***Patent Challenge Clauses: A New Antitrust Offense***

**Dr. Alan D. Miller, The University of Haifa**

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**Centennial Campus, The University of Hong Kong**

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Patent licensing contracts commonly prohibit licensees from challenging the validity of the patents at the basis of the contract or penalize such challenges. A considerable debate has emerged as to whether courts should enforce these challenge clauses. We argue that this debate has not gone far enough. Challenge clauses should be illegal under antitrust law. Our argument is based on two grounds. The first, doctrinal route, argues that this new antitrust offense is a natural extension of the logic of the Supreme Court’s landmark case of Federal Trade Commission v. Actavis, decided three years ago. The second, normative route, shows that a normative foundation exists for recognizing this antitrust offense. We propose three cumulative conditions that should exist for a new antitrust offense to be realized, and show that they are met in the case of challenge clauses. Our conclusion challenges the existing laws and draws a new line between contract law and antitrust law, which is applicable to other cases as well.

**Alan D. Miller** is a senior lecturer with appointments in the Faculty of Law and in the Department of Economics at the University of Haifa. Dr. Miller studied history at the University of California, Berkeley (1998), law at Northwestern University (2001), and economics at the California Institute of Technology (2009). Prior to entering into an academic career, he served as an attorney for the Transportation Security Administration, an agency of the United States Department of Homeland Security. Dr. Miller is primarily engaged in the analysis of legal institutions through the lens of economic theory, primarily using the axiomatic method. He has worked on a diverse set of legal subjects including tort, contract, property, freedom of speech, intellectual property, antitrust, election, and corporate law, and has published in a wide range of journals, including the New York University Law Review, the Iowa Law Review, the Yale Journal of Regulation, the Journal of Economic Theory, and the Journal of Public Economics. He is currently on the editorial board of Mathematical Social Sciences.