

Connecting the Antitrust Dots: In Praise of Herb Hovenkamp

*Bill Baer**

Thanks for inviting me to this Symposium celebrating the 100th volume of the *Iowa Law Review* and honoring the contributions of Professor Herbert Hovenkamp.

In January 1915, in the inaugural issue of the *Law Review* (then the *Iowa Law Bulletin*), the editors proposed to focus almost exclusively on the law of this great state, concluding that the important developments outside of Iowa were adequately covered by other publications. To the editors: we are all fortunate that you expanded your vision. Over the ensuing century the *Law Review* has grown to become national in scope, reputation and leadership. In 1933, for example, it pioneered the legal symposium format, featuring contributions on administrative law from Felix Frankfurter and John Henry Wigmore.¹ I salute the current *Law Review* staff and the many talented lawyers who preceded you.

Likewise, Professor Hovenkamp's influence extends far beyond this law school and the state of Iowa. Herb, your contributions here in Iowa City are themselves noteworthy—recipient of the University of Iowa Outstanding Teachers Award, and teacher and mentor to so many of the College of Law's graduates, including some who have served with distinction at the Antitrust Division and the Federal Trade Commission.

At the same time, Herb has been educating and informing the nation's broader antitrust community—including lawyers, businesses, enforcers, and judges. And that is my focus this evening. Part observer, part interpreter, and part advocate, Herb has helped steer the evolution of our country's competition policies. He is the senior author of *Antitrust Law: An Analysis of Antitrust Principles and Their Application*—the leading antitrust law treatise. Often described as anchoring the mainstream of antitrust theology, Professor Hovenkamp's contributions are equally respected by those who identify with the scholarship of Cambridge, New York, and Chicago. Herb, your unique standing is evidenced by the distinguished academics,

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1. See Willard L. Boyd & Randall P. Bezanson, *Ninety Years of the Iowa Law Review: The Personalities, Policies and Events that Shaped an Enduring Tradition in Iowa Legal Education*, 91 IOWA L. REV. 1, 3-4 (2005).

practitioners, and enforcers who have gathered for this event.

The Antitrust Division has long appreciated Herb's contributions to the field. Indeed, in 2008, the Justice Department awarded Professor Hovenkamp the Antitrust Division's John Sherman Award for a lifetime of contributions to the teaching and enforcement of antitrust law and the development of antitrust policy. In announcing the award, my predecessor, Tom Barnett, aptly reflected that, "Professor Hovenkamp sets the standard for antitrust scholarship today. . . . [H]is insights and cogent analysis have helped to improve antitrust law and policy to better protect consumer welfare and to spur economic growth."²

Why does a treatise like *Antitrust Law* matter? To explain the significant influence that Herb and a small number of other authoritative scholars have had on antitrust law, I need first to talk about the statutory framework in which we operate.

In enacting our core antitrust statutes, Congress set forth broad principles, leaving most of the details to be sorted out by the courts over time. As Diane Wood, Chief Judge of the Seventh Circuit has explained, "[f]rom the time the Sherman Act was passed in 1890, it has been understood as a 'common law' type of statute, a statute setting forth very general propositions, that the Judges in common law fashion would implement and develop on a case by case basis."³ The Supreme Court similarly described the Federal Trade Commission Act's ban on "unfair methods of competition," as a phrase that "does not admit of precise definition," and reasoned that it was enacted with the expectation that "the meaning and application [would] be arrived at by . . . the gradual process of judicial inclusion and exclusion."⁴ While the Clayton Act—the third core antitrust law of the land—does proscribe specified practices, it too uses language that requires ongoing interpretation—as in Section 7's ban on anticompetitive acquisitions only where the effect "may be substantially to lessen competition." As one court explained more than 50 years ago, the Clayton Act "was deliberately couched in general and flexible terms" and that it was incumbent on the judiciary to fashion "a coherent body of substantive law out of the Congressional policy and language."⁵

In building flexibility into our antitrust statutes, Congress made the right call. Think how much economic activity has changed in the period since

2. Press Release, U.S. Dep't of Justice, Professor Herbert Hovenkamp Receives Justice Department's 2008 John Sherman Award (July 28, 2008), *available at* http://www.justice.gov/atr/public/press_releases/2008/235516.htm.

