL COMPETITION SYSTEM ALSO LACKS ANY FORMAL SYSTEM FOR A CENTRALIZED ASSESSMENT OF DIFFERENT APPROACHES. HOWEVER THERE ARE INFORMAL MECHANISMS FOR DOING SO, INCLUDING THE INTERNATIONAL COMPETITION NETWORK, THE OECD WORKING GROUP AND OTHER LESS FORMAL GROUPS THAT SPEND THEIR TIME ASSESSING BEST PRACTICES AND, INFORMALLY, COMPARING RESULTS.

Europe has, if anything, seen greater variation. Consider, for example, the initial years of the European Commission Merger Regulation focused on the formal distinction between “cooperative” and “concentrative” joint ventures.<sup>19</sup> European merger control has quickly evolved both in application and legislatively. Throughout the ‘90s the European Commission entertained novel antitrust theories and remedies,<sup>20</sup> and by 2004, just 15 years after the regulations were enacted, the ECMR saw substantial reform that, among other things, enabled the commission to prohibit mergers that “significantly impede effective competition” even if the merger would not confer dominance, which previously had been the sole standard.<sup>21</sup>

To be sure, this history of tinkering is not quite the formal, parallel experimentation that Sabel discusses. A critic might point out that Europeans don’t necessarily feel bound to learn from American failures, and vice versa. But what creates an experimentalist culture, as opposed to just legal diversity is a sense of continuing trying to learn from what has succeeded and what has failed. This may be due to the influence of economists than any other reason, and their fondness for the “natural experiment.”<sup>22</sup> Of course, the success or failure of any law is hard and maybe impossible to measure accurately, which makes this a challenging proposition. Given the lack of controls and the difficulty of untangling cause and effect, it is difficult to know whether a given merger policy was more or less successful, or whether a major investigation was just a waste of resources or a critical turning point for an industry. But nonetheless there is a spirit of learning that is manifested in efforts to learn from failures, or imitate investigations seen as successful.

The global competition system also lacks any formal system for a centralized assessment of different approaches. However there are informal mechanisms for doing so, including the International Competition Network, the OECD working group and other less formal groups that spend their time assessing best practices and, informally, comparing results.

### III. INTELLECTUAL PROPERTY LAWS

To say that the copyright, trademark and patent laws do not have an experimentalist spirit might be something of an understatement. Rather, to describe the laws as an ongoing experiment might easily risk offense.

There is no reason, *a priori*, that the intellectual property laws could not be subject to an experimentalist approach.<sup>23</sup> The laws have general goals and there are many potential ways to achieve them. To take a minor example, no one really knows what duration of copyright or patents is optimal. However, there seems at present to be very little apparent interest among lawmakers for trying different terms in different jurisdictions or for different subject matters and seeing what happens.

THE DOMINANT CULTURE OF INTELLECTUAL PROPERTY RETAINS A PERSISTENT LINKAGE WITH THE NATURAL LAW TRADITION, WHICH RECOGNIZES A NATURAL RIGHT IN THE INVENTOR OR CREATOR, AND THE LANGUAGE OF PROPERTY, OF WHICH THE PHRASE “INTELLECTUAL PROPERTY” IS JUST THE MOST OBVIOUS SIGN.<sup>24</sup>

Even though the IP laws are sometimes discussed and defended in economic terms, one might say that the influence of economic thought has been partial. There is, to be sure, much discussion of incentives as the justification for intellectual property, but a full application of the scientific method has not generally been welcome. In fact, proposals by economists to tinker with obvious defects in the law are more often met with panic than interest.

Rather, despite the efforts of some scholars, the dominant culture of intellectual property retains a persistent linkage with the natural law tradition, which recognizes a natural right in the inventor or creator, and the language of property, of which the phrase “intellectual property” is just the most obvious sign.<sup>24</sup> In this view, the primary duty of the law is to recognize and protect rights of individuals (or corporate individuals). These could be rights against the government, like the American right against self-incrimination; rights in contract; or rights in property. The recognition of such rights is less a means to some other goal than the point of the law itself. What rights should be protected is, moreover, less a matter that depends on circumstance, but rather an answer that comes from consideration of fundamental truths.

