

RESPONDING TO ANTITRUST AND INFORMATION TECHNOLOGY

D. Daniel Sokol*

Professor Herbert Hovenkamp is the most important antitrust academic in the United States in terms of the application of antitrust academic thinking to antitrust law.¹ His work has been cited by more than 800 federal courts, including more than two dozen Supreme Court decisions.² In his recent article, *Antitrust and Information Technology*,³ Professor Hovenkamp addresses some of the most important issues involving antitrust.⁴ In particular, he addresses the issues of market power, consumer choice in the context of Google, the Apple e-books case, net neutrality and antitrust issues involving FRAND commitments and patent pooling.⁵ In doing so, Professor Hovenkamp offers an intellectual *tour du force* of most of the important issues in this interface of antitrust, intellectual property and high tech. Further, Professor Hovenkamp offers a policy roadmap for courts and antitrust authorities. This response provides an overview of the article and offers some suggestions of further implications of Professor Hovenkamp's work.

Professor Hovenkamp first identifies the limitations of traditional market power assumptions for high tech markets. As market definition and the identification of market power are the basis for potential intervention for antitrust in mergers and conduct cases, understanding why traditional market power analysis in digital technology may be lacking is very important to antitrust law and policy. For example, many internet markets are two sided (or multi sided) markets. Such markets are categorized by the platform bringing together different types of economic actors together to interact (e.g., EBay, Amazon, Zillow, Open Table and Facebook).⁶ As one side of the market may impact the other side(s) of the market, the interdependencies across each side of the market have

* UF Research Foundation Professor of Law, University of Florida, Levin College of Law and Senior Of Counsel at Wilson Sonsini Goodrich & Rosati.

1. Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2040 (2015).

2. *Id.* at 2046.

3. Herbert Hovenkamp, *Antitrust and Information Technology*, 68 FLA. L. REV. 419 (2017).

4. *See generally* THE CAMBRIDGE HANDBOOK OF ANTITRUST, INTELLECTUAL PROPERTY, AND HIGH TECH (Roger D. Blair & D. Daniel Sokol eds., forthcoming April 2017) (containing articles relating to antitrust issues in high tech industries).

5. *See* Hovenkamp, *supra* note 3.

6. *See* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 991–93 (2003). For an overview of the multi-sided market literature, see David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multi-Sided Platform Businesses*, in 1 OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 404, 404–47 (Roger D. Blair & D. Daniel Sokol, eds. 2015).

implications for traditional antitrust measures for market definition. Given some of these dynamics, Professor Hovenkamp correctly concludes that “many traditional measures of market power produce unacceptable false positives.”⁷ Indeed, he later adds that an “assessment of market power is extremely difficult in markets characterized by very low variable costs, IP rights, networking, multi-sidedness, or some combination of these things.”⁸ There are implications for such an analysis for cases such as the Google online search investigation.⁹ Professor Hovenkamp suggests that the decision of the FTC to drop its Google investigation was well founded as a matter of law and economics.¹⁰ I would suggest that the skepticism regarding the Google investigation stems from the complications involved in defining the relevant market, as platforms like Google compete for consumer attention (due to multi-homing) across general search, vertical search, and apps.¹¹

In the area of high fixed costs and long term monopoly power, Professor Hovenkamp’s analysis suggests that the Supreme Court correctly decided *Federal Trade Commission v. Actavis*.¹² Professor Hovenkamp argues that courts can infer market power beyond traditional market definition to look at onerous terms in contracts such as large payments from one firm to another to keep others out of certain pharmaceutical markets.¹³ Where I believe that this type of analysis becomes more complicated is where the payments are not cash payments but payments based on non-financial terms. In this setting, it may be more difficult to infer market power.¹⁴

Professor Hovenkamp also explores the issue of online vertical restraints.¹⁵ Online vertical restraints possess challenges that are in some

7. Hovenkamp, *supra* note 3, at 425.

8. *Id.* at 433.

9. See generally Michael A. Salinger & Robert J. Levinson, *Economics and the FTC’s Google Investigation*, 46 REV. INDUS. ORG. 25, 45–50 (2015).

10. See Hovenkamp, *supra* note 3, at 435. (“The U.S. and EU investigations into Google Search should be regarded skeptically notwithstanding Google’s high search market share in Europe.”).

11. See generally D. Daniel Sokol & Jingyuan Ma, *Understanding Online Markets and Antitrust Analysis*, NW. J. INTELLECT. PROP. TECH (forthcoming 2017) (explaining the difficulties involved in defining the market in multi-sided markets), <https://ssrn.com/abstract=2813855>.

12. 133 S. Ct. 2223 (2013); see Hovenkamp, *supra* note 3, at 429–30.

13. See Hovenkamp, *supra* note 3, at 430

14. See *In re Loestrin 24 Fe Antitrust Litigation*, 814 F.3d 538, 552 (1st Cir. 2016) (remanding for the district court to measure non-cash settlements as part an inquiry into the defendant’s market power); *King Drug Company of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 403 (3d Cir. 2015) (noting that the size of a reverse payment may serve as a proxy for market power).