3. Diane P. Wood, *Policy Roundtables on Judicial Enforcement of Competition Law*, ORG. FOR ECON. CO-OPERATION & DEV. 27 (1997), <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf>.

4. *FTC v. Raladam Co.*, 51 S. Ct. 587, 590 (1931).

5. *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 182 (S.D.N.Y. 1960).

passage of the Sherman, Clayton and FTC Acts. Our economy is larger and more complex. Today competition issues arise in some markets that even Jules Verne could not have imagined. In the late 19th and early 20th centuries, our country was experimenting with electrification, building a highway system, and witnessing the introduction of the mass-production assembly line. Today competition plays out in an increasingly global, digital, and networked economy. The Internet, advanced telecommunications, and a multitude of other technologies have fundamentally changed how businesses compete. These changes have introduced and enabled new practices and commercial arrangements that require thoughtful economic analysis and careful legal scrutiny by antitrust enforcers and the courts.

A related point is that as courts and enforcers work to interpret and apply these general statutes, they do so with an eye toward evolving economic principles. The courts today share the view that the purpose of our antitrust laws is to protect competition, rather than competitors. This consensus on how best to maximize consumer welfare owes much to the contributions of economists and legal scholars who, beginning in the 1950s, argued that many of the antitrust decisions of that period lacked sound economic foundations.

Since that time the debate over how best to protect competition has been influenced by a wide range of competing economic perspectives. As they work to advance their views on the appropriate application of our antitrust laws, economists and academics have given birth to an ever-expanding array of economic models, simulations, and econometric tools. It is no coincidence that the Antitrust Division and Federal Trade Commission together employ more than 100 PhD economists. Today, an investigation of—or lawsuit challenging—a potential violation of the antitrust laws inevitably involves economists (and often econometricians) on both sides.

The result of all of this is that a century and more after they were enacted, interpretation of our core antitrust statutes remains a work in progress. Over time, as courts have wrestled with these challenges, they have produced a large body of legal precedent that can be confusing and even inconsistent. There are few bright-line rules to guide courts and practitioners. Most antitrust cases turn on complex questions of market definition, market power, and competitive effects. Economic models and analyses can be pivotal and, at times, impenetrable. And, many judicial decisions are too fact-specific to provide actionable guidance for lawyers, businesses or other courts. An enterprising litigator likely can point to some case law somewhere that appears to support nearly any antitrust argument.

This complexity has heightened the importance of thoughtful, independent analyses of antitrust law. Antitrust practitioners, as well as competition enforcers and generalist judges, often need an authoritative perspective to help connect the dots.

Which brings us back to Professor Hovenkamp. Herb is an

uncommonly prolific contributor. He has published close to 150 articles covering a wide range of antitrust and related issues. He is also the author of numerous books, textbooks, and other materials. *The Antitrust Enterprise, Principle and Execution*, published in 2006, offers an important, integrated perspective on U.S. antitrust law. Other books, including several legal histories, demonstrate the range of his intellectual curiosity.

But, any discussion of Herb's contributions must center on his able stewardship of the *Antitrust Law* treatise. That resource—the first three volumes of which were published in 1978 by professors Phillip Areeda and Donald Turner—from day one has provided a uniquely comprehensive analysis of antitrust law and principles. Herb joined the team in 1984, assumed the mantle of senior author nearly twenty years ago, and throughout protected the franchise. The treatise has become an indispensable authority for practitioners, scholars, and courts alike. If you read antitrust briefs, one clear takeaway is that practitioners either cite to the *Antitrust Law* treatise as authority or find some way to distinguish it; there seems to be a consensus that there is no percentage in disagreeing. Indeed, as Justice Breyer once famously remarked, most advocates would prefer to have “two paragraphs of [the] treatise on their side than three Courts of Appeals or four Supreme Court Justices.”⁶

In the early 1990s, Judge Harry Edwards of the Court of Appeals for the District of Columbia wrote an article lamenting what he saw as a “growing disjunction” between legal scholarship and the practice of law. An exception, he noted, is the treatise, which he described as the paradigm of “practical” legal scholarship. The best treatises, he explained, “create an interpretive framework; categorize the mass of legal authorities in terms of this framework; interpret closely the various authoritative texts within each category; and thereby demonstrate for judges or practitioners what ‘the law’ requires.”⁷ Even then, more than twenty years ago, Judge Edwards recognized that *Antitrust Law* had already assumed its place, alongside Prosser's TORTS and Wright and Miller's *Federal Practice and Procedure*, as one of the classic treatises of American law.

