

The Roberts Court after two years: Antitrust, intellectual property rights, and competition policy

Rudolph J.R. Peritz*

The Supreme Court under Chief Justice John Roberts has rendered only one decision, *Illinois Tool Works Inc. v. Independent Ink, Inc.*,¹ that explicitly addresses the relationship between antitrust and intellectual property rights. But there have been at least five more cases that bear on the broader topic of competition policy and intellectual property rights. An interesting dynamic emerges from this cluster of opinions: While the antitrust cases apply intellectual property rights to justify restraints on competition, a range of opinions in three patent decisions call for limits on patent rights and, with those limits, effectively open markets to increased competition. Altogether, the six cases offer some insights into divergent approaches to the competition policies that have developed in these overlapping regimes.²

Especially for those who correlate progress with open access and competitive markets, the divergences summon closer attention to a neglected competition policy working within the patent regime as well as to the array of competition logics working in the broader domain of intellectual property rights. This essay is intended to introduce the outlines of such a project. The first section investigates some intersections of antitrust and intellectual property policies. It begins with *Independent Ink*, a tying case that involves a patented product, and then proceeds to expose the power of trademark rights to shape the antitrust analysis of two price-fixing claims, one involving resale price maintenance and the other a joint venture in oil refining and marketing. The second section briefly examines three patent cases, which shed light on an internal competition policy too often lost in the shadows of the property logic that dominates current patent policy analysis. The essay concludes with some observations about the crosscurrents of competition policy in the early days of the Roberts Court.

I. Antitrust and Intellectual Property Rights

Independent Ink was a unanimous decision in which a 1988 amendment to the Patent Act influenced the Roberts Court to overrule longstanding antitrust doctrine and to declare that “the mere fact that a tying product is patented does not support . . . a presumption . . . of market power.”³ As a result, contracts conditioning the sale of patented inventions on the purchase of complementary staple products no longer fall into the category of *per se* illegality. In two other cases, the Roberts Court’s antitrust doctrine

* Professor of Law and Director, IProgress Project, New York Law School. Thanks to Rick Brunell and Bert Foer for comments on a prior draft. This paper appears in the ANTITRUST BULLETIN’s symposium on the Roberts Court’s antitrust decisions, at 53 ANTITRUST BULL. 153 (2008).

¹ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006), *overruling* *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

² For an historical treatment of the larger question of free competition and its relationships to private property rights, liberty and equality, see RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* (Oxford Univ. Press, rev. ed. 2001).

³ 547 U.S. at 31 (citing 102 Stat. 4674, codified at 35 U.S.C. § 271(d)).

was channeled by the logic of trademark rights. In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁴ a deeply divided Court overruled a venerable doctrine of *per se* illegality in holding that resale price maintenance is to be judged by the rule of reason. In *Texaco Inc. v. Dagher*,⁵ a unanimous Court held that the decision by Equilon Enterprises – a joint venture between Texaco and Shell Oil – to sell gasoline at the same price to their separate chains of branded service station owners was not *per se* illegal as a horizontal price fixing agreement. The section is intended as an investigation into how antitrust policy is viewed through lenses colored by intellectual property rights.

In *Independent Ink*, a manufacturer of replacement ink for inkjet printers brought an antitrust claim against a patent holder asserting the *per se* illegality of conditioning the sale of patented printer components on the purchase of its unpatented ink. In an opinion by Justice John Paul Stevens, the Court rejected the claim of *per se* illegality and held “that, in all [antitrust] cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”⁶ While the holding came as no surprise, the underlying analysis raises some troubling questions. The holding was expected even though the Court overruled precedent from its 1984 Term because antitrust policy has become largely an expression of price theory economics, wherein lies a “virtual consensus” that patents *per se* do not confer market power. As the Court noted, this virtual consensus has been reflected in the enforcement agencies’ Intellectual Property Licensing Guidelines since 1995.⁷ Moreover, the virtual consensus was corroborated, in the view of Justice Stevens, by an 1988 amendment to the Patent Act, which adopted an economics-based approach to immunizing such tying provisions from claims of patent misuse in the absence of market power.⁸

The doctrinal consequence of the Court’s decision is, of course, a turn to the rule of reason and, with that shift, proof of market power becomes an element of the plaintiff’s case in antitrust tying as well as patent misuse claims. In practical terms, private plaintiffs will assert fewer tying claims against patentees as a result of the greatly increased cost of litigation and lower likelihood of success, a result that tracks antitrust’s broader migration toward the rule of reason’s often indeterminate and always expensive economics of market definition and competitive effects. Still, it seems to make good sense that the illegality of tying arrangements turn on their anti-competitive effects, which derive from market power.

That said, the Court’s analysis raises two related questions. First, why presume patents do not confer market power and, second, why proceed on the assumption that antitrust treatment of tying should parallel its patent misuse counterpart? For the Court,

⁴ 127 S.Ct. 2705 (2007).

⁵ 547 U.S. 1 (2006).

⁶ 547 U.S. at 46.

⁷ Department of Justice and Federal Trade Commission, Antitrust Guidelines For the Licensing of Intellectual Property (1995), available at <<http://www.ftc.gov/atr/public/guidelines>>.

⁸ 35 U.S.C. § 271(d)(5). The opinion’s rendition of that history closely tracks the Senate Report. S. REP. 100-83, S. Rep. No. 83, 100th Cong., 1st Sess. 1987, 1987 WL 967478 (Leg. Hist. at “Origin and Development of Patent Misuse Doctrine”) (page numbers unavailable). The Report discusses the economics of tying solely in terms of price discrimination; there is no reference to leverage theory.

there is a simple answer to both questions found in antitrust tying doctrine's genealogical roots in the federal common law of patent misuse and thus in justifiable links to the 1988 amendment to the Patent Act; the amendment requires misuse claimants to prove the market power that Congress apparently determined patents themselves do not confer.

