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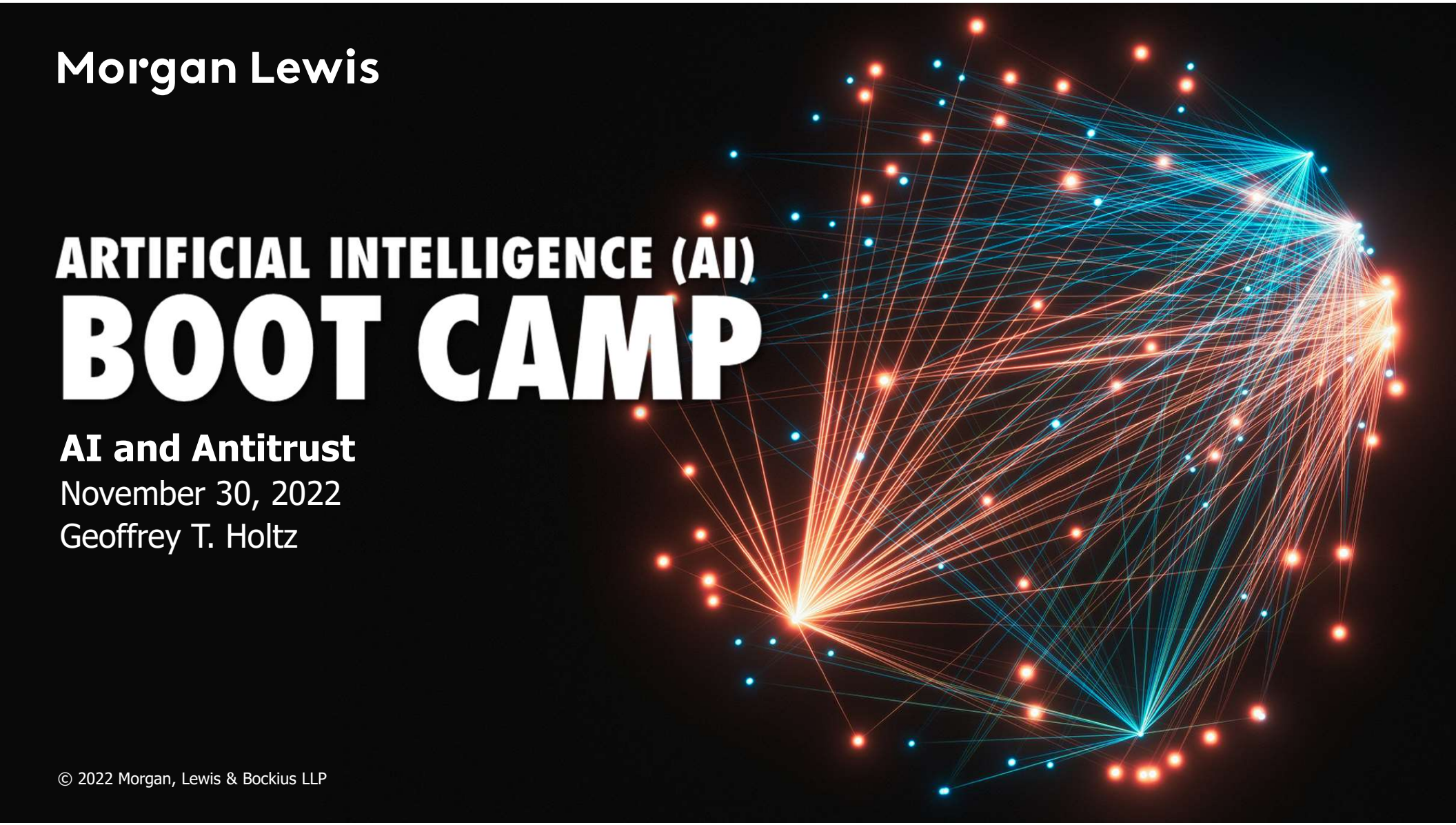

ARTIFICIAL INTELLIGENCE (AI) BOOT CAMP

AI and Antitrust

November 30, 2022

Geoffrey T. Holtz

Host

Andrew J. Gray IV

Presenter

Geoffrey T. Holtz

Morgan Lewis

Why Do We Need to Think About Antitrust?

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Patents Are a Lawful Monopoly . . .

"Antitrust law, like patent law, is 'aimed at encouraging innovation, industry and competition.' 'Despite the opportunities for conflict . . . a central goal of both patent and antitrust law is the promotion of the public benefit through a competitive economy.'"