Today, the *Antitrust Law*'s twenty-plus volumes provide an even more comprehensive analysis of antitrust law. (As an aside, Herb, the question does beg to be asked: do you ever delete material?) Whatever its length, the treatise has thrived because it is much more than a digest or reporter of judicial decisions. What Professor Hovenkamp—like Professors Areeda and Turner before him—has done is three-dimensional. The treatise synthesizes, in a clear and accessible way, the current state of antitrust law, as well as the

6. Justice Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 43 (1992).

history and evolution of judicial precedent. It teases out the doctrinal principles that explain and inform key judicial decisions. And, it hangs these precedents on a coherent legal framework and describes the economic principles that gird its foundation.

Importantly, Hovenkamp and his co-authors do not shrink from identifying what they view as errors in judicial reasoning. In those instances, or where sound economic theory has diverged from aging precedent, Hovenkamp and his co-authors offer their own prescriptive analyses. In so doing, they work to gently shape the law rather than to revolutionize it. As Herb once described, the treatise seeks to guide the direction of the law “by incremental nudges rather than avulsive shifts.”⁸

Like other great American legal treatises, *Antitrust Law* attained its authoritative status through consistency, accuracy, and careful reasoning. It has remained relevant through regular updates, which take into account both new legal precedents and evolving economic principles. For more than three decades, the treatise has helped antitrust lawyers and judges make sense of complex antitrust issues. It has thereby contributed significantly to the protection and preservation of competition in the United States.

The federal reporters confirm that there is a judicial audience hungry for Professor Hovenkamp’s brand of antitrust analysis. Indeed, it is the rare antitrust opinion (or brief) that does not lean on Herb’s authority for at least one proposition. Our unscientific online search found close to 550 district court decisions and 350 appellate court opinions that cite to Professor Hovenkamp’s work. To put that in perspective, I have been in the field for roughly the same time period as Herb. In my years in and out of government I have written articles and given my fair share of speeches. Yet, our online search found exactly two reported decisions that reference my contributions – such as they are – to antitrust thinking. Even more humbling is the thought that my best shot at getting cited going forward is this very talk – where I pay tribute to the influence of Herb Hovenkamp.

That influence on judicial thinking goes all the way to the top. As former U.S. Deputy Solicitor General Thomas Hungar has noted, “there is a remarkably high degree of correlation between the Areeda–Hovenkamp treatise (and other writings by Professor Hovenkamp) and the [Supreme] Court’s decisions.”⁹ Over the last decade, the justices have cited approvingly to the *Antitrust Law* treatise or other works by Hovenkamp in nearly all of the Court’s significant antitrust decisions.

Professor Hovenkamp has been particularly influential in matters that lie at the intersection of antitrust and intellectual property law. In addition

8. Herbert Hovenkamp, *The Areeda–Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 818 (1996).

9. Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, 23 ANTITRUST 53, 54–55 (2009).

to his treatment of these issues in law review articles and the *Antitrust Law* treatise, Hovenkamp is also co-author of a leading treatise on the application of antitrust principles to intellectual property law. Two Supreme Court cases help illustrate Hovenkamp's influence in this important and evolving area.

In 2006, in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, the Supreme Court reversed long-standing precedent holding that patents create a presumption of antitrust market power. This change brought federal law in line with the enforcement agencies' practice. In doing so, the majority cited the *Antitrust Law* treatise in explaining that it makes no sense to continue recognizing a presumption of antitrust market power after Congress specifically eliminated the comparable presumption in the patent misuse statute.¹⁰ The Court also quoted from both major Hovenkamp treatises (out of four total sources cited) to make the point that the Court's decision was in "accord with the vast majority of academic literature" on the subject.¹¹

