



The Relationship Between Competition Law and Intellectual Property

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Are Patents & Antitrust in Conflict?

“[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition.”

Atari Games Corp. v. Nintendo of America, Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).



Conflict? (cont'd)

- Why did the court say that they seem at odds at first glance?
- How do patents promote innovation, industry and competition?
- How does antitrust promote innovation, industry and competition?



Why did the court say that they seem at odds at first glance?

- Misconception of patents as “government-conferred monopolies.”
- Misconception of antitrust, competition law, or anti-monopoly law as always being opposed to monopolies.



How do patents promote innovation, industry and competition?

- Property rights are key to investment
- Tragedy of the commons
- Expropriation



How does antitrust promote innovation, industry and competition?

- People sometimes used to think that the goal of antitrust was to lower prices in the short term.

But “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”

Verizon Communications Inc. v. Law Offices Of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).



Antitrust promoting competition (2)

- Competition is a spur to innovation.

“[P]ossession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone.”

United States v. Aluminum Co. of America, 148 F.2d 416 (1945).



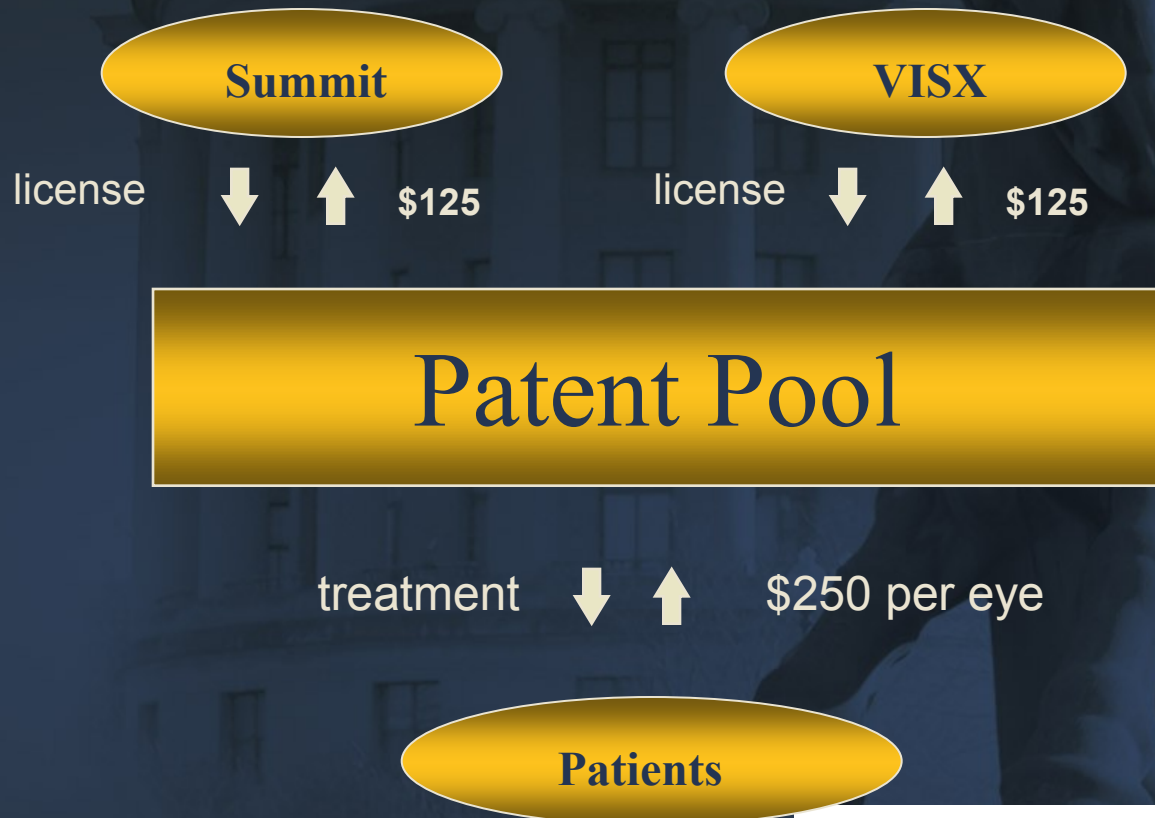
Antitrust promoting competition (3)