The intellectual culture of the rights tradition has created two important differences with the competition regime in the face of changing conditions and the evolution of the law.

First, in the face of changing conditions, the logic of a vested right suggested that the priority should be the protection the right against erosion. Courts must defend the holder of a vested right not just against external threats, but against subsequent government action that might threaten the value of existing rights. Second, rights systems generally aspire toward uniformity across jurisdictions. Given a clear idea as to what rights should be protected, there is, logically, no clear reason for variation between jurisdictions or nations.

We can see the practical implications of both of these tendencies as they have manifested over the last few decades. For one thing, the reaction to technological change has usually been a fortification of the right rather than a rethinking of the system.<sup>25</sup> Consider, for example, the reaction of the laws to the massive technological changes over the 1980s and 1990s, when the successive development of personal computers, digitalization tech-

nologies and the Internet rather obviously changed the assumptions on which both patent and copyright had long relied. In both the United States and Europe the predominant legal response was to strengthen copyrights and to expand the subject matter of patent. The merits of such laws are not the subject here; the point was that, as opposed to reconsidering what would serve the broader purposes of the law under changed conditions, the challenge was framed as protecting the existing rights against potential erosion.

The goals of uniformity and predictability has had its clearest implications at the international level. Unlike competition law, which varies significantly between OECD nations, over the last several decades all of the IP laws have become subject to a much stronger and geographically broader web of harmonizing international agreements, on multinational, regional and bilateral levels. The general aim of these treaties is to homogenize the world's IP regimes, reducing or eliminating geographical variation. All of the major laws are the subject of longstanding global treaties specifying minimum protections (The Berne and Paris conventions), which were fortified in 1994 by the addition of an intellectual property agreement to the World Trade Organization, and further strengthened by numerous bilateral treaties since then. And of course the World Trade Organization, unlike the informal organizations common to competition law, has the power to punish deviations from the intellectual property treaties with serious trade sanctions.

The pattern can also be observed at the national level. Both in Europe and the United States the last few decades have witnessed many important measures taken to create uniformity. In the United States, a single appeals court, the Federal Circuit, has heard the nation's appeals in patent cases since 1982 in an effort to bring greater uniformity to the patent law. Though proposals for constructing a uniform patent court akin to the Federal Circuit in the European Union have been unsuccessful so far,<sup>26</sup> the European Patent Convention, founded in 1973, provides a common application for the prosecution of patents in each of the member states.<sup>27</sup>

In short, stronger protection of uniform rights has been the clear trajectory of the intellectual property laws over the last few decades. That tendency is sharply at odds with the predispositions of the competition laws.

The dichotomy I am suggesting here is, of course, not absolute. In certain areas of the competition law, one can sense the influence of a vested rights theory, in, for example, the resistance to breakups of dominant firms, even if the economic case for doing so might be quite strong. And there are areas in IP law, like the American fair use doctrine (a judicial and scholarly favorite), which have, in fact, served as important outlets for judicial tinkering in the face of changing conditions. For example the famous *Sony* decision, blessing the VCR, broke with prevalent copyright doctrine, arguably as a reaction to perceived technological necessity.<sup>28</sup> Similarly, following a decade of bad press, Congress, the courts, and the American Patent Office have begun to make adjustments with American patent law. An example is the new post-grant review process, which includes a particular provision targeted at business method patents.

Nonetheless it would be hard to describe the intellectual culture of either the intellectual property laws as truly committed to experimental improvement of the law. It would be even harder to describe competition law as devoted to the protection of fundamental rights. We are left with a divergence in intellectual cultures with broad implications for just about every advanced economy in the world.



