

AFTERWORD:  
LOOKING FOR ANTITRUST LAW  
AT THE IP INTERSECTION

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I have an abiding interest in language in all of its varied uses—especially its capacity to teach and entertain. That interest leads me on occasion to contemplate the metaphors and analogies that lawyers use for purposes of explaining ideas and persuading others to think them sound. Consider, for example, the simile “like shooting fish in a barrel,” used to describe something easy to do. Why, I wonder, would you shoot the fish when they are already in the barrel? Isn’t that where you want them? And who came up with this idea in the first place? I am willing to bet it was not the guy who owned the barrel.

At this writing, I am considering another familiar metaphor. I imagine myself standing at the now famous intersection of antitrust and intellectual property. It is a busy intersection, as it has been for well over a decade. Indeed, it is now far busier as a result of this volume of the *Journal*, which presents a collection of fine articles from the Stanford/ABA Conference on Antitrust and Innovation, held May 19–21, 2010. My co-editor, Bill Adkinson, and I are proud to have played a role in presenting this body of work, and we commend it to you.

My goal in this Afterword is not to analyze these articles individually at the length they merit, but to comment on what they tell us as a group about the state of traffic at the IP/Antitrust Intersection. To me, the whole of this Symposium is more eloquent than the sum of its parts principally for what it tells us about the analytical viewpoint that much of antitrust literature brings to questions of intellectual property. Individually, as we shall see, the articles present new ideas and even concrete proposals worthy of close consideration

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and debate. But taken as a group, they also reflect an increasingly common—perhaps largely unconscious—approach by antitrust scholars to IP issues. It is an approach that leads many of them to find solutions to putative competition problems in bodies of law other than antitrust. As a result, we remain at the intersection of antitrust and intellectual property, but, as busy as it is, something has gone missing.

### I. ON LANGUAGE: “LIVING HAPPILY EVER EX POST”

Before turning to the substance of the Symposium, I note that my interest in language was repeatedly engaged by these talented writers. First, there are memorable rhetorical moments for which we can all be grateful. Suzanne Michel, for example, deftly paints the picture of standard-setting organization members negotiating licenses “in the shadow” of other bodies of law, such as contracts and patent damages.<sup>1</sup> Herbert Hovenkamp neologizes boldly when he refers to the “excessive proprietization” of intellectual property law.<sup>2</sup> In “What Drives Innovation,” Tom Nicholas analyzes the market factors essential to “fomenting innovation,” from the perspective of both demand and supply.<sup>3</sup> Considering the people who actually do the research, he notes that the productivity of a research team falls dramatically “when academic superstars die unexpectedly,” citing an article entitled (honestly) “Superstar Extinction.”<sup>4</sup>

Other language in the articles as a group, however, reflects a trend that I find less rewarding. I refer to the epidemic use of the terms “ex ante” and “ex post.” Literally “from beforehand” and “from afterward,” these Latin terms have potential value as an indication of whether a given analysis applies to a period prior to (ex ante) or later than (ex post) a triggering event at which relevant uncertainties have been resolved. But that is not, in all but a sliver of instances, how antitrust authors use them. At least when lawyers use the terms, ex ante virtually always means no more than “before” and ex post no more than “after.” In a few cases, “beforehand” and “afterward” would be the best translation. Only in the rarest case is a rigorous scientific distinction being attempted.

To make my point, I have performed a casual empirical analysis of these nine articles. They contain 256 instances of the term “ex ante” or “ex post.” To be sure, there are good reasons for some of the authors to be thinking in

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<sup>1</sup> Suzanne Michel, *Bargaining for RAND Royalties in the Shadow of Patent Remedies Law*, *supra* this issue, 77 ANTITRUST L.J. 889, 893 (2011).

<sup>2</sup> Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going*, *supra* this issue, 77 ANTITRUST L.J. 749, 755 (2011).

<sup>3</sup> Tom Nicholas, *What Drives Innovation?*, *supra* this issue, 77 ANTITRUST L.J. 787, 799 (2011).

<sup>4</sup> *Id.* (citing Pierre Azoulay, Joshua S. Graff Zivin & Jialan Wang, *Superstar Extinction*, 125 Q.J. ECON. 549 (2010)).

these terms. Three of the articles deal expressly with standard-setting organizations (SSOs), where the obvious triggering event is the adoption of an industry standard that may confer market power on the owners of patented technology included in the standard. Much potentially turns on the competitive conditions and promises made before the standard was adopted and the consequences for the market afterward. But is anything gained by revising my last sentence to insert *ex ante* for “before” and *ex post* for “afterward”? (Doubtful.)

I will also concede that the article most appropriate for use of the Latin terms, because it constructs and implements an economic model analyzing RAND commitments to SSOs,<sup>5</sup> has by far the highest use of the terms (121 “*ex antes*” and 67 “*ex posts*”). But it is telling that *every one* of the nine papers contains the expression, including those that do not mention SSO standards or evaluate any comparable triggering event. It was also interesting to find, as I have long suspected, that the number of “*ex antes*” vastly exceeded the number of “*ex posts*.” Overall, *ex ante* appeared roughly twice as often as *ex post* (170 to 86). This makes sense if they are mere synonyms for before and after. Both legal and economic antitrust analysis is likely to be backward looking, evaluating conduct that occurred in the past (that is, *ex ante* now). If the terms were being used more strictly, on the other hand, one would expect a closer comparison between the two periods surrounding the triggering event, and thus a better balance between the references to “*ex ante*” and “*ex post*.” Here, however, five of the nine papers use *ex ante* without using *ex post* at all, and in another the imbalance was 23 to 5. Only one set of authors was off the curve, achieving nearly perfect balance (14 to 13).

Let me be clear. All of these authors write and think with precision and verve. That is unsurprising, for this group contains successful practitioners, remarkable public servants, and academic superstars, both current and future. But it is part of my point that this epidemic rages at the highest level of analysis, afflicting the best and the brightest. Such was once the case with the word “parameter,” which was used improperly and pervasively some decades ago, before its misuse was checked to a large degree by curmudgeonly efforts such as this. I seek only moderation. If some of the jargon can be eliminated, there will be little to distract from the substance of the analysis.