Fed. Trade Comm'n v. Qualcomm Inc., 969 F.3d 974, 988 (9th Cir. 2020).

"The patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition."

Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1362 (Fed. Cir. 1999).

"[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 Am. Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990).

But Antitrust Law Still Applies . . .

Allergan pays $750M to settle Namenda antitrust charges

Wiping its slate ahead of BMS buy, Celgene to pay $117M in Revlimid antitrust settlements

Endo, others to pay $270.8M to resolve Lidoderm U.S. antitrust cases

FTC Settlement of Cephalon Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished

China's Antitrust Crackdown Hits Qualcomm with US$975 Million Fine

Relevant Antitrust Statutes

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Sherman Act Section 1:

- "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

- The Sherman Act only prohibits restraints of trade which are "unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing, trade." *Standard Oil Co.*, 221 U.S. at 58.
- Section 1 of the Sherman Act prohibits certain agreements among competitors ("horizontal agreements"), such as: price-fixing; bid-rigging; customer, geographic or product allocation; and some boycotts.
- Section 1 of the Sherman Act also prohibits certain agreements among non-competitors ("vertical agreements"), such as certain tying or exclusive dealing agreements between suppliers and customers.

Sherman Act Section 2:

- "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony..." 15 U.S.C. § 2.

- Prohibits individuals and business entities from monopolization, attempts to monopolize and conspiracies to monopolize.
- Prohibits certain behavior by monopolists or those who want to become one ("monopolization" or "attempted monopolization"), such as:
  - tying
  - predatory pricing; and
  - some exclusive agreements.

Clayton Act Section 7 also Governs Mergers

Foreign Law and State Laws:

- Some foreign jurisdictions are very aggressive
    - Particularly as to U.S. tech companies
    - 2021 CMA publication: “Algorithms: How they can reduce competition and harm consumers.”
- State antitrust laws
    - California revising antitrust statutes
- State unfair competition or consumer protection laws

Criminal Penalties!

- U.S. v. Zito
  - Bid-rigging by president of a paving and asphalt company
  - First DOJ criminal monopolization conviction in 40 years

Collaborative Technology Sharing – Standard Setting Organizations and Patent Pools

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Standards or Other Collaborative Uses

- Autonomous vehicles
  - Must communicate with one another, useful to adopt common standards
  - Tuning the AI – judgment calls
- Finance industry, fraud detection
- Sharing life sciences research/modeling/testing technologies
- Connecting in the "metaverse"
- Unwitting (?) collaborative use
  - e.g. company X sells product that uses AI to determine how to optimally price products to different customers; if multiple competitors use company X's AI product, you could end up with effective price-fixing, competitors are arriving at the same prices for a particular customer
  - RealPage apartment rents

Standard Setting is Permitted, With Conditions

- *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988)
  - Standard setting activities by private associations can result in significant procompetitive benefits. "When . . . private associations promulgate standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition… those standards can have significant procompetitive advantages."
  - A standard, however, is "implicitly an agreement not to manufacture, distribute, or purchase certain types of products" among competitors or potential competitors, and as such has long been subject to antitrust scrutiny.
  - Well-settled rules on what one can and cannot discuss, and what one must disclose and commit to.

Standard Essential Patents (SEPs)

- A standard essential patent (SEP) is a patent which is necessary, or "essential," for a product to comply with an industry standard, such as those governing mobile communications or other industries where interoperability is critical. Standard setting organizations (SSO or SDO) typically require that participants declare any SEPs they may hold and agree to license them either royalty-free or on fair, reasonable, and non-discriminatory (FRAND) terms.
  - SSOs do not set licensing rates.
  - SSOs are not adjudicatory bodies and do not resolve disputes over rates.

"Gaming" the Standard-Setting Process

- Often cited is *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 315-16 (3d Cir. 2007), where the Third Circuit held that a plaintiff sufficiently states antitrust claim by alleging that a SEP owner promised to license its SEPs on fair, reasonable and non-discriminatory ("FRAND") terms, the promise was intentionally false, and the SDO relied on that promise to include the SEP in the standard.
- Failing to disclose IP or untimely disclosure (Rambus)
- Patent hold-up: leverage gained not from the value of the invention ("ex ante"), but from the fact that other people are locked into their own or others' investments ("ex post").

Maybe an Issue for Patent Law and Contract Law?