NONETHELESS IT WOULD BE HARD TO DESCRIBE THE INTELLECTUAL CULTURE OF EITHER THE INTELLECTUAL PROPERTY LAWS AS TRULY COMMITTED TO EXPERIMENTAL IMPROVEMENT OF THE LAW. IT WOULD BE EVEN HARDER TO DESCRIBE COMPETITION LAW AS DEVOTED TO THE PROTECTION OF FUNDAMENTAL RIGHTS. WE ARE LEFT WITH A DIVERGENCE IN INTELLECTUAL CULTURES WITH BROAD IMPLICATIONS FOR JUST ABOUT EVERY ADVANCED ECONOMY IN THE WORLD.

#### IV. USING ANTITRUST FOR PATENT EXPERIMENTALISM AT THE UNITED STATES SUPREME COURT

I believe there is a need for a more experimentalist approach to the intellectual property laws, and particularly to the patent laws. The law, I believe, needs better mechanisms not simply to celebrate its successes, but to correct its errors, both specific and general. One way this might be achieved is to act within the structure and institutions of the laws themselves; as just discussed, this is a project underway in certain respects. But the other path is to rely on the competition laws as a kind of oversight and adjustment mechanism for the intellectual property laws.

I am, of course, hardly the first to advocate this position, and it is clear that the world's major competition agencies already view part of their job as handling patents' unexpected consequences. Yet that role is not universally accepted for the ideological reasons just suggested. When a competition agency takes a look at how a patent or copyright is actually being used, it raises the question of what degree the government can, having given out rights, later declare that it has made a mistake and limit usage based on new evidence.<sup>29</sup> That was precisely the question presented in the American Supreme Court's 2013 patent-antitrust decision, *Federal Trade Commission v. Actavis, Inc.*, the Court's first case at the intersection of the two laws in quite some time.<sup>30</sup>

At issue in the case was a particular practice of brand-name pharmaceutical drug manufacturers and their generic rivals with respect to patented drugs. In the late 1990s the Commission began investigating and challenging certain settlements between patent-holders and would-be generic entrants. The Commission suspected that generics and brand-name manufacturers were settling patent infringement cases in a way that effectively split patent profits at the expense of the public.

The facts of the particular case considered by the Supreme Court make clearer how this might happen. The case centered on AndroGel, a testosterone replacement therapy manufactured by Solvay, a relatively large drug company. In 2003, two other drug makers sought to introduce generic versions of the drug. While AndroGel is protected by a patent that expires in 2021, the generics challenged the patent as invalid, and also not infringed upon by the proposed generic products. Under the Hatch-Waxman Act, such challenges are a form of infringement, and Solvay sued.

Three years later the parties settled, agreeing to make generic AndroGel unavailable until 2015. Of course, the drug would have reached the public in 2006 or 2007 if the patent had been found invalid or not infringed. Meanwhile, Solvay made large payments to the generic manufacturers (which it claimed were unrelated). As such, the Federal Trade Commission alleged the settlement was a payment for a delayed arrival of a generic drug, or a "pay-for-delay" deal.

From the view of strict vested rights approach, it is obvious that such settlements ought not to be challengeable under the antitrust or other laws, for several reasons. The patent grant defines a right for a private citizen that is his with which to do whatever he wants. The idea of government examining, *ex poste*, the usage of rights already granted contradicts the idea of a right that has vested. Moreover, even if we might concede that the particular usage of the right in question is unattractive, the idea of selectively examining such rights *ex poste* threatens the certainty and clarity prized by the system as a whole.

This is what Chief Justice Roberts meant when he wrote, in dissent, that a patent right creates a “zone within which the patent holder may operate without facing antitrust liability.” Once assigned, in this vision the right is supreme within the zone defined by its claims. For the Chief Justice, so long as the patent holder had not left the scope of his assigned right, the case was over. As he put it, in a line that captures this notion, there was “no reason adjudicate questions of patent law under antitrust principles.”

