

What Antitrust Law Can (and Cannot) Teach about the First Sale Doctrine

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The first sale doctrine (or exhaustion) limits the exclusive rights that survive the initial authorized sale of an item protected by such rights. The first sale doctrine has always been under pressure by owners of intellectual property rights, and courts have never been able to precisely outline its contours, or fully articulate its rationale. Recently, and somewhat counter-intuitively, insights borrowed from modern antitrust law and economics are invoked to provide a seemingly robust theoretical foundation for undermining exhaustion rules or narrowing their scope, and thereby strengthen IP owners' control over downstream distribution and use of the goods they produce.

This article shows why this trend is misguided and should be resisted. Not because the insights from modern antitrust are irrelevant, quite the contrary. Indeed, the insights from modern antitrust law and economics can help underpin some of the first sale doctrine's missing theoretical foundations and help drawing its proper contours. However, as this article demonstrates, the insights from modern antitrust do not support the case against the first sale doctrine. When taken seriously, these insights ultimately support its continued vitality.