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<sup>5</sup> RAND refers to “reasonable and non-discriminatory” licensing terms (some add the word “fair” and say FRAND). In many cases, an SSO may be more likely to adopt a standard embodying a patented technology if the patentee commits beforehand to license the patent on RAND terms. See Michel, *supra* note 1, at 890.

## II. NEW ARRIVALS AT THE INTERSECTION

The analysis is indeed substantial in these articles, as is the specificity of several of the proposals offered to improve competition. Herbert Hovenkamp begins the Symposium with a short essay setting forth seven principles to frame the innovation inquiry. Yet, even in such a general overview, he offers a concrete proposal for change: that the courts construe intellectual property law to require an analog to antitrust injury. Just as antitrust injury requires that the plaintiff's injury flow not just from the defendant's conduct, but from the competition-reducing aspect of that conduct,<sup>6</sup> so IP law should require "proof of actual injury-in-fact of a kind that diminishes the ex ante incentive to innovate."<sup>7</sup> His focus on first principles is welcome and, as we shall see, important to my theme. Particularly resonant is the first of the principles he lists: "[I]t is not the purpose of antitrust to fix defects in other regulatory regimes, particularly when those regimes are federal."<sup>8</sup> Well said, but a hard principle to honor, as we shall also see.

The next two articles provide profitable background on (1) the application of laws related to innovation and monopoly prior to the Sherman Act (by Zorina Khan) and (2) the economics that drive the production of innovation itself (by Tom Nicholas). Professor Khan describes a fascinating evolution from a period in the 1600s and 1700s of "significant restrictions on patentees and other innovators, in keeping with European precedents," to a "distinctly American approach" in the 19th century, recognizing that "private actors searching for monopoly rents can benefit society."<sup>9</sup> Turning to the enforcement efforts of the U.S. antitrust agencies in the late 20th century, however, she notes that "the balance has shifted in a direction reminiscent of the strictures of the colonial period."<sup>10</sup> (In context, it is not a compliment.) Professor Nicholas's economic analysis of the innovation production function focuses on three specific factors: IP institutions, the supply-side of inventors (some tragically short-lived), and the financing of technological development. Particularly interesting is his discussion of the historical potential for prizes, rather than patent rights, to stimulate invention.

Three of the articles focus intensely on the issues arising from standard-setting organizations (SSOs) and their adoption of industry standards that may include patented technology. Richard Gilbert considers the consequences of attempts by SSOs to have patent holders commit to offer "fair, reasonable,

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<sup>6</sup> *Atl. Richfield Co v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).

<sup>7</sup> Hovenkamp, *supra* note 2, at 755.

<sup>8</sup> *Id.* at 750.

<sup>9</sup> B. Zorina Khan, *Antitrust and Innovation Before the Sherman Act*, *supra* this issue, 77 ANTITRUST L.J. 757, 783 (2011).

<sup>10</sup> *Id.* at 785.

and non-discriminatory” (FRAND) licensing terms before their patented technology is included in the standard.<sup>11</sup> He does a tremendous service by turning the focus away from whether a royalty rate is actually “fair and reasonable.” (As Damien Geradin and others have shown, those terms are quite difficult to define, either before or after the commitment is undertaken.<sup>12</sup>) Instead, Professor Gilbert turns to the non-discriminatory (ND) aspect of the FRAND commitment, and constructs a model to show that it is the SSO patent holder’s ability to threaten *discrimination* among licensees that puts much of the upward pressure on royalty rates. He suggests that crafting and enforcing a proper commitment to non-discrimination may discourage SSO holdup without discouraging innovation.

Suzanne Michel considers SSO commitments through the prism of the FTC’s recent report on the subject, of which she was a principal author.<sup>13</sup> She explains in greater detail why the FTC concluded that the competitive issues that arise from SSO standards should lead to changes in the patent law respecting both damages for infringement and the propriety of injunctions. At least where a FRAND commitment is in place, she argues that the goal of patent law should be to preserve for consumers the benefit of competition as it existed prior to adoption of the SSO standard. To do so requires (1) limiting an award of patent damages to a reasonable royalty (as opposed to lost profits), (2) capping the royalty at the amount of the next best alternative royalty available prior to the standard, and (3) rarely, if ever, granting an injunction.

In the third article addressing SSOs, George Cary, Mark Nelson, Steven Kaiser, and Alex Sistla consider the proper role of antitrust law in policing SSO conduct.<sup>14</sup> They address, and reject, recent commentary suggesting that antitrust law may be impliedly preempted by patent law in such cases. They also analyze arguments that anticompetitive conduct by SSO members can best be remedied by applying principles of patent, contract, and tort law. Despite the occasional relevance (and utility) of those principles, the other legal regimes do not fully address, and may not fully remedy, the antitrust concerns prompted by SSO misconduct. The authors conclude that the only body of law

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<sup>11</sup> Richard J. Gilbert, *Deal or No Deal? Licensing Negotiations in Standard-Setting Organizations*, *supra* this issue, 77 ANTITRUST L.J. 855 (2011).

<sup>12</sup> See, e.g., Damien Geradin & Anne Layne-Farrar, *The Logic and Limits of Ex Ante Competition in a Standard-Setting Environment*, 3 COMPETITION POL’Y INT’L, Spring 2007, at 79, 88–89 & 97–99, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=987321](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987321).

<sup>13</sup> FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 145–46 (2011) [hereinafter 2011 FTC PATENT REPORT], available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

<sup>14</sup> George S. Cary, Mark W. Nelson, Steven J. Kaiser & Alex R. Sistla, *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, *supra* this issue, 77 ANTITRUST L.J. 913 (2011).

offering a complete answer to the genuine antitrust questions raised by SSOs is the law of antitrust.

