



CPI Talks: Interview with Judge Diane Wood, 2nd District Court, New York



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Interview Transcript

CPI: What do you think will be the 'Hot Topic' issues in antitrust for the coming year?

Diane Wood: The issues raised by the apple e-books case, and more broadly issues raised by markets that involve a substantial internet component, I think are the newest issues on the horizon, and the most challenging. This is partly because they don't respect national boundaries, of course. They're both national issues and international issues at the same time.

Do you expect there to be any Landmark decisions on antitrust coming from the Supreme Court any time soon?

DW: Right now the court does not have on its docket any big antitrust case, although it has not filled out its docket yet for what we'd call the October Term 2015. The court however has been very interested in intellectual property. What it means, what it takes to have a patent, what does it mean to abuse a patent? So I think the issue of the Intersection between intellectual property law and competition law, which was a very big topic back in the 1980s, is now coming back again as a major issue. And once again, Intellectual Property is a matter of international importance as well as national.

Might this resurgence of Intellectual Property and Copyright as a big topic be related to the blurring of national boundaries?

DW: Boundaries in antitrust law do blur, because markets evolve. One of our biggest challenges in





antitrust law is to remember that a snapshot of what the relevant market looks like today may not tell us what it's going to look like next year, once a remedy begins to take effect, or what it's going to look like in 5 years. That's probably part of the issue in the E-books case, but in the IP area we're struggling with boundaries. How big should a patent be? How much should be covered by a patent? How long should a copyright last? And when does it become important to let other people come in and use the same technology? If you have a patent for only 20 years, you know other people will come in in 20 years. If you have an idea and a copyright, say for a Software copyright, other people can use it but only 90 years later. So that has a great effect on competition, and not a good one.

What do you think about the new 'Sharing Economy' firms, like Uber or AirBnB - Is this a matter for competition agencies to tackle, or could this be solved through regulation and market dynamics?

DW: I think the major issues in these sharing economies such as Uber are not competition issues. I think they could be addressed and probably will be addressed by other regulatory measures. You want to make sure that the drivers have enough insurance, that they have a good safety record. You want to make sure that if there is a problem there will be a responsible person. And our traditional regulation of taxi-cab services covers all of that, but these new technologies haven't gone there yet, or it's in a very early stage. But I don't really see it as anything other than new entries, from a competition point of view.

It has been argued that the European Commission is targeting Google for political reasons rather than for antitrust concerns, especially after the FTC closed this case for not finding enough evidence. What is your view about the Google case?

DW: I have worked over the years with the Competition Directorate and the Europeans. That kind of charge has been made over the years, but I don't think this really reflects the seriousness of the European Commission as one of the world's Premier competition agencies. I think one could simply have different views of the evidence. That has happened before between the U.S. and the EU. When I think of the GE-Honeywell case for example: they thought it was a problem, the U.S. didn't. And those differences probably flow from differences in the law.

Economics has increasingly become the centerpiece of antitrust cases. Do you believe the resolution of these cases could become a matter of robust and reliable economic analysis, rather than legalistic argument?

Do you think jurisdictions such as those of Latin America, where many practitioners rely on legal arguments, will naturally evolve to a more economic-based system?

DW: Competition law is an economic law, just as laws regulating securities markets touch very closely on economic matters, and for that matter some laws about product viability do as well. So I think economics is an inevitable part of competition law and I would expect that the Latin American systems, as they evolve, will rely on economic evidence. Now every country is entitled to define the purposes of its competition law as it wishes, and you see some interesting differences among countries. The Mexican law for example mentions market access, and that's not a part of the U.S. law. The U.S. law has gone through different phases, but now people would say that it's about consumer welfare. Market access may be a factor that helps to support consumer welfare, but it's not an end in itself. So I think it's really a question of how economics is going to be used, rather than a whether economics is going to be there. And I don't see how you can avoid it, actually, with competition law.





Mexico recently experienced its first conflict between competition regulators, as the IFT and COFECE sparred over jurisdiction on a telecommunications merger. What can Mexico learn from the experience of the U.S. on this matter?

DW: Any time there's overlapping authority someone is going to have to figure out who has the last word. What typically happens in the U.S. is there's an intra-agency process. They'll sit down and actually talk about whether this really ought to be done in one side or the other. For example, when we were de-regulating the Airline industry, sometimes the Department of Justice thought that it was up to it to take the first step, sometimes the Department of Transportation thought that it was its job. It simply had to be resolved, sometimes by the Solicitor General or by the Attorney General. In the end, it's a question of what's the scope of the law. You have to go back to the written law and interpret it.