- We concentrate on cases involving collusion or improper exclusion.
- Examples of alleged collusion: agreements on price, entry, or innovation
- Examples of alleged improper exclusion:
 - Exclusion by tying, exclusive dealing, or related practices
 - Exclusion by deception
 - Absent extraordinary circumstances that are hard to imagine, a mere unconditional refusal to license is not improper exclusion.



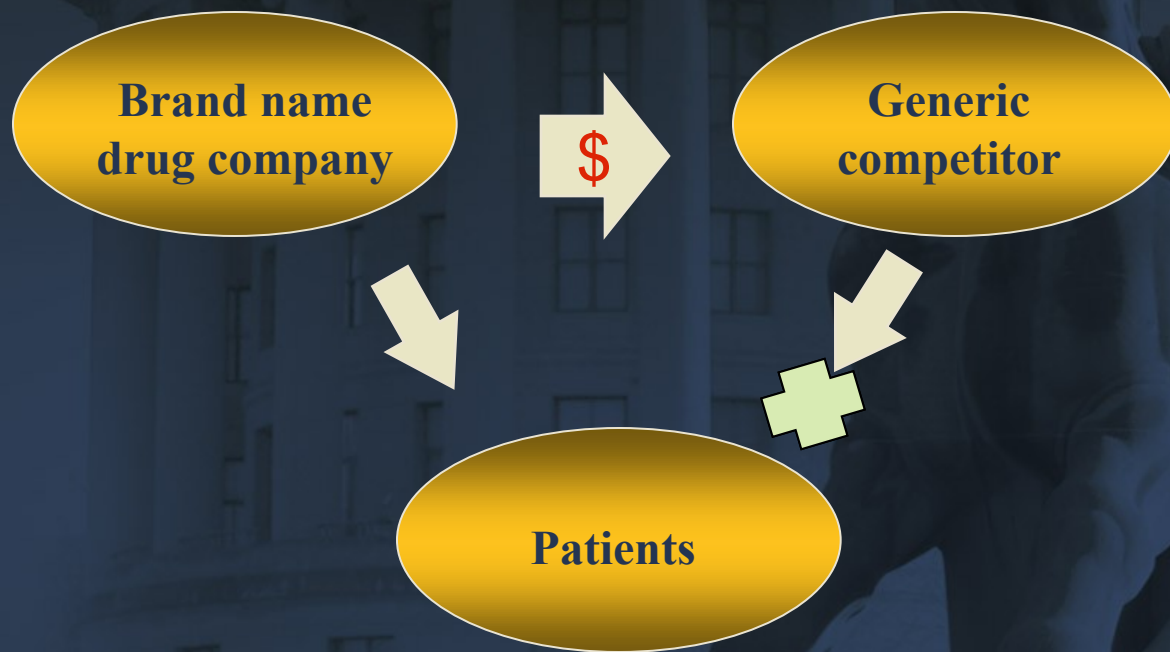
Examples of alleged collusion: agreements on price