Scott Hemphill and Mark Lemley address the much-debated topic of “reverse payment” patent settlements under the Hatch-Waxman Act, but from a different angle. Hatch-Waxman governs the FDA approval of generic drug applications (called ANDAs), and requires only that the proposed generic drug be “bioequivalent” to the branded drug it seeks to copy. The Act also sets up a procedure by which the innovator may sue the ANDA filer for infringement, generating a mandatory stay of the ANDA’s approval. The antitrust issue arises when parties settle that litigation. The FTC, private plaintiffs, and some commentators have argued—unsuccessfully to date—that any payment flowing from the innovator to the generic (called a “reverse” payment) renders the settlement presumptively unlawful. The courts have disagreed, holding that a settlement within the scope of a valid patent cannot reduce lawful competition unless the underlying patent claim was objectively baseless.<sup>15</sup>

Professors Hemphill and Lemley focus on another provision of Hatch-Waxman, which grants to the first ANDA filer a period of 180-day exclusivity during which the FDA may not approve any other generic product. The provision was intended to give generic challengers an incentive to litigate and set aside the innovator’s patents, but the authors conclude that “[i]t isn’t working.”<sup>16</sup> That is because the statute does not by its terms require the first filer to *win* a patent suit against the innovator in order to preserve that exclusivity. The FDA did adopt a regulation in 1994 that required a court victory before the first filer received exclusivity, but that “successful defense” rule was

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<sup>15</sup> Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98 (2d Cir. 2010) (*Cipro IV*), cert. denied sub nom. La. Wholesale Drug Co. v. Bayer AG, 131 S. Ct. 1606 (2011); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008) (*Cipro III*), cert. denied, 129 S. Ct. 2828 (2009); *Joblove v. Barr Labs., Inc.*, 466 F.3d 187 (2d Cir. 2006) (*In re Tamoxifen Citrate Antitrust Litig.*), cert. denied, 551 U.S. 1144 (2007); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1068 (11th Cir. 2005), cert. denied, 548 U.S. 919 (2006); *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294 (11th Cir. 2003), cert. denied, 543 U.S. 939 (2004); *In re K-Dur Antitrust Litig.*, No. 01-1652, 2010 WL 1172995 (D.N.J. Mar. 25, 2010) (3d Cir. Judge Greenaway, by designation), adopting 2009 WL 508869 (D.N.J. Feb. 6, 2009) (Special Master’s Amended Report and Recommendations); *In re Androgele Antitrust Litig.*, 687 F. Supp. 2d 1371, 1379 (N.D. Ga. 2010); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp. 2d 514 (E.D.N.Y. 2005) (*Cipro II*); *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986 (N.D. Ill. 2003) (7th Cir. Judge Posner, by designation); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 252 (E.D.N.Y. 2003) (*Cipro I*); see also *King Drug Co. v. Cephalon, Inc.*, 702 F. Supp. 2d 514 (E.D. Pa. 2010) (applying rule of *Tamoxifen* and *Cipro IV*, but denying a motion to dismiss because complaints alleged that the settlements exceeded the patent’s scope).

<sup>16</sup> C. Scott Hemphill & Mark A. Lemley, *Earning Exclusivity: Generic Drug Incentives and the Hatch-Waxman Act*, supra this issue, 77 ANTITRUST L.J. 947, 948 (2011).

struck down by the courts as contrary to the statute.<sup>17</sup> The authors now propose an amendment to the Hatch-Waxman Act that would require the generic challenger to defeat the innovator's infringement claim, and hence "earn exclusivity." The effect, they argue, would be to improve competition and to limit the harm caused by "reverse payments" settlements.

I note by way of full disclosure that these professors and I fundamentally disagree on the issue of reverse payments. We have faced off several times, in print, at conferences, and even in court (where they have opposed my clients as amici). They acknowledge that the courts have repeatedly rejected their view that reverse payment settlements are presumptively illegal.<sup>18</sup> But their article does not rehearse or defend those arguments, because it has a different purpose. Their proposal for Hatch-Waxman exclusivity can rise or fall on its own merit, depending on one's view of the purpose of the exclusivity incentive and the anticipated effect of reviving the FDA's "successful defense" rule.

On a different topic, Christopher Leslie offers a spirited argument against the use of "metered" tying arrangements by patent holders, which are defended as a means of price discrimination. Such tying occurs when, for example, the seller of a patented copier requires the buyer to purchase all of the required ink from the seller as well. That arrangement "meters" the buyer's use of the machine, effectively discriminating in price between those who use a lot of ink, and those who use little. Challenging the ostensible consensus that price discrimination through tying is neutral or procompetitive, he argues that a "socially optimal level" of innovation can be achieved without allowing such metered tying.<sup>19</sup>

Finally, Michael Carrier argues that antitrust analysis of causation and anti-trust injury would benefit by substituting the principles of causation found in tort law.<sup>20</sup> Such a change, he asserts, would have prevented certain decisions related to antitrust injury and others he regards as erroneous (such as the D.C. Circuit's decision in *Rambus*<sup>21</sup>).

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<sup>17</sup> *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998); *Granutec, Inc. v. Shalala*, 139 F.3d 889, 1998 WL 153410 (4th Cir. 1998) (unpubl.).

<sup>18</sup> Hemphill & Lemley, *supra* note 16, at 949 & 966. See *supra* note 15 (collecting cases).

<sup>19</sup> Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, *supra* this issue, 77 ANTITRUST L.J. 811, 825 (2011).

<sup>20</sup> Michael A. Carrier, *A Tort-Based Causation Framework for Antitrust Analysis*, *supra* this issue, 77 ANTITRUST L.J. 991 (2011).

<sup>21</sup> *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

So there is much to discuss. This is, as Professor Hovenkamp tells us, an “exciting time for those involved in the field of antitrust and intellectual property,”<sup>22</sup> and the proposals advanced in this volume are part of the reason.