The economic rationale for presuming patents do not confer market power begins with the indisputable proposition that patents are not necessarily economic monopolies, notwithstanding the traditional patent rhetoric of monopoly. That is followed by the uncontroversial observation that some patents confer more market power than others and, indeed, that the great majority of patents have little or no effect on market prices and output. Many are what might even be called 'vanity patents.' This loosely inductive logic asserts the common sense of separating patent rights from the rhetoric of monopoly insofar as monopoly is understood to have a purely economic definition: Patents *per se* confer neither economic monopolies nor the lesser included advantage of market power.

Although it drives the dominant approach, this exclusively economic logic for understanding patent rights should nevertheless raise doubts for those who engage in policy analysis of patents and their relationship to antitrust. Here are three: First, a purely economic logic of monopoly abandons the cautionary prescription that patents confer a legal monopoly. In common law competition policies and antitrust jurisprudence from the early nineteenth century through the 1970s, legal monopoly was taken to mean immunity from liability for restraints of trade.⁹ In the case of patents, their status as legal monopolies reminds us that they are statutory exceptions to an underlying regime of competition that itself promotes progress.¹⁰ Indeed, well-settled antitrust doctrine, in its definition of monopoly as the power to exclude competitors or raise prices, would include the patent right to exclude as a form of monopoly power.¹¹ In jurisprudential terms, this raises doubts about the Roberts Court's abrogation of the *Jefferson Parrish* doctrine that patents confer a form of market power. In doctrinal consequence, the Court's purely economic conception of monopoly leads to the presumption that a patentee's tying provision is a reasonable restraint of competition – in particular, that restraining competition in printer ink is presumptively reasonable.¹²

The Court's new presumption of no market power raises a second doubt, even within a purely economic conception of patent monopoly: Notwithstanding the "virtual consensus among economists," every valid patent by definition does confer some modicum of market power insofar as its successful prosecution through the Patent Office

⁹ See Peritz, "Nervine and Knavery," *infra* note 25, for discussion of legal monopoly.

¹⁰ See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989), cited by Justice Breyer in his *Metabolite* dissent, 126 S.Ct. at 2926.

¹¹ *U. S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

¹² This view of antitrust as a junior partner can also be seen in other recent decisions, most clearly in *Verizon Comm., Inc. v. Trinko*, 540 U.S. 398 (2004), given the presence of an antitrust savings clause in the Telecommunications Act of 1996. Compare the opinion of the European Court of First Instance in *Microsoft*, (Case T-201/04 17 Sept.2007), in which the court stated explicitly that even where an intellectual property right is exploited in a lawful manner under the IP laws, it may still be unlawful under the competition rules prohibiting an abuse of dominance.

requires determinations of novelty and non-obviousness.¹³ In short, a valid patent must embody an element of invention which differentiates it from prior art and, thus, from all rivals. If the Court intended to defer to the congressional scheme of patent rights, the proper question should not have been whether but how much market power is conferred: Given the legislative fact that valid patents by statutory definition confer some market power, where does a particular invention lie along a spectrum of differentiation that runs from pioneering patents to minor improvements, from the integrated circuit to what might be called a ‘vanity patent’? And if the question were one of how much market power, why would the Court presume the equivalent of a ‘vanity patent,’ especially in the context of an expensive law suit over the commercial exploitation of patents, a case in which the patent holder is making a substantial investment in asserting the legal right to exclude and the antitrust challenger feels sufficient effects of market power to make worthwhile the expense and risk of a lawsuit? And so the Court’s presumption of no market power seems to run afoul the statutory requirements for patentability as well as the particular economic circumstances of such cases.

Finally, I want to address a third doubt raised by the Roberts Court’s antitrust presumption that patents do not confer market power: Closer attention could have been paid to the economics of tying. While the Court made its series of references to a “virtual consensus” among antitrust economists, this consensus has shown deep fault lines for some time. Indeed, such fissures are reflected in respondent’s arguments that two characteristics of the tying arrangement under scrutiny reflect circumstances that call for a rebuttable presumption of market power.

Respondents argued, first of all, that the tying arrangement itself should be taken as evidence that the patent confers sufficient market power to impose the provision. This argument is entirely consistent not only with the economic circumstances but also with the well-settled antitrust doctrine that direct evidence of coercive conduct supports a claim of market power.¹⁴ Respondents argued, secondly, that the evidence also supports a rebuttable presumption in the narrower circumstance of a “requirements tie,” – an “arrangement involving the purchase of unpatented goods over a period of time.” A requirements tie in permitting sellers to charge higher prices to heavier users is thus “a form of discrimination that is ‘strong evidence of market power.’”¹⁵ The Court rejected these arguments on questionable grounds. To begin, the Court oddly declared that the argument was not supported by the *International Salt* case, whose approach the Court had just overruled and so was entirely without precedential power. Second, the Court rejected the argument for a rebuttable presumption on the economic grounds that since price discrimination cannot occur in competitive markets, it is not evidence of market power. But price discrimination can occur in competitive markets and still evidence market power. The question is one of degree – not whether there is competition but how

¹³ 35 U.S.C. §§ 102, 103. If the Court were truly concerned with the triviality of many patents, the proper course is to raise the requirements for patentability. Indeed, the Court has addressed that issue in *KSR*, discussed in the text at notes 42-50 *infra*.

¹⁴ See, e.g., *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 477 (1992); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1043 (9th Cir. 2005).

¹⁵ 547 U.S. at 44.

imperfect the competition is.¹⁶ The answer to a question of degree begins with process, with allocating the burden of proof. As described in a lucid Amicus Brief, not only is this sort of price discrimination evidence of market power, but the practice produces anti-competitive effects.¹⁷ In this light, the patent-holder should carry a burden of rebutting a presumption of market power.

The practical result in *International Ink* is the patentee's presumptive power to exclude competition from a secondary market by tying the sale of patented components to the purchase of ink, a staple product available from numerous competitors. The Court's purely economic conception of monopoly power, together with its questionable treatment of respondent's price discrimination arguments, raises serious doubts about the adequacy of its rationale for overturning the *Jefferson Parish* presumption that patents confer market power.

