

Antitrust Regulation of Cumulative Innovation: Treatment of Grantbacks as an Example of the Benefits and Risks of Ex Ante Contracting

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This paper examines the role of antitrust in the regulation of cumulative innovation. It considers grantbacks as an example of ex ante contracting that can enable both pioneer and follow-on innovation but which also can harm follow-on innovation by diluting the incentives of a licensee to engage in follow-on innovation.

Antitrust analysis under U.S. and EU laws is capable of accommodating the well-recognized benefits and risks of grantbacks to cumulative innovation. However, the standards and factors employed in their assessment are casuistic and not tailored to new situations that have arisen with respect to the licensing of industry standards. A more systematic framework for analyzing grantbacks, developed in the paper, would better capture the positive and negative effects of grantbacks on follow-on innovation and on rivalry in follow-on innovation. It would also better recognize the various pro-competitive benefits of grantbacks but also their limits as justifications for anti-competitive effects on follow-on innovation.

The antitrust protection of a competitive rate of follow-on innovation can, however, fall short of a socially optimal rate of follow-on. That is because absent a licensing agreement little follow-on may be expected within the scope of a patent if follow-on innovators can be held up in ex post negotiations with the patent holder. Antitrust, nonetheless, offers some protection to follow-on innovation beyond that minimum competitive baseline. In particular, prohibitions in U.S. and EU laws on unfair practices could address unreasonable restraints of follow-on innovation. Consistent with the principles underlying the prohibitions and their recent applications to licensing in the standard-setting context, intervention in grantbacks that harm follow-on innovation could be warranted when harm to the pioneer innovator's incentives and pro-competitive justifications for the grantback can be excluded.

Antitrust offers little protection, though, if ex ante contracting between cumulative innovators merely fails to enable follow-on innovation. Though EU law foresees intervention in refusals to license specifically on grounds of enabling follow-on innovation, the primary means of antitrust policy to promote cumulative innovation are to encourage pro-competitive ex ante contracting and to maintain competition in upstream technology markets unharmed.