Patent and Antitrust:
Differing Shades of Meaning

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ABSTRACT

The relationship between patent law and antitrust law has challenged legal minds since the emergence of antitrust law in the late 19th century. In reductionist form, the two concepts pose a natural contradiction: One encourages monopoly while the other restricts it. To avoid uncomfortable dissonance, the trend across time has been to try to harmonize patent and antitrust law. In particular, harmonization efforts in recent decades have led Congress and the courts to engage in a series of attempts, some aborted and some half-formed, to graft antitrust doctrines onto patent law. These efforts have failed to resolve the conflicts.

This piece argues that the deviations between patent law and antitrust law run far deeper than courts and commentators recognize. The problem isn't just that one encourages monopoly while the other limits it. Rather, patent law and antitrust law often use the same concepts and terminology with differing meanings and contexts. In other words, it may appear that they are talking about the same things, and yet, they are not.

Our tendency to assume parallel meanings threatens any attempt to reconcile the two bodies of law. Most importantly, ignoring asymmetries can lead to both under protection and overprotection of patent rights, as well as the improper application of antitrust laws. To highlight the problem, this piece explores a number of examples of differing meanings in hopes of promoting a more subtle understanding of the patent/antitrust terrain.