- The FTC's *Summit-VISX* case in the 1990's



Examples of alleged collusion: agreements on entry

- Pay-for-delay cases



Examples of alleged collusion: agreements on innovation

Pool

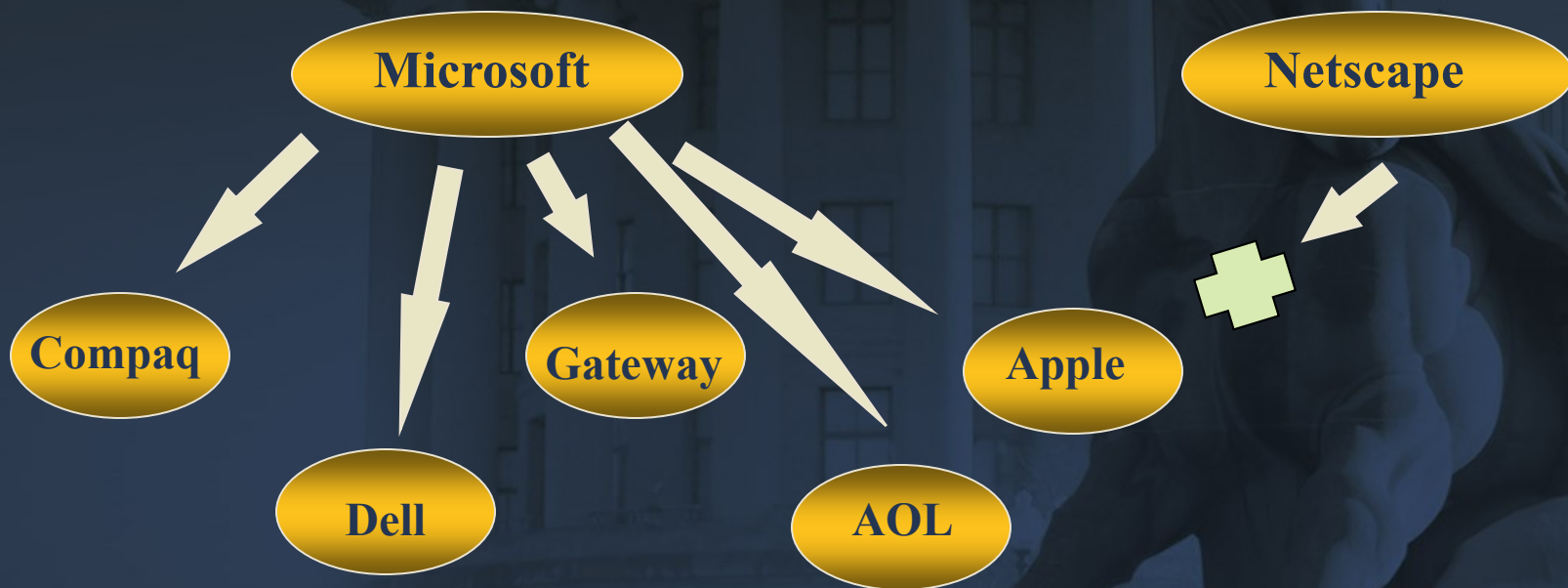


Mfrs. Aircraft Ass'n; Automobile Mfrs. Ass'n



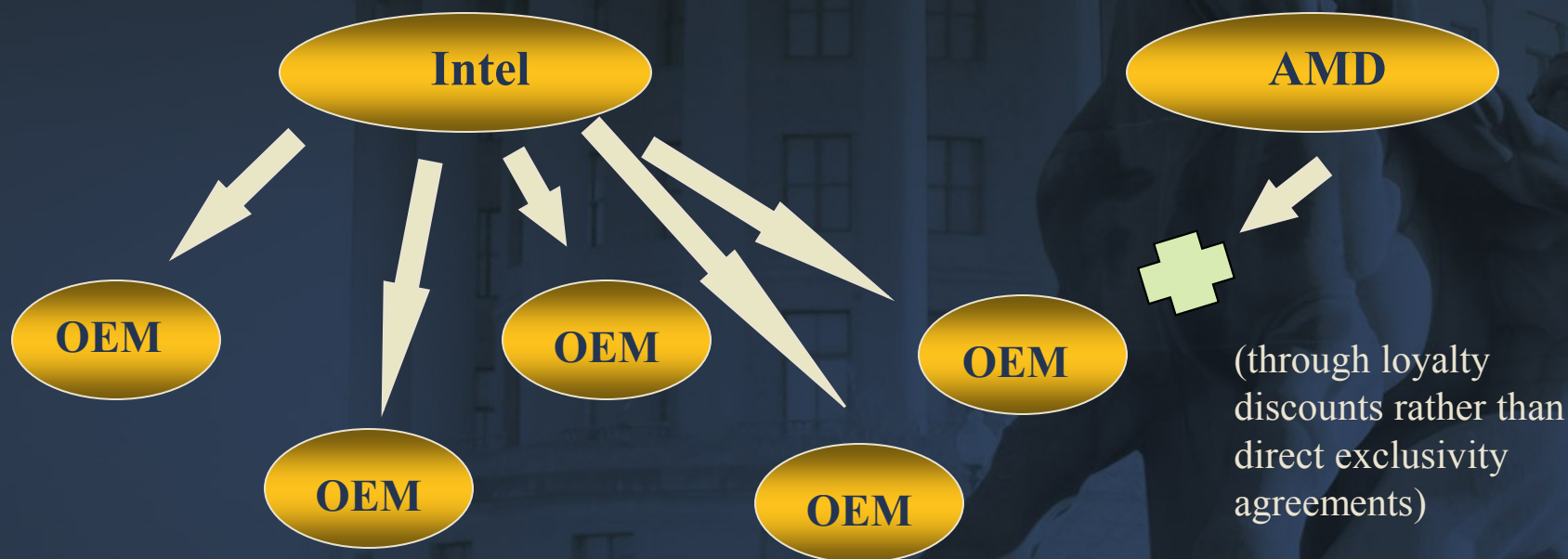
Exclusion by tying, exclusive dealing, or related practices

- DOJ's *Microsoft* case in the 1990's

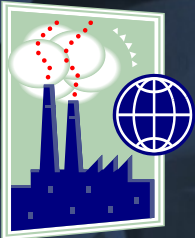
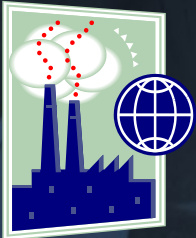
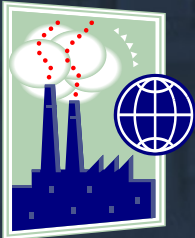
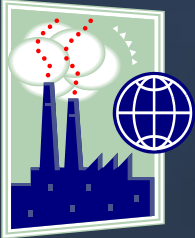
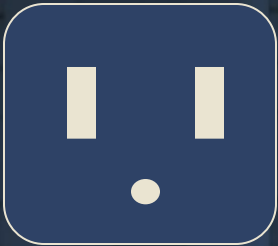
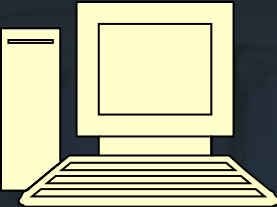
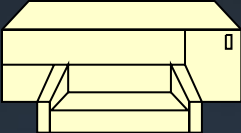


Exclusion by tying, exclusive dealing, or related practices

- The FTC's *Intel* case last year



Exclusion by deception



A mere unconditional refusal to license is almost certainly not improper exclusion.

- This is true no matter how valuable or essential the intellectual property is.
- Otherwise, the more valuable the invention, the fewer rights the inventor would have.
- The same is true of high royalty rates or other onerous terms.
 - Note, however, that the patent system should take into account the potential for “hold-up” after sunk costs are expended.



Summary so far:

- Property rights are important.
- Antitrust is not concerned with the mere exercise of property rights, but only with collusion or improper exclusion.
- A mere unconditional refusal to license is almost certainly not improper exclusion.



Applying These Principles

- Distinguishing normal exercise of intellectual property rights from collusion
- Distinguishing normal exercise of intellectual property rights from improper exclusion



Distinguishing normal exercise of intellectual property rights from collusion

“ . . . For analytical purposes, the Agencies ordinarily will treat a relationship between a licensor and its licensees, or between licensees, as horizontal when they would have been actual or likely potential competitors in a relevant market in the absence of the license.”

