

Corporate (and other) sponsored academic research in competition law

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Law and Science

- Science is a self-governed institution. Importance of peer review process and scientific accountability. This assumes agreement between experts about most of the scientific core of their discipline
- The law has a complex system of rules and practices for choosing what to believe when facts are uncertain
 - Rules regarding the relevance of scientific evidence for the specific dispute
 - How to address the problem of conflicting evidence
 - Burden of proof
 - Standard of proof

Expert witnesses

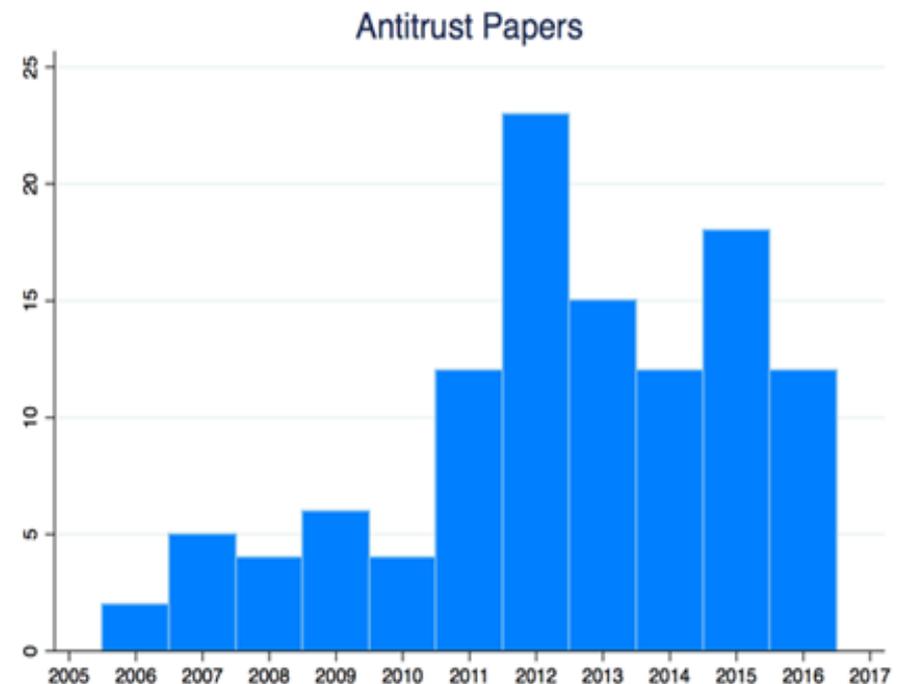
- **Lord Woolf** : *Interim Access to Justice Report*, June 1995, Ch. 23, para. 5,
 - “(m)ost of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect. [...] In many cases the expert [...] has become ... ‘a very effective weapon in the parties' arsenal of tactics’”.
 - **Material bias** has always been an issue
 - Naïve (Mertonian) view of science?

Two views about law and scientific evidence

- Deference to the self-governance of science (that is the expert consensus): e.g. The Frye v. US (1923) standard on the 'general acceptance in the particular field'
 - the role of the expert is to represent the consensus view in the specific discipline
 - the CA/court defers to the expert's description of the scientific consensus in the discipline unless it has doubts as to the veracity of the account. Mainly procedural devices to deal with this problem (hot tubbing, specialized courts, single joint expert, panel of experts)
- Need for the courts to assess the scientific validity of the specific scientific evidence.
 - Universal criteria for determining a claim's scientific status (second order or meta-scientific principles)
 - a more intrusive substantive assessment of the scientific evidence, according to the judge's/regulator's representation of the consensus view in the discipline (first-order principles)
 - discretionary power of regulators/courts to assess and screen scientific evidence