15. Herbert Hovenkamp, *Antitrust and Information Technology*, 68 FLA. L. REV. 419, 444–46 (2017).

ways distinct from traditional vertical relations.¹⁶ Over the past 40 years, U.S. case law has transformed vertical restraints from one of *per se* illegality to one characterized in many cases by rule of reason.¹⁷ Perhaps the most important online vertical case in the U.S. to date has been the Apple e-books case.¹⁸ Professor Hovenkamp concludes that, as a matter of law and policy, *Apple* was correctly decided.¹⁹ In doing so, he has adopted the hub and spoke analysis of the court and differentiates this factual situation from the situation contemplated in *Leegin Creative Leather Products Inc. v. PSKS, Inc.*²⁰ What Professor Hovenkamp does not address (nor did the district court or Second Circuit address in a meaningful way) is the efficiency rationales for the agency model that Apple implemented for the book publishers. Further, it would be interesting to know if Professor Hovenkamp would have brought this as a criminal case as there was evidence introduced of naked price fixing of the music publishers with each other.²¹ It may be that there was concern that the commissions did not look like traditional criminal price fixing because of an agency model that gave what were effectively commissions to the publishers. However, in a price fixing case involving commissions between Christies and Sotheby's, Sotheby's CEO Alfred Taubman went to jail for price fixing.²²

In the next part of the article, Professor Hovenkamp addresses net neutrality.²³ The entire net neutrality regime is currently under reconsideration by the Trump administration.²⁴ Of note, Professor Hovenkamp explains that, for the most part, net neutrality and antitrust are distinct.²⁵ He also explains, however, that antitrust can play a role

16. See generally Edward Iacobucci & Ralph A. Winter, *European Law on Selective Distribution and Internet Sales: An Economic Perspective*, 81 ANTITRUST L.J. 47 (2017); Pinar Akman & D. Daniel Sokol, *Online RPM and MFN Under Antitrust Law and Economics*, REV. INDUST. ORG. (forthcoming 2017), <https://ssrn.com/abstract=2852782>.

17. D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2080–81 (2015); D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1009–11 (2013).

18. See *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 672–81 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

19. Hovenkamp, *supra* note 3, at 444.

20. 551 U.S. 877 (2007); see Hovenkamp, *supra* note 3, at 445–46.

21. *Apple Inc.*, 952 F. Supp. 2d at 672–81.

22. Orley Ashenfelter & Kathryn Graddy, *Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby's and Christie's*, 1 J. COMPETITION L. & ECON. 3, 13 (2005).

23. Herbert Hovenkamp, *Antitrust and Information Technology*, 68 FLA. L. REV. 419, 444–53 (2017).

24. Cecelia Kang, *Trump's F.C.C. Pick Quickly Targets Net Neutrality Rules*, NY TIMES, Feb. 5, 2017, https://www.nytimes.com/2017/02/05/technology/trumps-fcc-quickly-targets-net-neutrality-rules.html?_r=0.

25. Herbert Hovenkamp, *Antitrust and Information Technology*, 68 FLA. L. REV. 419, 446–47 (2017).

where there is exclusion by an integrated monopolist against content providers.²⁶ I would have liked to see a longer discussion of the proposed merger between Comcast and Time Warner Cable and in particular a discussion of the theories of harm that seemed to motivate the successful government case.²⁷

In the final section of the article, Professor Hovenkamp deals with the complexity surrounding FRAND licensing.²⁸ Professor Hovenkamp is correct to first note that the debate begins with whether or not these antitrust or IP problems. He identifies that the “fundamental questions about the meaning and scope of FRAND status is a question of patent law, not of antitrust.”²⁹ The cases to date have been, in the United States, IP cases rather than antitrust cases.³⁰ This may change due to the *Apple v. Qualcomm*³¹ case and an FTC case against Qualcomm that were filed since Professor Hovenkamp’s article was published, which will provide interesting insight into how courts address this important issue that is fundamental to the business models of both companies.

The major contribution of Professor Hovenkamp’s article is to provide, in broad application to the entire antitrust, IP and high tech interface, an analysis of how complex these issues are and what sort of cases make for good case law. An implication for such cases is to proceed cautiously and to ensure that legal theories of harm are based on economic analysis of such harm in order to ensure that consumers benefit from antitrust law enforcement.

26. Hovenkamp, *supra* note 3, at 446.

27. Nicholas Hill et al., *Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron*, 47 REV. INDUST. ORG. 425, 427–30 (2015).

28. Herbert Hovenkamp, *Antitrust and Information Technology*, 68 FLA. L. REV. 419, 456–59 (2017).

29. Hovenkamp, *supra* note 3, at 459.

30. *Id.* at 458–59.

31. Redacted Complaint for Damages, Declaratory Judgment, Injunctive Relief & Demand for Jury Trial, *Apple Inc. v. Qualcomm Inc.*, No. 3:17-cv-00108-GPC-NLS (S.D. Cal. Jan. 20, 2017).