- *Fed Trade Comm'n v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020).
  - The FTC sued Qualcomm, alleging Qualcomm violated Section 1 and Section 2 of the Sherman Act by restraining trade in, and unlawfully monopolizing, CDMA and LTE technologies for cellular phones. After the Northern District of California agreed, Qualcomm appealed.
  - The Ninth Circuit reversed the district court's conclusion that Qualcomm violated the antitrust laws as a result of its breach of its contractual commitment to license its SEPs on FRAND terms, concluding that "the Third Circuit's 'intentional deception' exception to the general rule that breaches of SSO commitments do not give rise to antitrust liability [in *Broadcom*] does not apply to this case" as the district court had not found that Qualcomm had deceived a standards body or that it charged discriminatorily higher royalty rates to competitors.

Patent Pools

- Patent pools and copyright blanket licenses are used where IP rights of different companies are necessary to commercialize a product.
- Courts and the antitrust enforcement agencies typically evaluate pooling arrangements under the rule of reason. 2017 IP Guidelines § 5.5*; see also Broad. Music, Inc.*, 441 U.S. at 4-5 (upholding the application of the rule of reason to a blanket license to copyrighted music compositions of numerous performers for which licensing was otherwise not available in a cost-effective manner).
- While pooling arrangements can promote competition by facilitating the distribution of IP, reducing transaction costs, and avoiding costly infringement litigation, IP licensors can use these arrangements to implement collective price or output restraints with anticompetitive effect.