### III. LAW v. POLICY: THE REAL COLLISION

Despite their differences in tone and topic, an interesting thread runs through these articles as a group. They identify various issues as competitive concerns, but the solutions they propose generally look to bodies of law other than antitrust. Suzanne Michel would solve (or ameliorate) the problem of “holdup” of SSO members through judicial amendments to the law of patent remedies; Professors Hemphill and Lemley would address anticompetitive pharmaceutical settlements through a formal amendment to the Hatch-Waxman Act; Michael Carrier would replace antitrust causation principles with the law of torts; Herbert Hovenkamp, would have intellectual property law change its very definition of infringement injury. Even Messrs. Cary, Nelson, Kaiser, and Sistla—in arguing for the relevance of antitrust law—find themselves having to refute the “solutions” to SSO concerns found by others in patent law’s equitable defenses, as well as in tort and contract law. By the time one finishes the articles that do not by their structure engage the current state of antitrust law (Gilbert, Khan, and Nicholas), the view from this particular intersection includes antitrust law only as a speck on the horizon. What is going on here?

I think the answer lies in the difference between antitrust law and antitrust policy. By “law” I mean only what Holmes meant: a prediction of what a court will do.<sup>23</sup> The law tells us what antitrust results are required; it tells us what conduct, whether wise or foolish, altruistic or selfish, is so anticompetitive that it must be proscribed. “Policy” is a much broader term, perhaps necessarily vague. By antitrust policy I mean proposals for action formulated usually by the government or the academy to promote competition. These include proposals intended not only to prevent competitive harm, but to improve the current state of competition (at least as perceived by those proposing the policy). Such policies thus aim at what antitrust law might be, rather than what it currently is. Useful here is the distinction made by Richard Posner and others between positive and negative duties: “There is a difference between positive and negative duties, and the antitrust laws . . . have generally been understood to impose only the latter.”<sup>24</sup> Even for an alleged monopolist,

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<sup>22</sup> Hovenkamp, *supra* note 2, at 755.

<sup>23</sup> Richard A. Posner, *Introduction*, in *THE ESSENTIAL HOLMES* ix, xi (Richard A. Posner ed., 1997); O.W. Holmes, Jr., *The Path of The Law*, 10 *HARV. L. REV.* 457, 458 (1897).

<sup>24</sup> *USM Corp. v. SPS Techs., Inc.*, 694 F.2d 505, 513 (7th Cir. 1982) (Posner, J.).

the antitrust laws impose only the negative duty to refrain from harming competition, not the positive duty to improve it.

None of this means that the pursuit of antitrust policy is wrongheaded, or always inferior to pure law enforcement. The formulation of antitrust policy as I have defined it is part of the enforcement agencies' job; they have been created to think, analyze, and report to the public in terms broader than technical compliance with the law. Nor is the "mere" enforcement of law without its own capacity to improve competition. The point is that there are differences between law and policy that should be kept in mind when evaluating the utility of proposals for action.

One of those differences is that today's policy prescriptions may not only be more vague than established legal principles, but fickle as well. One obvious example arises from the dispute over reverse payments. Prior to the election of 2008, the Solicitor General and the DOJ's Antitrust Division repeatedly told the Supreme Court that the FTC's assertion that reverse payment settlements were presumptively illegal was incorrect.<sup>25</sup> Since the election, the Solicitor General has neatly avoided signing any brief on the subject (or having anyone in the SG's office do so), but the Antitrust Division has reversed course, accepting the FTC's position of presumptive illegality and arguably going beyond it.<sup>26</sup>

This focus on antitrust policy accounts for the lack of focus on the existing strictures of antitrust law in these articles. The authors make no pretense that existing antitrust law mandates the adoption of a given definition of "fair, reasonable and non-discriminatory" royalties in SSOs, or that current antitrust law proscribes SSO royalties that do not capture the full benefits of competition that existed prior to the industry standard. Nor does anyone contend that

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<sup>25</sup> *E.g.*, Brief for the United States as Amicus Curiae at 16–17, *FTC v. Schering-Plough Corp.*, 548 U.S. 919 (2006) (No. 05-273), 2006 WL 1358441, at \*12 (rejecting the FTC's view that "the presence of a reverse payment . . . necessarily render[s] consumers worse off and lessen[s] competition"). In an earlier brief on a different petition, the Solicitor General was joined not only by the DOJ Antitrust Division, but also by the FTC itself, and told the Court that, if the case under consideration (*In re Cardizem*) were construed to "require a per se rule" for "every settlement agreement that includes a reverse payment in exchange for the exclusion from the market of an allegedly infringing product," "the court of appeals' decision would be erroneous." Brief for the United States as Amicus Curiae at 12, *Andrx Pharms. Inc. v. Kroger Co.*, 543 U.S. 939 (2004) (No. 03-779).

<sup>26</sup> Brief for the United States in Response to the Court's Invitation at 28, *Ark. Carpenters Health & Welfare Fund v. Bayer AG*, 604 F.3d 98 (2d Cir. 2010) (No. 05-2852), 2009 WL 8385027, at \*28 [hereinafter DOJ *Cipro* Brief]. Under the new DOJ standard, competitive effect turns not on any objective measure of patent strength, but on the defendants' subjective beliefs about the strength of the patent, that is "their contemporaneous evaluations of the likelihood of an invalidity judgment." *Id.* Under that standard, the overly cautious patentee—who always expects bad things to happen—commits an antitrust felony, while the recklessly overconfident patentee does not.

amending the Hatch-Waxman Act to require a first filer to “earn” its exclusivity without settling is mandated by current antitrust doctrine—any more than antitrust law mandates an exclusivity period of 180, rather than 200, days. This explains the need for proposals to amend or borrow from other bodies of law in order to achieve the policy goals set forth. But the very making of such proposals carries with it two potential dangers.