THE ENTIRE OPINION IS CAPTURED BY ONE, EARLY LINE: “[R]EVERSE PAYMENT SETTLEMENTS CAN ... SOMETIMES VIOLATE THE ANTITRUST LAWS.” THE WORD “SOMETIMES” IS VERY DEAR TO THE COMPETITION LAW AND THE PRAGMATIST/EXPERIMENTALIST METHOD. IT SUGGESTS UNCERTAINTY AND A LACK OF FIXED TRUTHS, THAT EVERYTHING WILL TURN ON PARTICULARIZED ASSESSMENT OF FACTS AND CONSEQUENCES.

To the Federal Trade Commission’s lawyers, its Commissioners and a majority of the Supreme Court, at least some of these so-called settlements were really just agreements to split the proceeds of a dubious monopoly at the consumer’s expense, and as such a specific failure of the patent system in need of correction. More broadly, since such settlements are not uncommon, they were, as a class, a defect in the system that should be fixed.

That framing found a receptive audience in Justice Breyer, the majority author, who among American judges is one of the most obvious in viewing the intellectual property law as an experiment, and a rather dubious one at that. In fact, Breyer’s previous writings represent some of the few pragmatist writings on intellectual property to emerge from the Supreme Court. He dissented in *Eldred v. Ashcroft*, a copyright case that examined a legislative effort to lengthen the copyright term, retroactively, in light of purportedly changing conditions.<sup>31</sup> It is hard to see how a retroactive term extension promotes any new authorship, and so Breyer declared that the law’s “practical effect is not to promote, but to inhibit, the progress of Science.”

As a professor, Breyer was less restrained. In 1970 he wrote *The Uneasy Case for Copyright*, a lengthy piece that examined copyright and concluded that the law, if perhaps useful once, was no longer really necessary to ensure the production of creative works, and should therefore probably be done away with.<sup>32</sup> Both of these works reveal a very different approach to legal change than that demanded by a rights-based model. The law is an instrument; we should examine its content in light of its claimed goals and, if current conditions suggest the law is valueless, so be it. But until 2013, Breyer had not yet had a chance to write at length on the patent-antitrust intersection.<sup>33</sup>

The entire opinion is captured by one, early line: “[R]everse payment settlements can ... sometimes violate the antitrust laws.” The word “sometimes” is very dear to the competition law and the pragmatist/experimentalist method. It suggests uncertainty and a lack of fixed truths, that everything will turn on particularized assessment

of facts and consequences. Breyer’s opinion is at pains to emphasize the specific contingencies that could create anticompetitive consequences, as shown by the following passage with an astonishing string of contingencies (seven, by my count) that, in the right combination, may be more important than encouraging settlements.

[A] reverse payment, where large and unjustified, can bring with it the risk of significant anti-competitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent; a court, by examining the size of the payment, may well be able to assess its likely anticompetitive effects along with its potential justifications without litigating the validity of the patent; and parties may well find ways to settle patent disputes without the use of reverse payments.<sup>34</sup>

Yet, by far the most significant thing about the opinion is not its use of semi-colons but rather the im-

PLICATION THAT THE ANTITRUST REGIME SITS IN A POSITION OF SUPREME OVERSIGHT OVER THE PATENT LAWS.<sup>35</sup> BREYER’S APPROACH MAKES CLEAR THAT, POTENTIALLY, ANY ANTICOMPETITIVE CONSEQUENCE THROWN OFF BY THE PATENT SYSTEM COULD BE SUBJECT TO CHALLENGE. TO BE SURE, A PATENT GIVES ITS OWNER SOME IMMUNITY TO ANTITRUST. BUT “PATENT AND ANTITRUST POLICIES ARE BOTH RELEVANT IN DETERMINING THE ‘SCOPE OF THE PATENT MONOPOLY’—AND CONSEQUENTLY ANTITRUST LAW IMMUNITY—THAT IS CONFERRED BY A PATENT.”<sup>36</sup>

IN THE STRONGEST READING OF THE OPINION, PATENT POLICY IS REDUCED TO SIMPLY ONE MORE FACTOR FOR ANTITRUST ANALYSIS, WHICH IS EFFECTIVELY MADE THE UBER-POLICY....YOU MAY OWN A PATENT, IT SAYS, BUT NONETHELESS, THE COMPETITIONS LAW WILL ALWAYS BE WATCHING.