There remains the second question raised by the *International Ink* decision's new doctrine for resolving the question of a patent's market power in tying cases: Why conclude that the antitrust doctrine of tying should parallel its patent misuse counterpart? In the Court's view, "given the fact that the patent misuse doctrine [since 1917] provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after [the 1988 amendment to the Patent Act] has eliminated its foundation."¹⁸ But this logic seems tenuous, for at least two reasons.

First, it was perhaps disingenuous for the Court to state: "It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute 'misuse.'"¹⁹ Although the Court was correct in the abstract because tying is an offense under the Sherman Act, Justice Department practice has long reserved criminal prosecution for price fixing cartels; it is common knowledge that the agency simply does not pursue criminal charges for tying arrangements.

Second, the Court accepted an imagined invitation by Congress to reappraise the doctrine after a lapse of twenty years. Most would say that the invitation expired long ago, whether by way of an equitable doctrine of laches and reasonable reliance or simply the passage of time and changed circumstances. Moreover, the Court could have learned that there was no invitation at all: Congress explicitly chose not to equate patent misuse under the 1988 amendment with antitrust tying by rejecting the prior Senate bill sent to conference, which did equate the two in language stating there would be no misuse "unless such practices . . . violate the antitrust laws." The conference bill as enacted

¹⁶ For a similar approach to the question of anti-competitive effects, see Justice Breyer's dissenting opinion in *Leegin*, 127 S.Ct. at 2729-30.

¹⁷ Brief for Barry Nalebuff, Ian Ayres and Lawrence Sullivan as *Amici Curiae in Support of Respondent*, 2005 WL 2427646 (Sept. 28, 2005). See also, Rudolph J.R. Peritz, *Dynamic Efficiency*, in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 108 (London: Elgar Press 2002) (Cuccinota, A., Pardolesi, R. & Van den Bergh, R., eds.) (European Association of Law and Economics). These anticompetitive effects are not recognized by the statics approach of neo-classical price theory dominating current antitrust jurisprudence. Nalebuff, et al, *supra*.

¹⁸ 547 U.S. at 42.

¹⁹ *Id.*

eliminated that equation because, according to the House Conference Report, patent misuse and antitrust prohibitions were overlapping rather than identical.²⁰ The Conference Report couldn't make it any plainer that the change to the statutory language in Section 271 (d)(5) was not intended to affect extant antitrust doctrine. In practical terms, the amendment's new requirement of proving power in the market for the patent or the patented product does not necessarily or impliedly correlate with the antitrust approach to market power, and certainly not with a full-blown antitrust rule of reason. There is strong evidence that Congress rejected an opportunity to equate patent misuse and antitrust tying and, with that rejection extended instead an invitation to maintain the separation between the two doctrines.

Moreover, the House Conference Report accompanying the final bill as enacted observed that patent misuse was founded on the equitable doctrine of unclean hands.²¹ Congress understood misuse not as comprising an entirely economic determination but rather as having a normative component that deems certain conduct illegal because it extends a patent's power beyond the statutory realm of legal monopoly and into the domain of trade restraints. Misuse policy is not a consumer welfare matter of proving anticompetitive effects but one of keeping legal monopolies within their statutory boundaries. Although the Roberts Court cites the Patent Act as highly influential if not authoritative for its shift to the antitrust presumption that patents do not reflect market power and, thus, for its shift to a rule of reason, the shift actually derives not from patent policy or jurisprudence but rather from a mindset influenced by mainstream antitrust economics.²²

Patent misuse and its connection to the doctrine of unclean hands has always been part of the larger equitable framework for patent rights, including not only other equitable

²⁰ *Senate Report, supra* note 8, at "IX. CHANGES IN EXISTING LAW." The House Conference Report that accompanied passage of P.L. 100-418, OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, said very little, though what was said is instructive: "Present law[:] Patent misuse is a common law doctrine that has its roots in the equitable doctrine of unclean hands. Section 271 of Title 35, U.S. Code, provides that certain narrowly described activities of a patent owner shall not be considered patent misuse. Although some misuses of patents may constitute antitrust violations, others do not. House bill[:] No provision. Senate amendment[:] Amends Title 35 to provide that a patent owner's licensing practices will not constitute patent misuse unless they violate the antitrust laws. Conference agreement [:] The Senate recedes to the House." H.R. CONF. REP. 100-576, H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 1988, 1988 U.S.C.C.A.N. 1547, 2124 (Leg. Hist.).

²¹ *Id.*; *Dawson Chemical Co. v. Rohm and Haas Co.*, 448 U.S. 176, 183, 196 (1980); *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1427 (Fed. Cir. 1997).

²² This antitrust mindset can be contrasted to that reflected in the recent European *Microsoft* case, available at <<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04>>. There, the European Court of First Instance confirmed the European Commission's determination that, under exceptional circumstances, competition policy can trump IP rights. The exceptional circumstances turned on the question of access to an indispensable asset controlled by a dominant firm, there Windows protocols controlled by Microsoft. The protocols amounted to an essential facility for entry into the intranet server market. For a brief discussion, see Rudolph J. R. Peritz, *The Microsoft Chronicles: Neelie Crows, Barnett Bellows While Information Flows, or Not*, presented at *Colloquium on Pro-Consumer Efficiencies in Antitrust Law & Practice: U.S., E.U., Japan*, LUISS Guido Carli University, Rome, Italy, 26 October 2007; forthcoming in *Microsoft e il flusso di informazioni. Note (comparatistiche) dal fronte antitrust/proprietà intellettuale*, 10 MERCATO, CONCORRENZA, REGOLE (2007) (Ital. trans.).

defenses but also the core equitable remedy of injunction.²³ Although patent misuse and antitrust tying have an intertwined history, they have been two separate causes of action with their own underlying competition policies. In short, patent misuse has traditionally been seen as regulating conduct that ranges between legitimate use and antitrust violations, and perhaps beyond. Accordingly, there has always been a different remedy for a different offense: Unlike antitrust remedies of treble damages and injunctive relief, patent misuse gives rise to suspension of patent rights until the misuse has been ‘purged.’ Despite their genealogical connection, patent misuse and antitrust tying are anything but identical – something that Congress preserved but the Court neglected.