*Pitfall #1.* The first is that the perceived policy concern may not prove to be a *competitive* concern, if subjected to a rigorous analysis of first principles. Consider the issue of SSOs and the potential for “holdup.” The first thing to note is that the definition of the term “holdup” is different from article to article. For Messrs. Cary, Nelson, Kaiser, and Sistla, holdup requires the wrongful acquisition of monopoly power through manipulation of the standard-setting process.<sup>27</sup> With that as the definition, the issue of “holdup” lends itself to analysis under the existing law of monopolization, as they have little trouble demonstrating. For Suzanne Michel and the FTC Patent Report, however, holdup does not require any wrongdoing by a patent holder; it occurs whenever another SSO member has invested substantially in the standardized technology (and is thus “locked in”), and the resulting royalty charged by the patent holder is higher than it would have been had no standard been chosen.<sup>28</sup>

But if that is the definition, and holdup occurs even when any monopoly power created by the standard was lawfully acquired, where is the antitrust problem that the FTC seeks to remedy? Let’s begin at the beginning, and ask why we allow SSOs (which generally consist of horizontal competitors) to adopt standards in the first place. It is because considerations of network effects, interoperability, and other factors make a standardized product a better product for consumers. There may indeed have been earlier rivalry between the seller of the product included in the standard and other alternatives. But the judgment of the courts to date, which is shared by the FTC, is that the prior competition was for a lower-quality, non-standardized product. Assuming full disclosure, we allow the standard to be set, and those who follow it to be locked in, because consumers benefit when we do. If that is true, what in antitrust law mandates that we also preserve the benefits of the pre-standard competition? Why should consumers, who traded in one form of competition for an improved form of competition, continue afterward to receive the benefit of both? That is, why do they get both the lower prices caused by competition between inferior, non-standardized products *and* the higher quality of the standardized product? Perhaps these questions have satisfactory answers. But

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<sup>27</sup> Cary et al., *supra* note 14, at 914–15.

<sup>28</sup> Michel, *supra* note 1, at 892 n.9. Professor Hovenkamp appears to offer yet another version of holdup, a “major problem” that occurs when the PTO “grant[s] patents on fairly trivial inventions that other users of the same technology are likely to discover on their own.” Hovenkamp, *supra* note 2, at 754.

the failure even to ask them leads me to suspect that the “concern” with holdup so defined does not derive from any genuine injury to the competitive process.

If it provides no theory that the holdup it defines is anticompetitive, does the FTC Report advance anything other than a policy seeking to reduce the royalties charged whenever an SSO standard is adopted? Does such a goal merit changing patent law so that the patent holder would receive as infringement damages only the same “reasonable royalty” it would have received without the standard in place? Lowering royalties would surely help other sellers of the standardized goods, and hence downstream consumers, but so would any number of restrictions on the rights of patent holders, such as compulsory licensing.<sup>29</sup> There is nothing inherently wrong with a policy to transfer wealth from patent holders to consumers, but it is important to call it by its real name.

A similar conclusion flows from applying first principles to the antipathy of three of our authors to reverse payment settlements. In addition to Professors Hemphill and Lemley, Professor Hovenkamp singles out reverse payment settlements for particularly harsh treatment in his introductory essay, condemning them as a means of illustrating two of his seven “innovation” principles.<sup>30</sup> He, too, has been frustrated by the refusal of the judiciary to share his aversion when the settlement excludes no more competition than would enforcement of the patent, and the patent claim itself is not so weak as to be “objectively baseless.”<sup>31</sup>

I do not expect to persuade these professors after all these years, but I think I can show that applying first principles to the question of reverse payments removes any mystery as to what the courts have done. The first step in any rule of reason analysis is to show an adverse effect on competition in a market. Assuming a settlement of a good faith patent dispute that excludes no more competition than the patent itself, the analysis is straightforward: (1) The antitrust laws do not protect unlawful competition, and thus “the public is

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<sup>29</sup> See, e.g., 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 709, at 305 (3d ed. 2008) (“Both patent and antitrust policy provide formidable reasons against compulsory licensing of intellectual property rights . . .”).

<sup>30</sup> Hovenkamp, *supra* note 2, at 751 & 752–53.

<sup>31</sup> See *supra* note 15 (collecting cases). Given those holdings, it is surprising that Professor Hovenkamp gives as an example of an obviously harmful settlement one in which a plaintiff brings an action for trespass even though it “has no title whatsoever to the defendant’s land.” Hovenkamp, *supra* note 2, at 753. The claim was thus “a ham-handed sham” brought “to cover a naked market division agreement.” *Id.* The problem with this example is that it fits easily within the rule adopted by the courts to reject the attack on reverse payments that Professor Hovenkamp supports. The “objectively baseless” trespass claim he posits would obviously fail the test of the circuit courts.

not entitled to benefit from competition among infringers”;<sup>32</sup> (2) The antitrust plaintiff bears the burden of showing that the allegedly excluded generic competition was lawful competition;<sup>33</sup> (3) That burden cannot be carried simply by retrying the settled patent claim as part of an antitrust case—we already know that either party could have won the patent trial, so having a subsequent jury pick a winner under the same standard of proof tells us nothing new;<sup>34</sup> (4) The antitrust plaintiff must therefore show that the generic would have won *every* subsequent trial, because the patent is so weak that every reasonable litigant would agree it was “objectively baseless”; otherwise, the claim that lawful generic entry would have occurred absent the settlement is rank speculation.<sup>35</sup>

As you can see, payments play no role at this stage of the inquiry; in the first step, it does not matter *why* the generic failed to enter—only whether that prospective entry can be proven lawful. Without a theory of harm to lawful competition, the FTC’s crusade against reverse payments devolves to a policy in favor of lowering the prices of existing patented drugs, no matter what it takes. Perhaps it is a good policy, but let us not pretend that its consumer “benefits” flow from enhanced competition.<sup>36</sup>

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<sup>32</sup> Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 F. 358, 364 (7th Cir. 1907); see, e.g., *In re Canadian Import Antitrust Litig.*, 470 F.3d 785, 790–92 (8th Cir. 2006) (no antitrust liability for conspiring to preclude the importation of illegal drugs); *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 712–13 (5th Cir. 1999) (“If the importation of these services was illegal, there is no legal export market to Mexico.”).