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In the strongest reading of the opinion, patent policy is reduced to simply one more factor for antitrust analysis, which is effectively made the uber-policy. That’s implied when Breyer says courts should determine liability by “considering traditional antitrust factors such as likely anticompetitive effects, redeeming virtues, market power, and potential offsetting legal considerations present in the circumstances, such as here those related to patents.”<sup>37</sup> For adherents to a rights model, it must be something to see a property right reduced to merely one of many “potential offsetting legal considerations present in the circumstances.”

What we have, ultimately, is a Supreme Court blessing for the use of the competition laws to examine potential excesses of the current patent regime. As such, it represents a powerful victory for a method that uses the antitrust laws to improve the functioning of the patent system, not from within the law itself, but by external measurement of the law’s consequences for the economy. You may own a patent, it says, but nonetheless, the competitions law will always be watching. ▲

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1. Isidor and Seville Sulzbacher Professor of Law, Columbia Law School. My thanks to Scott Hemphill for comments, and to Bill Toth for timely research assistance.
  2. U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 1.0 (1995).
  3. Other examples include Herbert Hovenkamp, Antitrust and Innovation: Where We Are and Where We Should Be Going, 77 Antitrust L.J. 749, 750 (2011); Mark A. Lemley, A New Balance Between IP and Antitrust, 13 Sw. J. L. & Trade Am. 237 (2007); Harry First, Microsoft and the Evolution of the Intellectual Property Concept, 2006 Wisc. L. Rev. 1369 (2006); Michael