Last year, Professor Hovenkamp's analysis also featured prominently in the Supreme Court's *Actavis* decision, which allowed the Federal Trade Commission's antitrust challenge to a reverse-payment agreement to proceed under a rule of reason analysis. Justice Breyer's opinion identified five considerations that informed the Court's decision. For four of these, the decision relied heavily on Herb's analysis. Notably, Justice Breyer cited the *Antitrust Law* treatise as the primary or exclusive support for two of these considerations: that an unexplainably large reverse payment is a strong indicator of market power and that it also provides a workable surrogate for a patent's weakness.¹²

And, in the wake of the *Actavis* decision, Herb co-authored *Activating Actavis*, an alliterative article that seeks to "identify and operationalize the essential features of the Court's analysis" in an effort to "help courts and counsel fill the gaps" in the decision.¹³ This is precisely the sort of practical scholarship that has characterized and elevated Hovenkamp's influence on the development of antitrust law.

Professor Hovenkamp has also been an important influence on the judicial treatment of unilateral pricing conduct under the Sherman Act. In this area, Herb builds on a foundation laid by Professors Areeda and Turner, including their landmark 1975 article on the antitrust analysis of

10. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1291 (2006) (citing PHILIP E. AREEDA & HERBERT HOVENKAMP, 10 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1737c (2d ed. 2004)).

11. *Id.* at 1291 n.4 (quoting AREEDA & HOVENKAMP, *supra* note 10 and 1 H. HOVENKAMP, M. JANIS & M. LEMLEY, IP AND ANTITRUST § 4.2a (2005 Supp.)).

12. See *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2234–37 (2013) (citing 7, 12 AREEDA & HOVENKAMP, *supra* note 10, ¶¶ 1503–1504b, 1511, 2046 (3d ed. 2012) and H. HOVENKAMP, M. JANIS, M. LEMLEY & C. LESLIE, *supra* note 11, § 15.3 (2d ed. Supp. 2011)).

13. See Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating Actavis*, 28 ANTITRUST 1, 16 (2013).

predatory pricing claims.¹⁴ The price-cost analysis they advocated was elaborated upon in the *Antitrust Law* treatise and later embraced, in large measure, by the Supreme Court's 1993 *Brooke Group* decision.¹⁵

In a 2006 article entitled *The Law of Exclusionary Pricing*, Hovenkamp analyzed what he characterized as “new frontiers” of price predation claims. Among other points, that article was critical of the Ninth Circuit's 2005 *Weyerhaeuser* decision, which upheld a jury verdict against the defendant for paying “too much” to purchase logs. Herb criticized the Ninth Circuit for failing to adapt a cost-based test under the facts in that case, and described the decision as an “antitrust disaster of enormous proportions.”¹⁶ A few months later, the Solicitor General quoted Herb's critique in urging the Supreme Court to grant certiorari and reverse.¹⁷ A unanimous Supreme Court did so, citing Hovenkamp's article for the core proposition that “predatory-pricing and predatory-bidding claims are analytically similar.”¹⁸

Herb's analysis has also been center stage as courts have wrestled with conditional pricing practices, including bundled and market-share based discounts. In evaluating bundled discounting, for example, Herb has advanced a “discount attribution” test for evaluating a rebate's exclusionary potential, in which the entire discount paid on all products in a bundle is attributed to the price of the product for which exclusion is claimed.¹⁹ In *Cascade Health Solutions v. PeaceHealth*, the Ninth Circuit embraced a test that drew heavily from Herb's analysis. In doing so, the Ninth Circuit quoted entire paragraphs from *Antitrust Law*, which it characterized as the “leading treatise on antitrust law.”²⁰

Unilateral pricing conduct raises tough questions. Early this year, the Division and the FTC held a joint public workshop that explored conditional pricing issues. As I noted at the workshop, in this area it is not always easy to draw the line between the practices that injure competition and those that benefit consumers. In a thoughtful piece also published this year, Herb

14. See Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

15. See 3 PHILIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* Ch. 7C (1978); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–27 (1993).

16. Herbert J. Hovenkamp, *The Law of Exclusionary Pricing*, 2 COMPETITION POL'Y INT'L. 21, 37 (2006).

17. Brief for the United States as Amicus Curiae at 19 n.13, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2006) (No. 05-381), 2006 WL 1491286 at *19 n.13 (citing Hovenkamp, *supra* note 16, at 35–38).

