
ANTITRUST LAW JOURNAL

American Bar Association

Section of Antitrust Law

Abstracts

The 1975 Xerox Consent Decree: Ancient Artifacts And Current Tensions

By: Willard K. Tom

The article reviews the Federal Trade Commission's 1975 Consent Order against Xerox Corp., which ordered compulsory licensing of Xerox's patents, and uses it as a lens with which to view the evolution in the relationship between antitrust and intellectual property in the last twenty-five years. There have been dramatic changes in the manner in which antitrust views matters such as price discrimination, cross-licenses and field-of-use restrictions, patent acquisitions, and reacquisitions of joint venture entities. The article then goes on to reflect on some of the special issues that arise in the context of the so-called "killer patent portfolio" – portfolios that aggregate large numbers of patents, as well as the overwhelming majority of patents in a field. Finally, the article sorts through various issues as to which antitrust can deal with the problems posed by such portfolios (acquisitions of competing patents, acquisitions of necessary complements, exclusive dealing), issues as to which antitrust is unlikely to have a practical answer (predatory patenting), and issues as to which it is murky whether antitrust has an effective answer or not (intergenerational extensions of monopoly power, multi-level entry problems).