- A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. Pa. L. Rev. 761 (2002); Daniel J. Gifford, *The Antitrust/intellectual Property Interface: An Emerging Solution to an Intractable Problem*, 31 Hofstra L. Rev. 363 (2002).
4. A prominent suggestion for more experimentalism in patent is Lisa Larrimore Ouellette, *Patent Experimentalism* (working paper 2013); see also Tim Wu, *Bad Uses of Good Laws*, N.Y. Times, Oct. 10, 2012.
  5. For a definitive recent work on legal pragmatism, see Richard A. Posner, *LAW PRAGMATISM AND DEMOCRACY*, (2003),
  6. John Dewey, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 74 (Dover Publ'ns, Inc. 2004) (1916).
  7. *THE MORAL WRITINGS OF JOHN DEWEY* 261 (James Gouinlock, ed.) [need year of the edition]
  8. John Dewey, *THE PUBLIC AND ITS PROBLEMS* 202-03 (Swallow Press Books 1954) (1927).
  9. Cf. William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, available at [http://www.law.columbia.edu/faculty/fac\\_resources/faculty\\_lunch?exclusive=filemgr.download&file\\_id=9477&rtcontentdisposition=filename%3DSimon.pdf](http://www.law.columbia.edu/faculty/fac_resources/faculty_lunch?exclusive=filemgr.download&file_id=9477&rtcontentdisposition=filename%3DSimon.pdf).
  10. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, (1998); William Simon & Charles Sabel, *Minimalism and Experimentalism in the Administrative State*, 100 Georgetown L. J. 53 (2010); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003); Michael C. Dorf, Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000)
  11. William Simon & Charles Sabel, *Minimalism and Experimentalism in the Welfare State*, 100 Georgetown L. J. 53 (2010).
  12. As Posner writes, pragmatism is “the secret story of our courts as of our political system in general.” *Id.* at 333.
  13. Thurman W. Arnold, *THE BOTTLENECKS OF BUSINESS* 3 (1940).
  14. *FTC. V. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013).
  15. A older, alternative position might say that the point of antitrust is to
  16. *RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW* 92 (ed. Ariel Ezrachi) (2012).
  17. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (“To read the passage as demanding any ‘specific,’ intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.”).
  18. *THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY* 58 (Albert Foer ed., 2008) (citing U.S. DEP’T OF JUSTICE, ANTITRUST DIV., WORKLOAD STATISTICS for the proposition that the DOJ has brought no monopolization cases under the Bush Administration) available at [http://www.antitrustinstitute.org/files/Monopoly%20Chapter%20from%20%20AAI%20Transition%20Report\\_100520082111.pdf](http://www.antitrustinstitute.org/files/Monopoly%20Chapter%20from%20%20AAI%20Transition%20Report_100520082111.pdf).
  19. See generally Nicholas Levy, *EU Merger Control: A Brief History*, CLEARY GOTTLEIB STEIN & HAMILTON (2004) [http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584-f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH\\_CGSH\\_Paper\\_IBC\\_Conference\\_EU\\_Merger\\_Control\\_-\\_A\\_Brief\\_History.pdf](http://www.cgsh.com/files/Publication/39346756-bc80-4fd2-9584-f358ffc72239/Presentation/PublicationAttachment/05b61f33-f646-4c9e-a7ec-f6b8b0bfce4f/CGSH_CGSH_Paper_IBC_Conference_EU_Merger_Control_-_A_Brief_History.pdf). [ultimately, I think we’ll want to dive into the sources cited therein, rather than to this document itself]
  20. See *id.* at 15-16 and citations therein.
  21. Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, 2004 O.J. (L 24). For further discussion of the 2004 changes to the European merger control regulations, see Werner Berg, *New EC Merger Regulation: A First Assessment of its Practical Impact*, *The Symposium on European Competition Law*, 24 Nw. J. Int’l L. & Bus. 683 (2003-2004) available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1586&context=njillb>.
  22. E.g. Malcolm B. Coate. *The Use of Natural Experiments in Merger Analysis*, Federal Trade Commission (July 19, 2012).
  23. For a recent suggestion of how this might be accomplished, see Lisa Larrimore Ouellette, *Patent Experimentalism* (working paper 2013), *supra*.
  24. Cf. Robert Merges, *Justifying Intellectual Property* (2010).
  25. A full history can be found in Tim Wu, *Copyright’s Communications Policy*, U. Mich. L. Rev., and Jessica Litman

26. See Robert D. Swanson, *Implementing the E.U. Unified Patent Court: Lessons from the Federal Circuit*, 9 B.Y.U. INT'L L. & MGMT. REV. 169 (2013) and citations therein, particularly to Council Draft Agreement 16741/11, Draft Agreement on a Unified Patent Court, of 11 November 2011, Annex.
27. European Patent Convention, Oct. 5, 1973, 1065 U.N.T.S. 199.
28. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984).
29. Cf. Charles River Bridge v. Warren Bridge, 36 US 420 (1837).
30. The last was Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (holding that the existence of a patent on a product tied to an unpatented product is not sufficient to establish the market power necessary to find illegal tying).
31. Eldred v. Ashcroft, 537 U.S. 186, 242 (2003) (Breyer J., dissenting).
32. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970)
33. The closest he came was in Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 548 U.S. 124, 138 (2006) (“a decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as to whether the patent system, as currently administered and enforced, adequately reflects the “careful balance” that “the federal patent laws ... embod[y].”) (Breyer, J., dissenting).
34. F.T.C. v. Actavis, Inc., 133 S. Ct. 2223, 2237.
35. *Id.* at 2227 (2013).
36. *Id.* at 2231.
37. *Id.*