

**PATENT MISUSE AND ANTITRUST:**

**AN EMPIRICAL STUDY**

A THESIS

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## ABSTRACT

This empirical study seeks to present a systematic, comprehensive account of the recent history of patent misuse case law, its actual state and its relationship with antitrust law. The study is based on the use of case content analysis complemented by interviews. The findings present an analysis of how federal judges who employed patent misuse did so, and how patent misuse is current perceived by contemporary judges, academics, government officials, and lawyers.

First, this study observes that in some aspects, the actual state of patent misuse is consistent with conventional wisdom, while in others misuse more diverse and dynamic than popularly believed. Second, the analytical process judges undertake in patent misuse is surprisingly complex. Third, the diminished use of patent misuse and the lack of success enjoyed by alleged infringers relying on the defense may be affected by the perception of misuse as an “antitrust-lite” doctrine. This outcome is attributed to a number of factors, including the Patent Misuse Reform Act of 1988 and Federal Circuit jurisprudence. The study concludes that it may be more consistent with Supreme Court precedent and legislative intent to release patent misuse, at least partially, from its fettered existence with antitrust. It reveals that courts, commentators and interviewees believe patent misuse could be used, either on its own, or as a complement to antitrust law, in addressing a number of controversial forms of patent exploitation which have dominated the patent litigation landscape in recent years. It observes that the parameters of patent misuse will have to be more carefully marked out to address the valid concerns of its detractors. The prognosis for the vitality of patent misuse apart from antitrust is promising.