Two antitrust cases, both involving price fixing, illustrate the impact of trademark protection. These are discussed more summarily as offering further insight into how intellectual property rights channel antitrust doctrine.

In *Leegin*, a deeply divided Court overruled the century-old *Dr. Miles Medical* decision²⁴ that held minimum resale price maintenance *per se* illegal. The landmark case had been on shaky ground since the *Khan* decision (1997) concluded that maximum resale price maintenance is to be judged under the rule of reason.²⁵

Writing for the *Leegin* majority, Justice Anthony Kennedy concluded that an economic consensus called for revocation of the *per se* rule in *Dr. Miles*: “[I]t suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer’s use of resale price maintenance.”²⁶ In short, deference to longstanding precedent was outweighed by the fashionable economic logic that price restraints on intrabrand competition can be reasonable because they promote interbrand competition. But Justice Stephen Breyer and his three fellow dissenters insisted that Justice Kennedy’s opinion for the bare Majority paid insufficient respect to the doctrine of *stare decisis* as the result of overstating the asserted economic consensus and neglecting the fact that Congressional repeal of the fair trade statutes in 1975 was “premised upon the existence of [the *Dr. Miles*] rule [and thus] constitutes important public reliance upon that rule.”²⁷

Nevertheless, despite the deep division, all nine Justices applied what has become the standard framework for analyzing vertical restraints by manufacturers: the distinction between interbrand and intrabrand competition and, with it, the property logic of trademark rights that underlies product branding. Indeed, no one questions the proposition that “[t]he promotion of interbrand competition is important because ‘the primary purpose of the antitrust laws is to protect [this type of] competition.’”²⁸ Since

²³ The *eBay* decision and the equitable remedy of injunction are discussed in the text accompanying notes 50-54 *infra*.

²⁴ *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); for fuller discussions, see Peritz, *Nervine and Knavery: The Life and Times of Dr. Miles Medical Company*, in *ANTITRUST STORIES*, E. Fox & D. Crane, eds. (St. Paul: West Publishing, 2007); Peritz, *A Genealogy of Vertical Restraints*, 40 *HASTINGS L.J.* 511 (1989).

²⁵ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

²⁶ 127 S.Ct. at 2710, 2714.

²⁷ *Id.* at 2732.

²⁸ *Id.* at 2716 (quoting *Khan*, 522 U.S. at 15).

the *GTE Sylvania* (1977) decision, brand ownership through trademark rights has provided the property logic for manufacturers to restrain competition in branded goods they no longer own or possess so long as they own the brand.²⁹

Ever since passage of the Sherman Act, federal courts have struggled with the question of manufacturers' restraints on distribution and sale of their branded products. The question of reasonable restraints early involved two intertwined elements – contractual restraints and intellectual property rights. There was no clear rule regarding contractual restraints of trade until the *Dr. Miles* decision prohibited resale price maintenance in the absence of a well-scrivened consignment agreement. Before then, large manufacturers of patent medicines met with mixed success in asserting arguments that intellectual property rights should immunize from antitrust liability resale price maintenance provisions in sales contracts.³⁰ After *Dr. Miles*, the property logic of consignment, which allowed manufacturers to retain title after giving up possession of the goods, would justify immunity from antitrust liability until the latter half of the twentieth century, when the Supreme Court would close the exception, re-open it, and close it emphatically in *GTE Sylvania* (1977), only to suggest later that an opening remained.³¹

It was the *White Motor* (1963) decision that first created a separate category for non-price restraints in a case which involved a small manufacturer. Whether in a consignment or a straight sales contract, White Motor Company was permitted to impose non-price restraints on its dealers when it showed that the restraints enhanced competition against General Motors, Chrysler and Ford. Such restraints were no longer considered *per se* illegal and would be judged under the rule of reason. The Court's implicit commercial predicate was that White Motor could not compete on price against the Big Three because it could not match their economies of scale. The small manufacturer would fail without dealer restraints to enforce its plan to compete on quality against other brands – its plan to differentiate its brand. In practical terms, interbrand competition was clearly

²⁹ *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Until *GTE Sylvania*, the property logic of vertical restraints resided in the consignment contract's retention of title in the goods. The power of the title holder to restrain competition was recognized in *Dr. Miles*, which rejected the prior property logic that trade secret or trademark ownership permitted restraints on alienation or contractual restraints of trade. See Peritz, *Nervine*, *supra* note 24.

³⁰ Federal Courts tended to permit contractual restraints on sales of goods involving patent rights, while the outcomes were mixed on sales of goods involving trademark and trade secret rights. See Peritz, *Nervine*, *supra* note 25. An earlier case, *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (establishing the 'first sale' doctrine), had already declared limits on resale price maintenance involving copyrighted books; the price restraints were imprinted on the books themselves rather than expressed in contracts with retailers and were thus restraints on alienation rather than contractual restraints of trade. *Dr. Miles* would permit the former only when the property logic of consignment allowed that the goods had not been sold, allowing a manufacturer to retain title and thus exert ownership rights on *its* property; there would be no resale price maintenance at retail because there had been no prior sale. The Court found a restraint of trade in *Dr. Miles* because the faulty consignment agreement devolved into a contract of sale. See Peritz, *supra*.

³¹ *GTE Sylvania*, *supra* note 29; *Bus. Electronics Corp. v. Sharp Electronics Corp.*, 484 U.S. 717, 733 (1988) (suggesting viability of consignment-sale distinction); see Peritz, *Genealogy*, *supra* note 24, at 511-16, 531-37, 550, 562-67.

more important in those particular circumstances because, without success against the Big Three, intrabrand competition among White Motors dealers would be moot.³²

After almost twenty-five years of wobbling, the Court in *GTE Sylvania* returned to a view consistent with *White Motor*, the view that the *per se* (il)legality of non-price restraints should not turn on the distinction between consignments and sales contracts. Adopting a rule of reason for non-price restraints regardless of the contractual form, the Court abandoned the property logic of consignment for a property logic of trademark ownership in announcing that interbrand competition – that is, brand development – is simply more important than intrabrand competition. In *GTE Sylvania*, the Court’s determination that interbrand trumped intrabrand competition in cases involving struggling firms was expanded into a general proviso that interbrand competition is antitrust’s primary concern in all cases of vertical non-price restraints. Twenty years later, *Khan* (1997) further extended the property logic of trademark ownership rights to justify maximum resale price maintenance in the name of interbrand competition.