18. *Weyerhaeuser Co.*, 127 S. Ct. at 1076 (citing Hovenkamp, *supra* note 16, at 35).

19. See, e.g., 3 AREEDA & HOVENKAMP, *supra* note 10, ¶ 749 (2014 Supp.); see also Hovenkamp, *supra* note 16, at 32.

20. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906–09 (9th Cir. 2008) (noting that “Areeda and Hovenkamp also support using a discount attribution approach to determine if a bundled discount is exclusionary”) (quoting 3 AREEDA & HOVENKAMP, *supra* note 10, ¶ 749b2 (2006 Supp.)).

acknowledged important limitations to the Areeda–Turner test, but concluded that despite its imperfections, no one had been able to come up with something better.²¹ As we continue to wrestle with unilateral pricing issues we will—like courts and practitioners across the country—value Herb’s thoughtful and cogent perspectives.

Herb’s work often has particular resonance for the Antitrust Division, as it likely does for other enforcement agencies. Unlike those in private practice, we don’t answer to clients or work to advance the goals of any particular corporation or other commercial interest. Our mandate is to protect and preserve the competitive process for the benefit of American consumers. As an independent voice, whose scholarship is focused on how antitrust law can best advance consumer welfare, Herb’s analysis is often consistent with our own. And where it is not, it gives us reason and opportunity to reconsider the strength of our convictions.

Like other litigants, the Division often cites to the *Antitrust Law* treatise and other of Professor Hovenkamp’s works as persuasive authority. To mention just a few recent examples, his analysis has been cited in briefs we filed in our civil conduct cases against Apple, eBay and American Express, as well as our merger challenges in *United States v. Bazaarvoice* and *United States v. H&R Block*.

And, like competition lawyers across the country, Antitrust Division attorneys often turn to Professor Hovenkamp’s writings to answer questions or to confirm our understanding of the law and related economic principles. It should not surprise you to learn that all of our attorneys have a link on their desktops to the *Antitrust Law* treatise.

Where gaps in judicial precedent exist, Herb’s scholarship often validates our internal analysis. For example, the Division has brought several cases against technology companies for agreeing not to “poach” each other’s employees. From the beginning, we saw these agreements as *per se* violations of Section 1 of the Sherman Act. But we found no cases squarely addressing this question in the employment context. Herb, however, had previously recognized this gap in the precedent and addressed it. As we quoted in a court filing last year, the *Antitrust Law* treatise characterizes such agreements as market allocation agreements that generally constitute *per se* violations outside the collective bargaining context.²² In recognizing and addressing this question proactively, Professor Hovenkamp exemplified the role of the practical scholar prized by Judge Edwards.

21. See Herbert Hovenkamp, *The Areeda–Turner Test for Exclusionary Pricing: A Critical Journal* 17 (Univ. of Iowa Legal Studies, Research Paper No. 14-16, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422120.

22. See Opposition of the United States to Defendant’s Motion to Dismiss Pursuant to FRCP Rule 12(B)(6) at 11, *United States v. eBay, Inc.*, 12-CV-05869 (N.D. Cal., Feb. 26, 2013) (quoting 12 AREEDA & HOVENKAMP, *supra* note 10, ¶ 2013b (3d ed. 2012)), available at <http://www.justice.gov/atr/cases/f296000/296069.pdf>.

This event is a tribute to past accomplishments. But it offers an opportunity to look forward as well. Our antitrust jurisprudence will continue to evolve and the core antitrust statutes will require continued interpretation as they are applied to new markets and business practices. Developments in economic theory and practice will need to be factored in. Those of us who practice antitrust law will continue to need thoughtful, nuanced, and balanced scholarship to help us meet these challenges. Law reviews, like the *Iowa Law Review*, have an important role to play. And, practical scholarship—epitomized by the contributions of Professor Hovenkamp—will remain a critical resource for practitioners, enforcers, and courts. It will continue to shape the evolution of antitrust law and policy in our country and help ensure that vibrant competition drives our economy forward and improves consumer welfare for future generations of Americans.

Thank you, Herb. And, thanks to the Law Review for the opportunity to be here this evening.