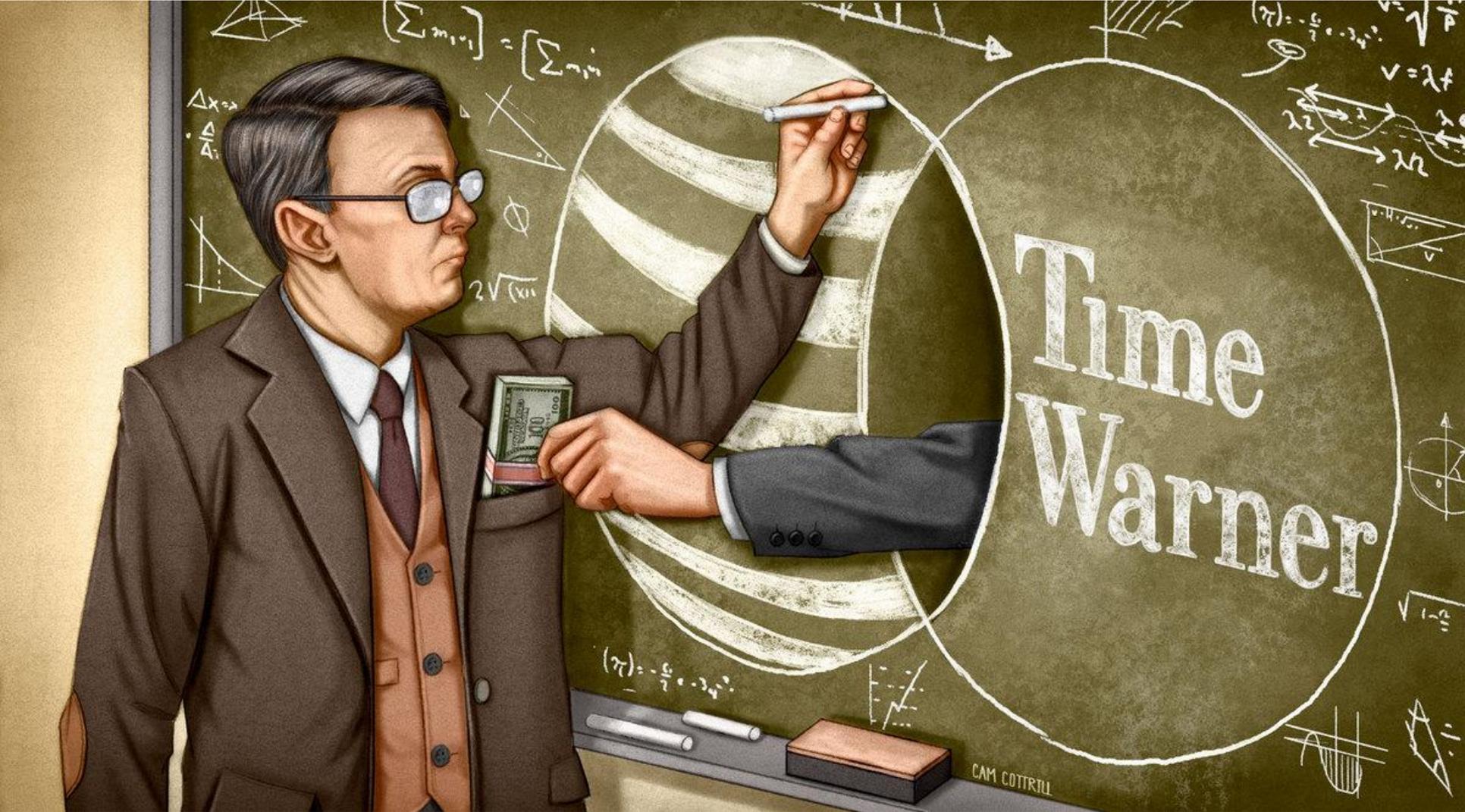
Blurring the Lines: Material bias in academic competition law and economics?

- Some examples:
- Google academics Inc.
<https://googletransparencyproject.org/articles/google-academics-inc>
- <https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers>
- <https://www.prweek.com/article/1258356/esapience-suit-exposes-suspect-tactics-academics-pr-roles>



Google funded competition studies spiked in 2012 at the time of the FTC investigation

Source: Google Transparency Project (2017)

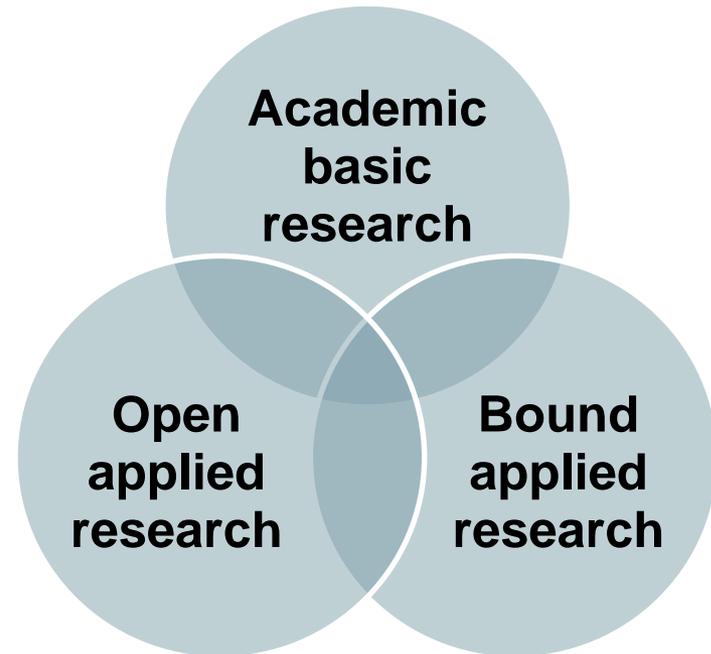


The complex community of competition law and economics experts: Forensic economists/lawyers