With the Roberts Court’s *Leegin* decision, the powerful property logic of trademark ownership now drives the entire body of vertical restraints doctrine toward privileging the commercial strategy of branding and product differentiation. Asserted unsuccessfully in the *Dr. Miles* era, trademark ownership and competition by product brand development now directs the Supreme Court to view markets as bifurcated, as working at distinct levels of intrabrand and interbrand competition. At one level, trademark ownership presumptively permits manufacturers to impose both price and non-price restraints on downstream sales of their branded goods. At the other level, increasingly concentrated markets and cooperative game strategies soften competition among manufacturers.³³

Does trademark policy promote its own, internal competition policy? Unlike the public interests underwriting patent and copyright, trademark protection is not justified by a role in encouraging invention. The Supreme Court observed long ago that a trademark does not “depend on novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought.”³⁴ Rather, the orthodox economic justification for trademark protection rests on production of market information and its value in decreasing consumer search costs, its value in improving competition on the merits by preventing mistake, confusion, or deception regarding the origin of goods. More recently, courts have come to view the social value of trademarks more expansively, as including not only an indication of origin but also a guarantee of quality.³⁵

³² *White Motor Co. v. United States*, 372 U.S. 253 (1963).

³³ For discussion of cooperative game strategies, see Peritz, *Doctrinal cross-dressing in derivative aftermarkets: Kodak, Xerox and the copycat game*, 51 ANTITRUST BULL. 215 (2006); Peritz, *Toward a Dynamic Antitrust Analysis of Strategic Market Behavior*, 47 N.Y.L.S. L. Rev. 101(2003).

³⁴ *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

³⁵ See, e.g., *Reddy Communications v. Environment Action Found’n*, 477 F.Supp.936 (D.D.C. 1979).

Yet since the pioneering work of economist Edward Chamberlin, economists in the United States have disagreed about the competitive effects of brand differentiation and, thus, of trademark protection. Chamberlin offered the strongest criticism, arguing that trademark rights were barriers to competition that artificially differentiated products, elevated costs, and created power to raise prices for products that are functionally identical. In this light, advertising and other forms of brand differentiation harm consumers. More recently, many economists have come to believe that advertising communicates useful information to consumers. Because advertising embodies both tendencies, it should come as no surprise that a dissensus persists regarding the economic role of trademarks and their impact on competition.³⁶

But this ambivalence is not reflected in the antitrust doctrine of vertical restraints, which has uniformly adopted a powerful “free rider” presumption to characterize price discounters and, with it, a benign neglect of the anticompetitive effects that trademarks and interbrand markets can produce. The “free rider” presumption in its current form derives from a property logic of protecting investment in trademarks rather than the trademark regime’s internal competition policy insofar as antitrust courts do not ask whether there is in fact free riding or, if there is, whether it actually confuses or otherwise harms consumers and thus produces anticompetitive effects. Were antitrust courts to address these questions, attention to the trademark regime’s internal competition policy would lead to a more careful analysis of the relationship between intrabrand and interbrand competition. I leave further exploration of that problematic to another day.

The property logic of trademark ownership also emerges in the Roberts Court’s *Dagher* decision, which is generally understood as involving horizontal price fixing. Writing for a unanimous Court, Justice Clarence Thomas treated Equilon Enterprises as “a lawful, economically integrated joint venture” between Texaco and Shell Oil, a view which made good sense in light of the joint venture’s prior approval by the Federal Trade Commission.³⁷ The Court held that the decision by Equilon to sell separately branded gasoline at the same price to Texaco and Shell service station owners was not *per se* illegal horizontal price fixing.³⁸

Once the antitrust question was defined as conduct by “a lawful, economically integrated joint venture,” the case was easy pickings, as reflected by the Court’s unanimity. It was easy because that antitrust doctrine is well-settled: Ever since the *BMI*

³⁶ See, e.g., Richard Schmalensee, *Advertising and Market Structure*, in *NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE* 373 (Joseph Stiglitz & G. Frank Matthewson, eds. 1991); EDWARD CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1932); Rudolph J.R. Peritz, *Innovation Economics and U.S. Antitrust Law*, in *POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW* (A. Cucinotta, R. Pardolesi, R. Van den Bergh, eds.) (London, U.K.: Elgar Press, 2002); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 *YALE L.J.* 1687 (1999); Paul Milgrom & John Roberts, *Price and Advertising Signals of Product Quality*, 94 *J.POL.ECON.* 796 (1986); J. Thomas McCarthy, *Trademarks and Unfair Competition* §2.10-11(4th ed. 2001). Compare Lee Bentham, *The Effect of Advertising on the Price of Eyeglasses*, 15 *J.L. & ECON.* 337 (1972)(advertising correlates with lower prices) with John A. Rizzo, *Advertising, and Competition in the Ethical Pharmaceutical Industry*, 42 *J.L. & ECON.* 89 (1999)(drug advertising reduces consumer sensitivity to price).

³⁷ *Dagher*, 547 U.S. at 4 (citing *In re Shell Oil Co.*, 125 F.T.C. 769 (1998)).

³⁸ *Id.* at 8.