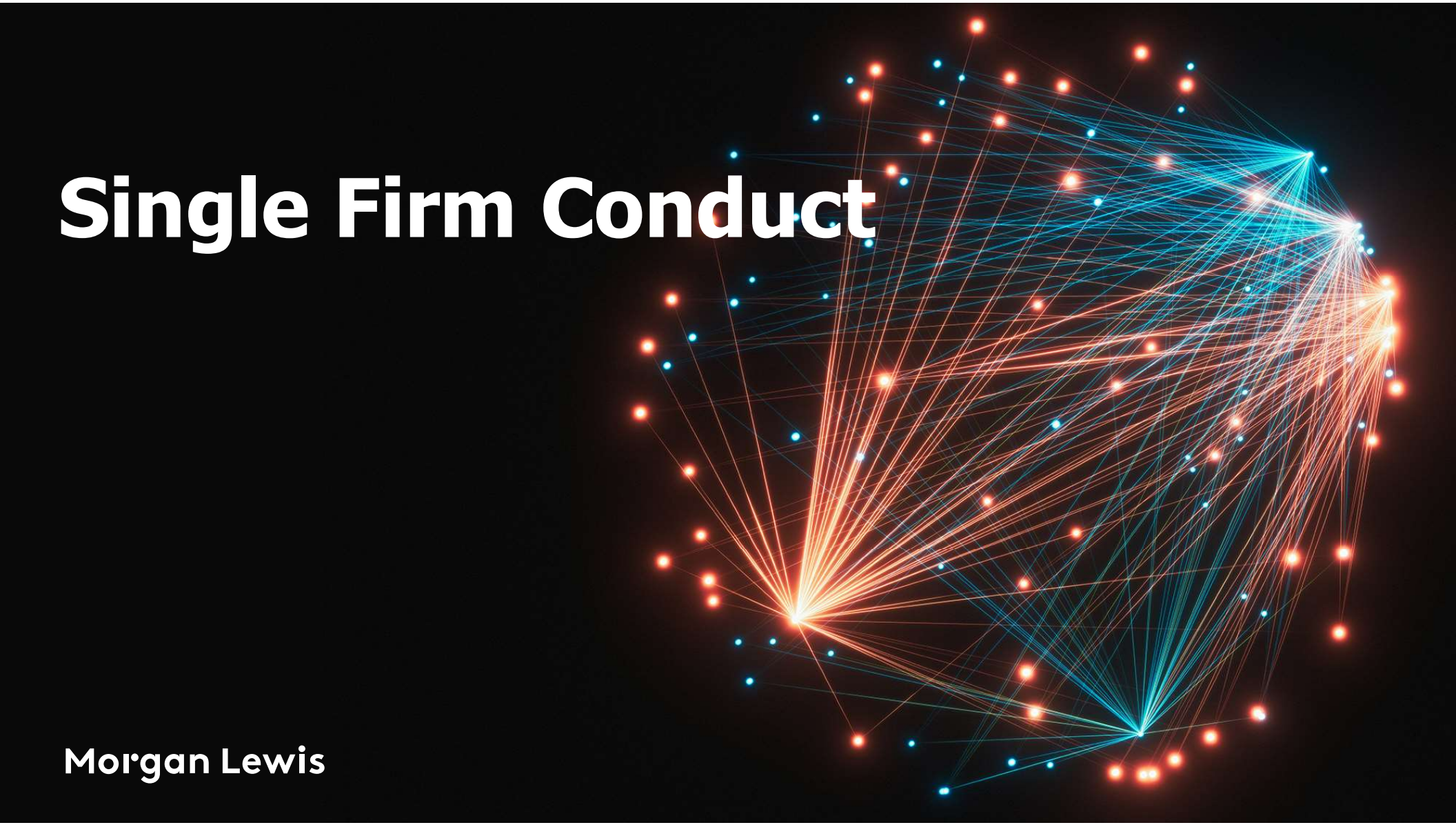
Patent Pools

- Parties considering a patent pool or cross-license arrangement can seek advance guidance from the antitrust agencies by seeking an FTC advisory opinion or a DOJ business review letter. The DOJ has issued several business review letters that address proposed patent pools, for example the:
  - MPEG-2 patent pool
  - DVD patent pools
  - 5G patent pool
  - University Technology Licensing Program

Patent Pools – Applicable Case Law

- The Supreme Court has recognized that patent pools should be addressed under the rule of reason analysis, except for arrangements where the only apparent purpose is naked price fixing. *United States v. Line Material*, 333 U.S. 287, 315 (1948).
- The "true issue" in situations involving a patent pool is whether the antitrust plaintiff lacked a "realistic opportunity" as a "practical matter" to obtain individual licenses from individual owners as opposed to a single license from the pool. *See Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 936 (2d Cir. 1980); *Matsushita Elec. Indus. Co., Ltd. v. Cinram Int'l, Inc.*, 299 F. Supp. 2d 370, 377 (D. Del. 2004).

Single Firm Conduct



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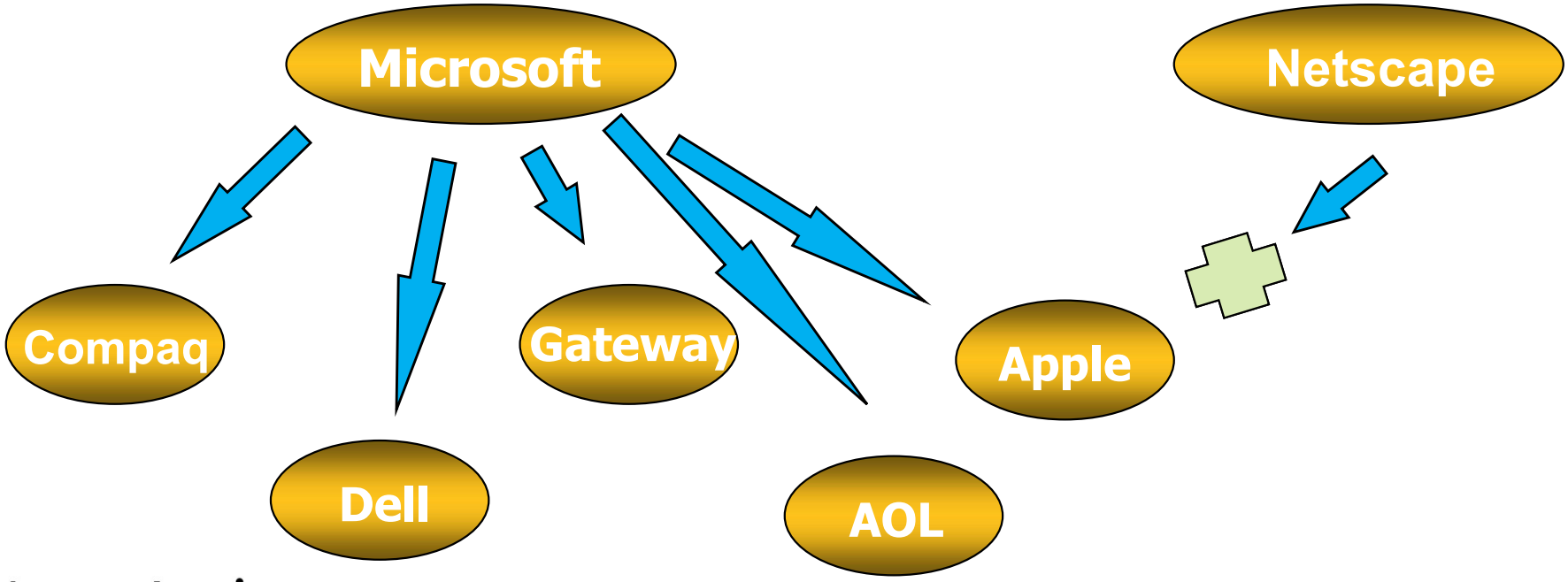
"Monopolists" Cannot Do Certain Things Non-Monopolists Can Do

