

Abstract

Patent Misuse and Antitrust: An Empirical Study

Patent misuse is a defense to patent infringement. It arises from the equitable doctrine of unclean hands as a reaction to the owner's misconduct in attempting the leverage patent rights to obtain or to coerce an unfair commercial advantage beyond the scope of the patent right. If misuse is found, the courts will withhold any remedy for infringement or breach of a license agreement, even against an infringer who is not harmed by the abusive practice. However, it does not invalidate the patent. The rights of the patent owner will be restored if and when the misuse is purged. Such purging occurs upon abandonment of the abusive practice and dissipation of any harmful consequences.

There has been a continuing debate about its proper role and scope of patent misuse. While earlier commentary suggested that patent misuse is problematic and it should no more than track antitrust principles, more recent views suggest that the patent misuse doctrine might have an important independent role to play because new developments in patent practice might be outside the reach of antitrust laws, and are in conflict with important patent innovation policies. This debate, like almost all academic and judicial policy debates is based upon economic theory and/or analyses of leading cases. While these are very valuable, they potentially suffer from the lack of a comprehensive picture of what the courts are doing. It also neglects current perceptions in the relevant legal community of what the courts are doing. This empirical study seeks to provide empirical answers to both questions.

This paper seeks to present a systematic, comprehensive account of patent misuse case law, its actual state and its relationship with antitrust law. Conventional legal doctrine derives from a small set of conventionally agreed-upon leading cases. This study determines whether that conventional wisdom in fact has empirical support. The body of the study has three components. The first component comprises of a case content analysis of how federal courts approach patent misuse in the context of antitrust laws. This first part constitutes the main component of the project. These findings provide an empirical analysis of how the population of judges who employed patent misuse did so. The second component of the project considers how contemporary judges, academics, government officials and lawyers understand patent misuse in relation to antitrust. The purpose of these interviews is to explore the legal community's awareness or legal consciousness of the scope and nature of patent misuse in relation to antitrust law, and provide an indication of whether more in-depth research is required. The first two components collectively map the actual and perceived contours of patent misuse, and its relationship with antitrust law.

Daryl Lim