Forensic economists/lawyers are situated across the pole that goes from “bound-applied research” to “open-applied research”, as some of them are also active academics, while academic economists concentrate at the pole of “academic basic research”, with some being occasional consultants and thus included in the “open-applied research”

vs

Academics



Academic basic research: scientist were hired to perform limited non-research duties, and obtained outside support for (presumably) theoretical research of their own choice.

Open-applied research: scientists were hired to perform limited non-research duties and obtained outside support for (presumably) practical research of their own choice.

Bound-applied research; scientists were hired to work full-time on problems related to the purposes of their employing organizations

The scope of the ASCOLA code

- This Code aims to highlight **the responsibility of scholars to society**. From this perspective it complements codes that aim to regulate the relation between scholars themselves
- It covers:
 - **Research published** in traditional professional media, such as books, journals, general and specialised newspapers and periodicals, or in digital form in other professional media, such as blogs, Internet research pages, discussion and working papers
 - In the current heavily mediatised research environment, **research** may also be **made public** through its presentation in conferences, workshops, seminars, or through interviews with traditional and non-traditional professional or non-professional media
- It is non-binding for ASCOLA members: aims to set some ethical framework for our work

The principles/values of the ASCOLA code

- ***Objectivity and Independence***: All scholarship should express the personal and independent opinions of the author(s) without any bias and without any interference by any third party.
- ***Transparency***: Authors should appropriately identify all sources of what could reasonably be perceived as bias and make appropriate disclosure of any and all affiliations that could reasonably be perceived as a source of bias. Except for good (and disclosed) reasons, empirical work should make data and methods available to permit replication.
- ***Fairness***: All scholarship should make fair use and assessment of research findings and represent as faithfully as possible the different opinions and views expressed in the published literature.

Disclosure rules I

- Every article should **clearly state the direct and indirect sources of financial support** for the particular article in the first footnote. If none, this fact should be clearly stated.
- If this is a commissioned article (“work for hire”), this fact should be clearly stated in the article.
- If the research was directly funded or otherwise supported, this fact should be clearly stated in the article.
- If the **author(s) received compensation from consulting/expert witnessing/serving with a law firm or consulting firm**, to the extent this is permitted by current data protection or other legislation, each author should identify each **interested party** from whom he or she has received significant financial support, summing to at least \$10,000 in the past three years, in the form of consultant fees, retainers, grants and the like. (also for in kind support)
- Each author should also disclose any **paid or unpaid positions** as officer, director, or board member of relevant non-profit organizations or profit-making entities in any organization whose policy positions, goals, or financial interests relate to the article; also, prior industry affiliation or prior employment in interested parties (within the past three years from the date of the submission of the research outcome) and scheduled future employment should also be disclosed (also applicable to spouse, partner, children)

Disclosure rules II

- An **“interested” party** is any individual, group, or organization that has a **financial, ideological, or political stake related to the article**. The term “interested” party also includes the national or regional **competition authorities** (including sector-specific regulators), international organisations representing competition authorities, or other public regulatory authorities, should the research or research outcome relate to a decision or action/inaction of that public authority.
- Each author must disclose if another party had the **right to review** the research prior to its circulation. Should the author bid for engaging in the research required by an interested party, this fact should also be clearly stated.
- When researchers organize **conferences, workshops, or seminars**, they should disclose any non-de minimis funding or in-kind support
- **Disclosure should be precise** and should include, **to the extent this is permitted by current data protection or other legislation**, information on the party that has provided the funding or in-kind support. For instance, general disclosure of the kind “The authors have worked with large and small clients in the X sector” is not sufficient. Researchers should be more precise identifying the funder(s) to the extent this is possible. If the support has been channelled through a law firm, an NGO or a political pressure group, the original source should be stated.

Future steps

- Executive Board of ASCOLA reviews the code
- Annual Assembly of ASCOLA adopts the code
- Campaign to promote the code to all peer-reviewed journals in competition law so as to ensure the code has some binding effect
- Broader public campaign in collaboration with the media