- Tying – I will sell or license this technology, but only if you buy this other product from me (or don't buy from someone else)
- Self-preferencing? – Using AI/algorithm to steer customers toward your products
- Exclusive dealing – I will sell or license this technology, but only if you use only my technology for this product, not someone else's
- Generally considered under the rule of reason

What Does Rule of Reason for Tying and Exclusive Dealing Look Like?

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



Patent Acquisitions/Aggregation

- The acquisition of patents may be subject to antitrust review under Section 7 of the Clayton Act, as well as Sections 1 and 2 of the Sherman Act. *See* 2017 IP Guidelines § 5.7.
- Recent cases have challenged, so far unsuccessfully, the aggregation of patents under the antitrust law. *Intel Corporation v. Fortress Investment Group LLC*, 511 F. Supp. 3d 1006 (N.D. Cal. Jan 6, 2021).
- *Mayor & City Council of Baltimore v. AbbVie Inc.*, 42 F.4th 709 (7th Cir. 2022)
  - "But what's wrong with having lots of patents? If AbbVie made 132 inventions, why can't it hold 132 patents? The patent laws do not set a cap on the number of patents any one person can hold—in general, or pertaining to a single subject."

Further Reading

- DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, 2017
- In flux with new administration and more active regulators in numerous jurisdictions
  - Meta/Within
- If unsure, particularly if the issue involves sharing IP with competitor(s), ask your competition counsel

QUESTIONS?

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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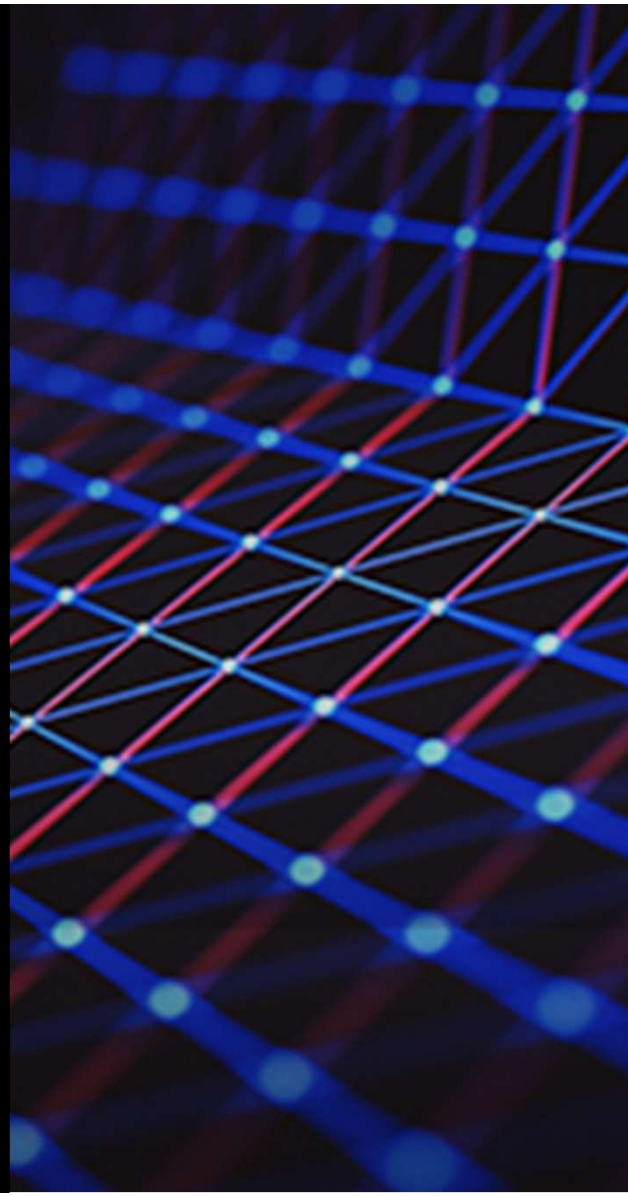
To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



Biography

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Geoff Holtz works on a variety of complex litigation matters, focusing on antitrust and intellectual property cases. He deals with class actions and other multi-party matters on both the plaintiff and defense side. Prior to law school, he worked as a programmer and computer network designer and, thus, developed a concentration in commercial disputes of all types involving complex software, hardware, and other technical issues.