<sup>33</sup> E.g., *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 862 (D.C. Cir. 2008) (noting in a Hatch-Waxman antitrust case that “a would-be purchaser suing an incumbent monopolist for excluding a potential competitor from which it might have bought a product at a lower price must prove the excluded firm was willing *and able* to supply it but for the incumbent firm’s exclusionary conduct”) (emphasis added). Many plaintiffs and the DOJ would like to switch the burdens in these cases, see DOJ *Cipro* Brief, *supra* note 26, at 23–24, but that desire runs up against another first principle: “Absent some reason to believe that Congress intended otherwise . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.” *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2351 (2009).

<sup>34</sup> *Valley Drug Co. v. Geneva Pharms., Inc.*, 344 F.3d 1294, 1308 (11th Cir. 2003) (“Patent litigation is too complex and the results too uncertain for parties to accurately forecast whether enforcing the exclusionary right through settlement will expose them to treble damages . . .”); *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 993 (N.D. Ill. 2003) (“No one can be *certain* that he will prevail in a patent suit.”).

<sup>35</sup> *Whitmore v. Arkansas*, 495 U.S. 149, 159–60 (1990) (“It is just not possible for a litigant to prove in advance that the judicial system will lead to any particular result in his case.”), *quoted in* *Joblove v. Barr Labs., Inc. (In re Tamoxifen Citrate Antitrust Litig.)*, 466 F.3d 187, 203 (2d Cir. 2006); *id.* (“We cannot guess with any degree of assurance what the [patent court] would have done . . .”).

<sup>36</sup> In an aptly entitled article, Kent Bernard and Will Tom offered a powerful demonstration that this policy against reverse payments is indefensibly one-sided. Kent S. Bernard & Willard K. Tom, *Antitrust Treatment of Pharmaceutical Patent Settlements: The Need for Context and Fidelity to First Principles*, 15 FED. CIR. B.J. 617 (2005–06). This policy assumes that consumers benefit only when a patent holder *loses* in court; it assumes that consumers always prefer the short-term benefits of lower generic prices to the long-term benefits of newly discovered drugs. It therefore “ignores the first principle that enforcing valid patents makes a major contribution to consumer welfare by providing the incentive for innovation.” *Id.* at 618; see *id.* at 622 (“[I]f the

Unlike Professor Hovenkamp, Professors Hemphill and Lemley do not revisit the arguments over the legality of reverse payments *vel non*, but focus on the role of Hatch-Waxman exclusivity. Thus, they heed a bit of wise advice traceable to Phillip Areeda's first volume:

[O]ften the primary fault lies with an administrative agency whose substantive and procedural rules allow new entry to be impeded merely because existing occupants of the market prefer to avoid new competition. But that is a problem of regulatory design that must generally be resolved by the legislative process or perhaps by a judicial challenge alleging that the agency is not conforming to its legislative mandate.<sup>37</sup>

Perceiving such a problem of regulatory design, they propose to amend Hatch-Waxman so that a first ANDA filer must "earn" exclusivity.

Nonetheless, the underlying reason they give for limiting exclusivity to first filers who actually defeat a patent in court (with some exceptions) is that settlements in which the first filer preserves its exclusivity create an anticompetitive "bottleneck."<sup>38</sup> Again, we need to be alert to definitions, because the bottleneck at issue here is quite different from the bottleneck originally perceived by the FDA in the late 1980s and discussed by the early Hatch-Waxman cases. The early "bottleneck" arose from the FDA's incorrect belief that, if a first filer settled its patent suit and did not enter the market, the FDA was absolutely foreclosed from approving any subsequent ANDA filer, "even if subsequent paragraph IV filers win in their patent infringement litigation."<sup>39</sup> In striking down the successful defense regulation, however, the D.C. Circuit showed that the statute clearly did allow for later ANDA filers to trigger ex-

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settlement prevents infringing entry, such prevention is itself a *pro-competitive* effect."). When both sides of the equation are considered, any competition theory based on the expected outcome of the patent case should require the FTC to worry not just that the license granted in settlement was too short (when a patent is weak), but also that the license granted was too long (when a patent is strong).

<sup>37</sup> 1 AREEDA & HOVENKAMP, *supra* note 29, ¶ 204, at 230–31 (3d ed. 2000); 1 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 203, at 43 (1978) ("[T]he primary fault lies with an administrative agency whose . . . rules allow new entry to be impeded . . .").

<sup>38</sup> Hemphill & Lemley, *supra* note 16, at 963.

<sup>39</sup> This was the FDA's argument in *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998) (*Mova*). Reply Brief for the Federal Government at 4, *Mova Pharmaceutical Corp. v. Shalala* (Nos. 97-5082, 97-5111) (Jan. 22, 1998), 1998 WL 35239807 ("This is so, significantly enough, even if subsequent paragraph IV filers *win* in their patent infringement litigation."). Others would repeat the view that no later filer could trigger the exclusivity. See Herbert Hovenkamp, Mark D. Janis & Mark A. Lemley, Correspondence, *Balancing Ease and Accuracy in Assessing Pharmaceutical Exclusion Payments*, 88 MINN. L. REV. 712, 717 (2004) ("[A reverse payment settlement with a first ANDA filer] prevents entry altogether, not just by the settling firm, but by any other generic as well."); David Balto, *Pharmaceutical Patent Settlements: The Antitrust Risks*, 55 FOOD & DRUG L.J. 321, 331 (2000) ("[T]he first generic firm to challenge a patent holder is the only generic firm that can enter; until it enters, no other generic firm can enter the market.").

clusivity by winning their own patent case.<sup>40</sup> Nevertheless, Congress amended the Hatch-Waxman exclusivity provisions in 2003, ostensibly to cure the bottleneck problem.<sup>41</sup> Not long afterward, Professor Hemphill observed that “the bottleneck does not apply to [ANDA] filings made after December 2003.”<sup>42</sup>