1995 DOJ-FTC IP Guidelines, § 3.3



E. Bement & Sons v. National Harrow Co. (1902)



POOL



United States v. Line Material Co. (1948)



POOL

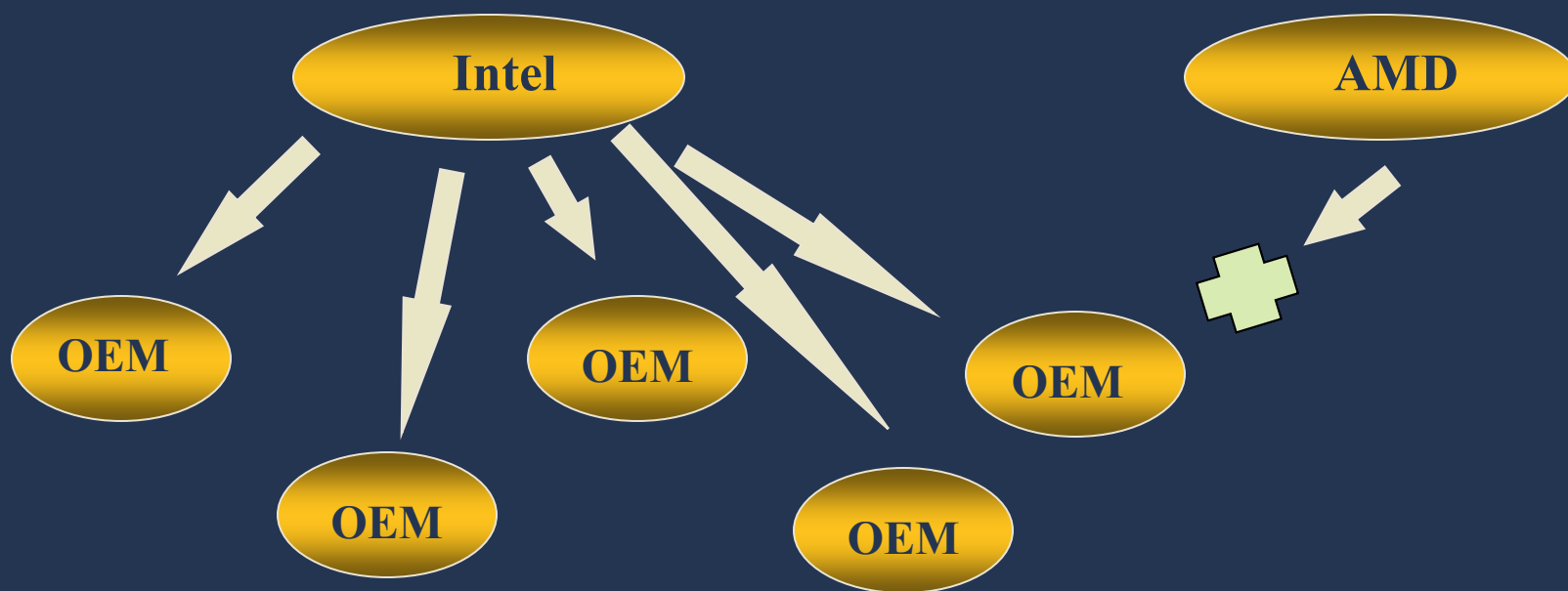


Distinguishing normal exercise of intellectual property rights from improper exclusion

- There is a vast “post-Chicago School” literature on “raising rivals’ costs.”
- The article that first popularized the concept for lawyers was Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986).
- Because antitrust seeks to protect competition, not competitors, two key elements of a “raising rivals’ costs” violation are:
 - That the conduct seriously threatens to create or maintain market power that would not otherwise exist
 - That the conduct not have adequate justification.



The *Microsoft* and *Intel* cases are examples of cases based on “raising rivals’ costs” theories.



CONCLUSION

- Properly understood, antitrust and intellectual property are not in conflict.
- The mere exercise of intellectual property rights does not harm competition.
- The kinds of practices that do harm competition are the same as those regarding other forms of property: collusion and improper exclusion.