(1979) case, economically integrated joint ventures have been treated as entities separate from their partnering corporations. Writing for the *BMI* Court, Justice Byron White characterized the blanket licenses as new products that BMI and ASCAP formulated from the raw materials of individual copyrighted musical compositions.³⁹ Hence, in the Court's view, the price was set by the joint ventures for their own blanket licenses rather than for bundles of compositions owned by third parties. Accordingly, ASCAP and BMI created an entirely new product market with new efficiencies; at the same time, copyright holders granted ASCAP and BMI only non-exclusive licenses, which maintained for CBS and other potential licensees the old market alternative of bargaining with individual copyright holders for their compositions.

But Equilon did not produce a new product from input materials provided by Texaco and Shell; nor did the two joint venturing partners create a new market while permitting their separately branded station operators a choice of entering the new market or remaining in an old market with numerous individual petroleum suppliers. In practical terms, the joint venture under the trade name "Equilon Enterprises" transformed interbrand competition into intrabrand restraints at the wholesale level, even though sales proceeded under the separate brands of Texaco and Shell. The *Dagher* decision presumptively permits Texaco and Shell through Equilon to set the wholesale prices for their branded retailers and, then, *Khan* and *Leegin* presumptively permit Texaco and Shell, with exact knowledge of wholesale prices, individually to set the resale prices for the separately branded petroleum products that Equilon produced. Beyond the anti-competitive effects sanctioned by this antitrust regime, if the purpose of trademark protection is the production of market information to improve competition on the merits by preventing mistake, confusion, or deception regarding the origin of goods, then this decision and its consequences have betrayed that purpose in the name of competition policy.⁴⁰

In these three decisions, the Roberts Court has announced antitrust doctrine that permits manufacturers greater power to restrain downstream competition and greater opportunities to coordinate marketing strategies with their competitors. In each, intellectual property rights have come into play. After *Independent Ink*, the patent holder has a presumptive right to restrain competition by conditioning the sale of a patented invention on the purchase of a staple, undifferentiated product that is widely available in competitive markets. After *Leegin*, the trademark owner has a presumptive right to engage in resale price maintenance of its branded goods, though it no longer owns or possesses them so long as it holds the goodwill. And in *Dagher*, a joint venture under the new trade name "Equilon Enterprises" has turned what was interbrand competition between Texaco and Shell into their presumptive right through the joint venture to set wholesale prices for goods sold to the two partners' branded retailers, whose resale prices are then subject to restraint by the two partners under *Leegin*. These three antitrust

³⁹ *BMI v. CBS, Inc.*, 441 U.S. 1, (1979); compare *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 333 (1982) (holding *per se* illegal price agreements by a joint venture not economically integrated).

⁴⁰ Of course, I do not intend to suggest that it was the property logic of trademark ownership alone that produced this result.

decisions reflect the property logics of two intellectual property regimes but not their internal competition policies, policies whose recognition might lead an antitrust court to an understanding of competition policy more broadly conceived.

II. Patents and Competition Policy

While the Roberts Court in three antitrust cases applied intellectual property rights to allow restraints on competition, a range of opinions in three patent cases call for limits on their exclusionary logics and effectively seek to open the door to increased competition.

The trio of patent cases address fundamental issues of patent policy. A unified Court in *KSR* expanded the scope of prior art to be considered in evaluating a combination patent and, in so doing, raised the level of creativity needed to meet the statutory requirement of non-obviousness.⁴¹ In another unanimous decision, the *eBay* opinion pointedly reminded the Federal Circuit that a permanent injunction for patent infringement is an equitable remedy that calls on the court to apply the traditional balancing test.⁴² And in his dissent from the *Metabolite* decision to dismiss a writ of certiorari as improvidently granted, Justice Stephen Breyer explicated the basic premise that “patent protection [excludes] . . . laws of nature, natural phenomena, and abstract ideas.”⁴³ These opinions are discussed for the limited purpose of revealing their normative commitments to a pervasive competition policy underlying the patent regime.

The Court in *KSR* took issue with the Federal Circuit’s “transform[ation of a] general principle into a rigid rule that limits the obviousness inquiry.” The patent principle holds that a combination is obvious to “a person of ordinary skill in the relevant field” when the prior art “demonstrate[es] a teaching, suggestion, or motivation to combine known elements” into that combination.⁴⁴ The Federal Circuit rigidified the principle “by overemphasis on the importance of published articles and the explicit content of issued patents.” This approach failed to take account of “common knowledge and common sense,” which consider a larger body of public knowledge, including “design need and market pressure,” knowledge which seldom finds its way into the literature of prior art. Justice Kennedy observed that a “person of ordinary skill is also a person of ordinary creativity, not an automaton.”⁴⁵ This observation brings to the fore the difficulty of separating ordinary creativity from the non-obvious type because “inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.”⁴⁶

⁴¹ *KSR Int’l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1742 (2007).

⁴² *eBay Inc. v. MercExchange, L.L.C.*, 126 S.Ct. 1837 (2006).

⁴³ *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 126 S.Ct. 2921, 2922 (2006) (Justice Breyer, dissenting).

⁴⁴ 127 S.Ct. at 1741, 1742.

⁴⁵ *Id.* at 1743 (citing *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1367 (Fed. Cir. 2006)) (internal quotation marks omitted).

⁴⁶ *Id.* at 1741.

The practical question, then, is what to do about the great bulk of inventions, which lie in the bandwidth between the ordinary and the non-obvious. There has been mounting criticism of the Federal Circuit's approach to that question and the resulting demands on the Patent Office, demands which have led to a standard that has diminished the non-obviousness requirement to the level of triviality.⁴⁷ In expanding the range of references for determining prior art, the Court in *KSR* raised the level of non-obviousness required for patentability. Now, a combination may be found non-obvious even without a "teaching, suggestion or motivation to combine known elements" in the prior art.

