

IP as Market Power

Talha Syed

(IPSC, DePaul 2025)

The Relation b/t IP & Antitrust

- Two central competing views in the field:
 - (1) New Deal period: IP rights presumed to confer market power (*Jefferson Parish* 1978)
 - (2) Neoliberal: no presumption, even rebuttable, that IP rights confer market power (*Illinois Tool Works* 2006)
- Underlying components of each:
 - (1) New Deal: (a) IP = monopoly (*Loew's* 1962) + (b) IP in “inherent tension” with Antitrust (Kaplow 1984)
 - (2) Neoliberal: (a) IP = property like any other (Elhauge 2003) (b) IP inherently compatible w/ Antitrust (if w/in formal “scope of patent” (Roberts dissent in *Actavis* 2013))
- Both views, though opposing, are equally erroneous

The Relation b/t IP & Antitrust

- Why New Deal view is wrong:
 - (1) IP rights do *not* always confer “monopoly” power over a product (which, in any case, is irrelevant)
 - (2) IP policy goals *not* in “inherent tension” with Antitrust’s policy goals (while both attend to dynamic-static tradeoffs, they are different ones, with different frameworks and tools)
- Why Neoliberal view is wrong:
 - (1) IP rights *are* property rights, but are *not* like any others (because over nonrival resource)
 - (2) IP rights *may*, even within their formal scope, be leveraged in AC ways

The Relation b/t IP & Antitrust

- The Right view:
 - (1) IP rights *do* presumptively confer market power
 - (2) But they are *not*, thereby, presumptively AC
- Three analytic steps:
 - (1) IP rights *do* presumptively confer supramarginal pricing power (since otherwise they provide no incentive)
 - (2) Supramarginal pricing *is* the right measure of “market power” for antitrust (no need for any alternative metric)
 - (3) IP right do *not*, thereby, become presumptively AC (to think so is to forget the distinct roles of “market power”)

Step 1: IP Rights = Presumptive Supramarginal Pricing Power

- What is IP?
 - (1) Exclusionary rights (like most property rights)
 - (2) Over nonrival resource (unlike most other resources)
- *Why* IP?
 - Why confer exclusionary rights over nonrival resource?
Unlike rival, not to enable (static) use—restricts such use.
 - Rather, solely to enable (dynamic) production of the good.
 - I.e., dynamic/static tradeoff (familiar “incentive/access”).
- How does IP work?
 - (1) If the good has no value, then IP rights confer no pricing power, *but also* provide no valuable incentive.
 - (2) If the good has value, then either IP rights confer pricing power, or provide no incentive. Period.

Step 2: Supramarginal Pricing Power = “Market Power”

- Supramarginal pricing power = “market power”
 - Supramarginal pricing power is the relevant antitrust metric of market power here
- Supramarginal pricing \neq supernormal returns
 - Conferral of supramarginal pricing power (“quasi-rents”) does *not* guarantee realization of supernormal returns (“rents” *simpliciter*)
 - But the latter is irrelevant for *both* IP *and* antitrust analysis
 - For IP analysis, what matters is balancing incentives and access *across groups* of innovations, not internal to one
 - For antitrust, what matters is “market power” per above—to think supernormal returns matter is to conflate market power with “anticompetitive”

Step 3: Market Power \neq Presumptive AC

- “Market power” is never by itself conclusive of some conduct being “anticompetitive” (AC)
- Rather, “market power” serves *distinct roles* in distinct forms of antitrust analysis:
 - (1) For Unilateral conduct, may be (a) impermissible means; (b) impermissible effects (N/A); or (c) filter (N/A)
 - (2) For Vertical restraints, is differentially relevant depending on (a) tying vs (b) exclusive dealing
 - (3) For Horizontal agreements, may be (a) irrelevant to per-se analysis (except as add-on step for P to show as part of productive-JV exception in concerted refusals), or (b) only relevant to RoR as indirect measure of AC effects