Biography

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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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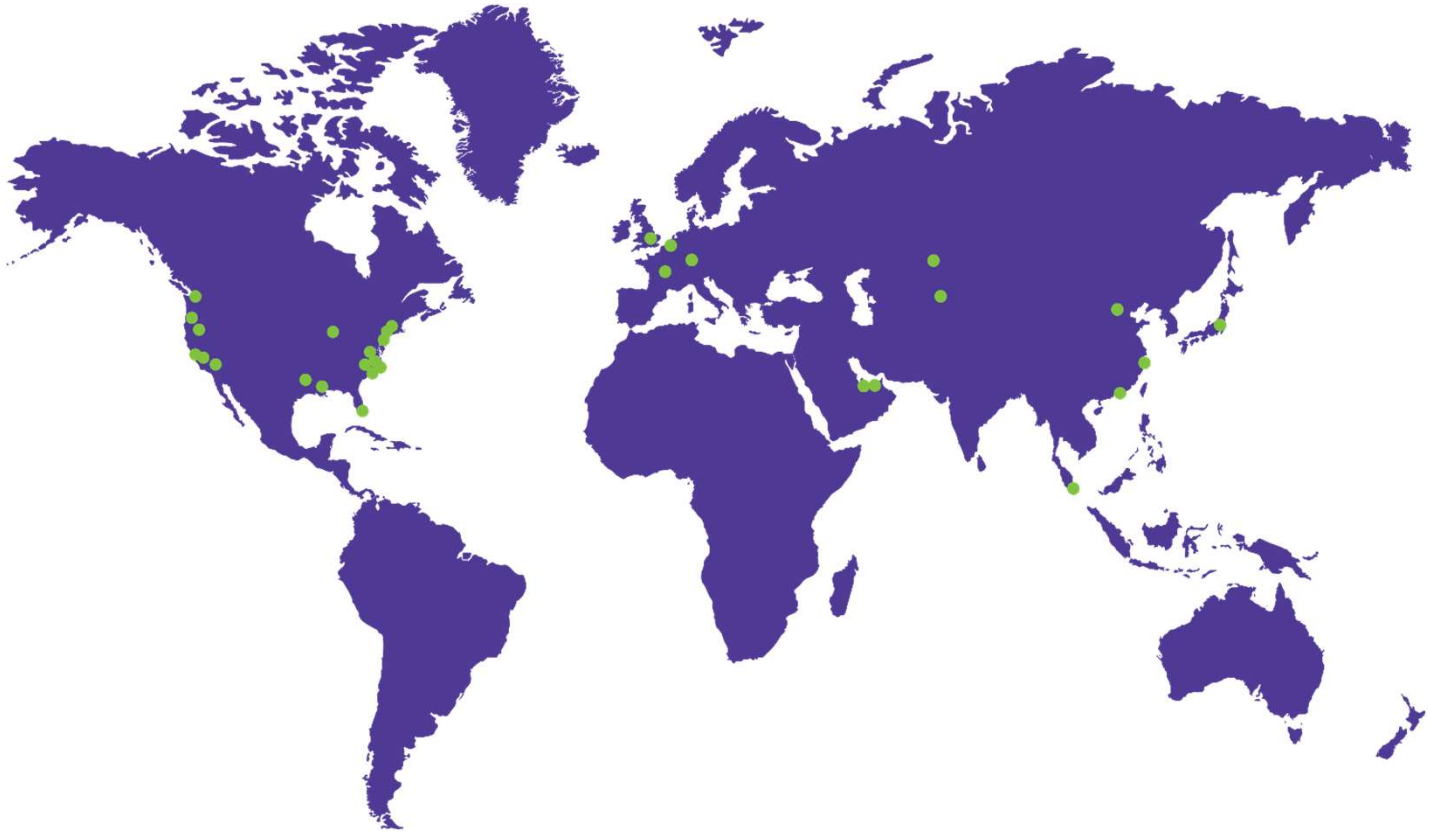

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THANK YOU