It should be noted that the very process of determining non-obviousness in the course of patent application can be understood as a contest in ideas, a competition between prior art and the prosecuted invention. The question of non-obviousness asks whether the invention embodies a new idea that surpasses prior art. *KSR* raises the level of difficulty for the new arrival to win this competition in ideas.⁴⁸

On the assumption that the heightened standard will result in a class of combination inventions that met the old standard for non-obviousness but fail the new one, what are the likely effects? Some of the newly obvious combinations, especially those involving processes, can be hidden from public view and thus their owners can seek protection as trade secrets. In this instance, public information about such combinations will be lost until the secrets are discovered. Owners of newly obvious combinations which are self-disclosing on sale or use will proceed in reliance on first-mover advantages or simply on the benefits of the new combination when they outweigh the competitive costs of imitation by others. The resulting mix of secret and public combinations is an empirical question. Nonetheless, *KSR*'s heightened standard for non-obviousness increases the play of competition, either immediately by direct imitation or eventually by investigation, independent discovery, or reverse engineering. The Court has expanded the scope of innovation by "ordinary creativity" and, with it, access to innovation that patent protection denied to competitors under the old rule.⁴⁹

The Court in *eBay* again spoke in a unified voice to reject another important instance of the Federal Circuit's rigid jurisprudence of expansive patent rights, this time

⁴⁷ See FEDERAL TRADE COMMISSION, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct.2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (as visited December 4, 2007); See also, John H. Barton, *Non-Obviousness*, 43 IDEA 475 (2003); *Antitrust and the New Economy: Comments* to the Antitrust Modernization Commission, Washington, D.C., available at <http://www.amc.gov> (Working Group on the New Economy, American Antitrust Institute) (July 2005)

⁴⁸ The statutory requirement of usefulness assures that the invention is not a disembodied idea. 35 USC § 101. For further discussion of this point, see Peritz, "Patents and Progress," *infra* note 55.

⁴⁹ The extent of access to competitors under the new approach deserves further comment insofar as it depends on the character of prior art embodied in the combined elements. If no elements are protected by patents still in force, then access to the new combination is entirely free and competition is simply extended. If, however, any element is still protected, then use of the new combination requires a license from each patent holder. But no patent license is required to practice the combination. The net effect in either case is free access to the combination and, with it, lower bargaining and licensing costs. In all circumstances, however, the intervention of trade secret protection must be taken into account, with consequences as described in the discussion accompanying this footnote.

its “general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances.” In rejecting this general rule, the Court held that issuance of permanent injunctions summons “familiar principles [of equity that] apply with equal force to disputes arising under the Patent Act.”⁵⁰ Justice Thomas’ opinion for the Court provides a clear and unembellished basis for a more flexible approach:

As this Court has long recognized, “a major departure from the long tradition of equity practice should not be lightly implied.” Nothing in the Patent Act indicates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions “may” issue “in accordance with the principles of equity.”⁵¹

While the opinion for the Court does not venture beyond the statutory text and equity doctrine to make plain the outcome, two concurring opinions offer differing policy analyses for support. Both address an issue raised in the opinion by Justice Thomas, in a passage that rejected the Federal Circuit’s reasoning for its general rule for issuing permanent injunctions. The Federal Circuit had concluded that the Patent Act’s explicit definition of a patent as “having the attributes of personal property,” particularly “the right to exclude others from making, using, offering for sale, or selling the invention . . . alone justifies its general rule.” It was here that Justice Thomas quoted the statutory language that provides for the discretion associated with traditional equity practice, observing that “the creation of a right is distinct from the provision of remedies for violations of that right.”⁵² The two concurring opinions assert sharply different rationales for treating the distinction between the exclusionary nature of property rights and the exclusionary remedy of injunction.

Chief Justice Roberts understood the relationship between right and remedy reflected in the statutory provisions to be reflected in a “long tradition of equity practice” to grant injunctions “upon a finding of infringement in the vast majority of patent cases” on account of “the difficulty of protecting a right to *exclude* through monetary damages that allow an infringer to *use* the invention against the patentee’s wishes.”⁵³ In sum, Justice Roberts was instructing federal judges not to stray from that “long tradition” of recognizing patents as fundamentally property rights to exclude, rights to empower individual choice about how to practice the invention, or whether to practice it at all, property rights that are understood as underprotected by a liability remedy of damages.

Justice Kennedy in his concurring opinion gave a diametrically opposed rationale for the Court’s declaration that the statutory definition of patent as property right does not necessarily define the remedy for its violation. At the outset, Justice Kennedy rejected the Chief Justice’s view that the difficulty of fully protecting patent rights with monetary damages underlies a “long tradition” that calls for judges to conserve the property rights in patents. In sharp contrast, Kennedy’s opinion invests the equitable nature of injunctive

⁵⁰ 126 S.Ct. at 1839 (both quotations in the paragraph).

⁵¹ *Id.* (citations omitted).

⁵² *Id.* at 1840 (citing 35 U.S.C. §§ 261, 154(a)(1)).

⁵³ *Id.* (joined by Justices Ruth Bader Ginsberg and Antonin Scalia) (emphasis in original).

relief with a progressive ability to adjust to change: “[I]n many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases.” Two examples are given: first, “industries in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees;” second, “patents over business methods,” which raise significant questions of “vagueness and suspect validity.”⁵⁴ Both examples reflect concerns that patent rights to exclude can be questionable barriers to the market entry needed for competition to flourish.

It is no accident that Justice Kennedy’s authority source for both examples is the Federal Trade Commission report entitled “To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy.” It is no accident because a fundamental tension emerges at intersections between patent rights and competition, a tension between injunctive exclusion from and permitted access to patented inventions and the information they embody. A balance between access and exclusion is required because both competition and patent regimes can promote innovation. Indeed, the constitutional provision authorizing Congress to enact patent legislation explicitly defines the purpose as promoting progress in science and useful arts. In this light, injunctive relief for patent infringement should not be granted, particularly to patent trolls or business patent holders, when it results in less progress than competition and compulsory licensing.⁵⁵ Justice Kennedy cautions against the dangers of excessive patent protection and, with it, inadequate regard for competition as a powerful means to promote progress through innovation.