In the current article, however, Professors Hemphill and Lemley address a new and different bottleneck. This one arises from what they call “a peculiar form of non-aggression pact,”<sup>43</sup> that is, a settlement with a first ANDA filer who “retains eligibility for the exclusivity period.”<sup>44</sup> When such a pact results in “retained exclusivity,” “[b]reaking through the resulting bottleneck is difficult, costly, and time-consuming.”<sup>45</sup> This new version of bottleneck, then, applies to virtually every Hatch-Waxman settlement with a first ANDA filer. Why? Because the authors make clear that even a settlement that merely divides the remaining patent life with a royalty-free, unrestricted license would be anticompetitive if exclusivity is “retained.”<sup>46</sup> But what does it mean to “retain” exclusivity in this context? The authors do not contend that a private settlement has any power to create exclusivity rights that do not already exist. A settling first filer will thus always “retain” its exclusivity unless it agrees to take affirmative, additional steps to forfeit that right (such as amending its ANDA to drop the certification of non-infringement, or allowing entry of a judgment with a finding that the generic’s ANDA product infringed the patent). There is no precedent for the proposition that an agreement otherwise legal becomes illegal because one party failed to abandon a different legal right. Until now, Professor Hemphill was the only commentator I had seen to suggest that every settlement with a first filer is unlawful unless the generic finds a way to forfeit its exclusivity.<sup>47</sup>

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<sup>40</sup> *Mova*, 140 F.3d at 1069 n.7 & 1073.

<sup>41</sup> 149 CONG. REC. 31,783 (2003) (statement of Sen. Kennedy) (“The Hatch-Waxman provisions in this bill are intended to prevent parking of the exclusivity.”).

<sup>42</sup> C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1587 (2006) (“Moreover the bottleneck does not apply to filings made after December 2003. Due to a statutory change, to simplify greatly a complicated scheme, FDA approval of those later-filed ANDA-IVs generally cannot be long-delayed on account of a settlement between the innovator and a first-filing generic firm.”). Although a full explanation is beyond the scope of this *Afterword*, my own view is that the “bottleneck” was misunderstood by the FDA and others before 2003, and remains misunderstood. See, e.g., Hemphill & Lemley, *supra* note 16, at 989 n.158. The point here, however, is that the concern expressed by the courts, Professor Lemley, and others pre-2003, was for a different bottleneck than that now addressed by Professors Lemley and Hemphill.

<sup>43</sup> Hemphill & Lemley, *supra* note 16, at 962.

<sup>44</sup> *Id.* at 950.

<sup>45</sup> *Id.* at 963; see *id.* at 963–64.

<sup>46</sup> *Id.* at 950; see *id.* at 966–67.

<sup>47</sup> C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 652–53 (2009). In a dissenting statement filed on commencing a reverse payments case, then FTC Commissioner (and now Chairman) Jon Leibowitz stated that he also “would have named as a defendant any generic company

There is nothing unworthy about raising the issue of “retained exclusivity,” nor in choosing a new definition of “bottleneck” to characterize its consequences. But we must keep the target in focus. The old bottleneck, according to some, was a legal bar on the FDA’s power to approve any subsequent ANDA until the patent expired. The new bottleneck consists of the difficulty and expense that later filers may encounter in attempting (in my view) to free-ride on the efforts of first filers.<sup>48</sup> The old bottleneck, according to some, was eliminated by the 2003 amendments to Hatch-Waxman. The new bottleneck continues today and is produced by nearly every settlement with a first-filing generic challenger. Several courts have noted (all but one in dicta) that the old bottleneck may have been, as the authors say, “troubling” under the antitrust laws.<sup>49</sup> No court has yet to analyze the new bottleneck.

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that took these payoffs and now refuses to relinquish their 180-day exclusivity.” On the other hand, he “would not sue any company that, to its credit, offered to relinquish [exclusivity].” Statement of Comm’r Jon Leibowitz Concurring in Part and Dissenting in Part, In the Matter of Cephalon, Inc. at 1, FTC File No. 061-0182 (Feb. 13, 2008), *available at* <http://www.ftc.gov/os/caselist/0610182/080213comment.pdf>. He did not cite authority or explain why relinquishment or its absence could either cure or cause an antitrust violation. No other Commissioner joined his statement.

Elsewhere, Professor Lemley has stated that a settlement simply dividing the remaining patent life would be a safe harbor for Hatch-Waxman litigants. 1 HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* § 15, at 15–50 (2d ed. 2010) (“[W]e think courts ordinarily should not object to a delayed-entry settlement because it is likely to be an estimate of the expected outcome by the parties with the best information about that outcome.”). Professor Lemley also drafted (and Professor Hemphill signed) the Brief Amici Curiae of 86 Intellectual Property, Antitrust Law, Economics, Business, and Public Health Professors in Support of *Certiorari, Louisiana Wholesale Drug Co. v. Bayer AG*, 131 S. Ct. 1606 (2011) (No. 10-762), 2011 WL 96300, stating that generic companies can settle “in the public interest” by “agreeing to delay entry without a payment.” *Id.* at \*13. There is no indication there that such settlements are nonetheless illegal if made with a first filer who does not affirmatively waive exclusivity, which strikes me as an enormous exception. (According to the FTC, of the 333 total settlements reported from 2004 through 2010, 150 were with first filers, including 74 of the 97 that the FTC claims included “payments.” See Bureau of Competition, Fed. Trade Comm’n, *Agreements Filed with FTC Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Summary of Agreements Filed in FY 2004 to 2010*, all reports available at <http://www.ftc.gov/reports/index.shtm> (locate “Medicare Prescription Drug” on page for each annual report).)

<sup>48</sup> The authors suggest that questions of the later filer’s standing to bring a Declaratory Judgment (DJ) action to set aside the patent make the effort to trigger exclusivity “even more time consuming, costly, and uncertain . . .” Hemphill & Lemley, *supra* note 16, at 964 & n.65. The Federal Circuit has held, however, that an ANDA filer has standing to seek a DJ based on the innovator’s listing of the patent in the Orange Book, as long as “a favorable judgment in th[e] action would eliminate the potential for the . . . patent to exclude [the generic] from the drug market.” *Caraco Pharm. Labs. v. Forest Labs., Inc.*, 527 F.3d 1278, 1293 (Fed. Cir. 2008); *accord Janssen Pharmaceutica, N.V. v. Apotex, Inc.*, 540 F.3d 1353, 1361 (Fed. Cir. 2008) (DJ standing exists whenever the generic “could be excluded from selling a noninfringing product even if the asserted patent [were] proven to be invalid.”)

