IP as Market Power

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The relation between IP and antitrust has long bedeviled courts and commentators. At the heart of the difficulties lie two different confusions, one on the IP side and the other in antitrust. Dispelling them results in overturning the prevailing wisdom in both fields, to issue in the conclusion that IP rights should, indeed, presumptively be taken to confer market power in the sense relevant to antitrust. Yet this does not mean that such rights should presumptively be taken to raise anticompetitive concerns. It is precisely the conflation of what are two distinct issues—namely, the role of IP rights in market power, and the role of market power in raising anticompetitive concerns—that has been a key source of trouble in this area. Disentangling them is the beginning of wisdom.

Once we do so, we see that, first, IP rights must confer supracompetitive pricing power if they are to perform their incentive function within IP policy. Second, what this means within antitrust policy is that such rights should presumptively be taken to confer “market power” since supracompetitive pricing power is the relevant antitrust notion of market power. Third, however, this is not to say that IP rights should presumptively be seen as anticompetitive. Whether the market power deriving from such rights should be seen to raise anticompetitive concerns requires a separate analysis, of the distinct roles of market power in antitrust scrutiny of conduct under sections 1 and 2 of the Sherman Act. Carrying out that analysis results in significant revisions to existing doctrine with large policy implications.