The implicit competition logic driving Justice Kennedy’s concurrence emerges even more emphatically in Justice Stephen Breyer’s dissent from the *Metabolite* decision. Justice Breyer’s opinion questions the wisdom of dismissing the writ earlier granted in a case that addresses the fundamental patent imperative to “[e]xclude from . . . patent protection . . . laws of nature, natural phenomena, and abstract ideas.”⁵⁶

What is so important about this issue? In Justice Breyer’s view, granting a “monopoly over a basic scientific relationship” upsets a careful balance embodied in patent rights: “[S]ometimes too much patent protection can impede rather than ‘promote the Progress of Science and useful Arts,’ the constitutional objective of patent and copyright protection.”⁵⁷

⁵⁴ *Id.* at 1842 (Justice Kennedy joined by Justices Stevens, Souter & Breyer) (for all quotations in the paragraph).

⁵⁵ *Id.* (FTC Report). “To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.” U.S. Const’n, Art. I, Sec. 8, para. 8. On the difficulties of determining whether a particular doctrine or policy promotes progress, see Peritz, “Patents and Competition: Toward a Knowledge Theory of Progress,” working paper presented 14 June 2006, at AALS Workshop on Intellectual Property Rights, Vancouver, B.C., and 4 September 2006, at 2006 ATRIP Congress: Intellectual Property and Market Power, Parma, Italy; working paper posted at <http://www.aals.org/documents/2006intprop/PeritzPaper.pdf> and at <http://www.law.berkeley.edu/institutes/bclt/ipsc/papers2/Peritz.doc> (IP Scholars Conf., August 2006).

⁵⁶ 126 S.Ct. at 2922 (Justice Breyer, joined by Justices Stevens & Souter, dissenting from opinion to dismiss writ of certiorari as improvidently granted).

⁵⁷ *Id.* at 2925 (citations omitted).

Justice Breyer was concerned about public access to “the basic tools of scientific and technological work” and, as such, to “part of the storehouse of knowledge and manifestations of laws of nature as free to all men and reserved exclusively to none.” The rationale for free access lies in the public policy to promote progress by encouraging “development and the further spread of useful knowledge itself.”⁵⁸ This of course is standard fare in the discourse of intellectual property rights. Indeed, this balancing approach to determining the metes and bounds of patent rights has been adopted in well-settled Court precedent, in the FTC Report on patent rights and competition, as well as in Justice Kennedy’s *eBay* concurring opinion – all of which appear throughout Justice Breyer’s footnote references.

What exactly is this balancing approach to patent rights? Justice Breyer incorporates it by reference to the landmark decision in *Bonito Boats* (1989). There Justice Sandra Day O’Connor wrote for the Court:

The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the “Progress of Science and useful Arts.” . . . [T]he stringent . . . novelty and nonobviousness requirements express a congressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material.⁵⁹

Justice Breyer was reminding his readers that the patent regime begins, as Justice O’Connor put it, with “the baseline of free competition . . . [from] which the protection of a federal patent is the exception.”⁶⁰ To establish the proper level of patent protection, courts must recognize the importance, indeed the primacy, of competition to promote progress by innovation. And so Justice Breyer concludes his opinion in *Metabolite* with references to competition policy – not only the *Bonito Boats* decision but also the FTC Report and former FTC Commissioner Robert Pitofsky’s article on antitrust and intellectual property rights.⁶¹

The three patent cases each address one aspect of this balancing jurisprudence: granting rights to exclude competitors only with respect non-obvious inventions, determining the propriety of exclusionary remedies by equitable principles rather than by a property logic of patent ownership, and finally, maintaining public access to “laws of nature, natural phenomena, and abstract ideas.” Every one of these three elements functions as a limit on the exclusionary power of patent protection. Each one widens public access to inventions or to the knowledge embodied in those inventions. The result

⁵⁸ *Id.* at 2923 (citations and internal quotation marks omitted).

⁵⁹ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146, 150 (1989); *Metabolite*, 126 S.Ct. at 2926 (citing 489 U.S. at 146).

⁶⁰ 489 U.S. at 156, 151.

⁶¹ 126 S.Ct. at 2929.

is increased play for the patent regime's internal baseline policy of free competition by innovation.

Concluding Observations

Together, the opinions in these six cases offer some insights into the Roberts Court's attitudes toward two overlapping competition regimes: Antitrust is well-understood in terms of competition policy, although the content is unstable and disjointed. But adequate attention has not been given the competition policies working within intellectual property regimes, including the patent and trademark precincts visited in this brief excursion through the Roberts Court's early jurisprudence. While this small sample is not enough to make broad generalizations, a few preliminary observations are warranted.

First, the patent regime harbors competition process values involving the production of market information. Patent policy insists on the importance of access to new knowledge for furthering not only scientific research but also commercial development of new products. In determining how to promote progress by innovation, policy makers must balance the benefits of patent rights to exclude competitors against the benefits of access to the knowledge needed for competition by innovation.

Second, the trademark regime also includes competition process values involving the production of information. But here, the nature of the information is different and thus the calculus changes. Trademarks are seen as improving competition when they create signposts inviting consumers to (re)turn to a product or service that satisfied their expectations or those of a trusted third party. This information has public value to the extent it lowers consumer search costs and so long as the regime maintains the integrity of the information reflected in the marks. But there is controversy over the informational value of trademarks and the advertising used to publicize them. Even when not misleading, distinctive marks can allow their owners to develop market power, allowing them to charge higher prices for differentiated products with functionally identical substitutes. Nevertheless, trademark protection does reflect a form of competition policy.

Third and finally, antitrust jurisprudence, including that of the Roberts Court, sometimes applies or assumes intellectual property rights as justifications for restraining the kind of free competition imagined by antitrust policy without taking into account the internal competition policies working in the precincts of patent and trademark rights.

In sum, the six cases discussed appear to reflect a discontinuity in intersecting competition regimes: The three antitrust decisions treat intellectual property issues in the purely property logic of exclusionary rights while the range of opinions directly involving intellectual property rights seek to limit their reach and, in consequence, effect an expansion of internal competition policies. For now, the observations themselves are a first step. For the future, there looms the difficult enterprise of harmonizing the intersecting competition policies carried forward in the Roberts Court's jurisprudence.