<sup>49</sup> See Hemphill & Lemley, *supra* note 16, at 950. The Sixth Circuit’s *Cardizem* decision is the only one that arguably imposed liability based on the creation of a “bottleneck,” but only as an alternative theory to its holding that the settlement went beyond the scope of the patent by excluding non-infringing drugs. *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907–08 &

*Pitfall #2.* The second danger of proposing to achieve antitrust policy through the revision of other legal doctrines is that one can quickly get in over one's head. This is especially true where policy proposals from the world of antitrust run up against established legal doctrines from other fields. Unlike current policy proposals, which (as we have seen) may change from election to election, most doctrines of law embody a long-term policy fired and formed for decades (or, in the case of patents, for centuries) in the crucible of litigation. Asking established legal doctrine to give way to current policy is sometimes necessary, but it raises questions of surpassing difficulty about the consequences of doing so.

These difficulties often go unaddressed, in my view, because of the tendency of the antitrust policymaker to view the exclusive purpose of the other body of law as the promotion of competition. Professor Hovenkamp raises the issue when he says: "Neither antitrust nor intellectual property law has any moral content. Their sole purpose is to make the economy bigger."<sup>50</sup> There may be some truth there, but the word "sole" gives me pause. For if the sole purpose of IP law is to grow the economy, it has some unusual ways of doing so—like allowing an inventor to keep its invention on the shelf for twenty years while excluding others from using it. The patent laws may promote other values, like producing inventions of the highest social value, whether or not they are the most marketable (think of the difference between the commercial incentive to invent a vaccine, which a patient will consume once in a lifetime, versus the incentive to invent a branded drug, which a patient may consume once daily for life).

In any event, it seems prudent to ask those difficult questions when contemplating changes in other legal doctrines. Thus, as we consider Suzanne Michel's proposal for new doctrines of patent law regarding remedies, I hope we will see discussions of precisely why patent law tends to give infringement plaintiffs the choice between lost profits and a reasonable royalty. Why does it measure damages or compute a royalty from the date of infringement? What underlying concerns of patent law would be sacrificed by changing those decades-old rules?

Similar questions may be raised about the underlying reasons for Hatch-Waxman exclusivity. What incentive did Congress intend for the first filer? Is there any reason to believe that, in establishing a process providing for patent

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n.13 (citing with approval *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 261 F. Supp. 2d 188, 242 (E.D.N.Y. 2003)). The *Cardizem* court also attributed that bottleneck in part to the *failure* of the agreement to settle the patent case, 332 F.3d at 907 n.12, so it did not present a mere settlement with "retained exclusivity" of the type discussed by Professors Hemphill and Lemley.

<sup>50</sup> Hovenkamp, *supra* note 2, at 750.

litigation, Congress did not want (or expect) there to be settlements—especially with the party given the greatest incentive to litigate? What if the D.C. Circuit was correct to conclude that “Congress [may have] meant what the statute says, *i.e.*, that the second applicant would have to wait . . . .”<sup>51</sup>

In considering the effect on the first filer’s incentives of removing, or greatly restricting, the right to settle, we should also study carefully the “natural experiment” on this question conducted by the FDA during the first fourteen years of Hatch-Waxman’s existence. From 1984 until 1998, the FDA insisted that a first filer “successfully defend” (*i.e.*, win) its patent suit before it earned exclusivity. During that period, the FDA granted exclusivity a grand total of three times—and not once after 1992.<sup>52</sup> By contrast, in the first four years after 1998, when the courts struck down the FDA’s rule, exclusivity was granted thirty-one times.<sup>53</sup> I suspect that the explosion of Hatch-Waxman litigation and the success of generic challenges to blockbuster patents have come since 1998, and that the demise of the successful defense rule may have been one of the reasons. In testimony to Congress in 2007, the FTC listed five generic victories over branded drugs with billions in annual sales (Zantac, Taxol, Prozac, Prilosec, and Paxil).<sup>54</sup> All but one came after 1998, and the exception (Zantac, in 1997) happened to be one of the cases that struck down the FDA’s successful defense rule.<sup>55</sup> Before reverting to a world of little or no exclusivity, I would take a closer look.

#### IV. CONCLUSION

The warning sign I am attempting to post at the IP/antitrust intersection should not be overstated. It is in the nature of antitrust to produce policy proposals, and some of those proposals produce genuine advances in the law itself. My caution applies to proposals thought to augment existing competition that are not firmly rooted in a theory of competitive harm. When such policies collide with time-tested principles of antitrust and IP *law*, it is not even a fair fight. Thus, it is important to know precisely what proposal is being made, what concern it claims to address, and what consequences (intended and unintended) may flow from its adoption.

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<sup>51</sup> *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1072 (D.C. Cir. 1998).

<sup>52</sup> FED. TRADE COMM’N, *GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY 57 & 60* (July 2002) [hereinafter *FTC STUDY*]; see Erika K. Lietzan, *A Brief History of 180-Day Exclusivity Under The Hatch Waxman Amendments to the Federal Food, Drug, and Cosmetic Act*, 59 *FOOD & DRUG L.J.* 287, 294 n.39 (2004).

<sup>53</sup> *FTC STUDY*, *supra* note 52, at 57.

<sup>54</sup> *Paying Off Generics to Prevent Competition With Brand Name Drugs: Should It Be Prohibited: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 130 (2007) (Statement of Jon Leibowitz, Comm’r, Fed. Trade Comm’n).

<sup>55</sup> *Granutec, Inc. v. Shalala*, 139 F.3d 889, 1998 WL 153410 (4th Cir. 1998) (unpubl.).

With that admonishment, I recommend you go back out into the IP/antitrust traffic and look hard at the new ideas this book contains. But be careful out there. If you see anyone pointing a gun at a fish, you are in metaphor hell.