Intellectual Property and Antitrust

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“Faith-Based Intellectual Property, Faith-Based Antitrust?”

For a fuller and better exposition of the notion that IP is “faith-based”, please see Mark Lemley's excellent paper at 62 U.C.L.A L. Rev. 1328 (2015)

Intellectual Property Rights: Background

- IP rights are a form of regulation designed to encourage innovation and creation for useful, social ends.
- In market-based economies regulation requires cost/benefit analysis to be acceptable.

Early Assessments of Intellectual Property Law

- Fritz Machlup was an economist commissioned by Congress in the 1950s to evaluate the patent system. He concluded that if we didn't have a patent system the evidence wouldn't justify creating one, but since we already had one the evidence didn't justify abolishing it.
- Things were no better in the 1980s: George Priest famously wrote that economists could tell lawyers virtually nothing about IP because there had been almost no empirical studies of IP regimes.

Intellectual Property Rights: Empirical Research

- However, over the past three decades there has been an unprecedented outpouring of empirical work on virtually every aspect of IP law and innovative and creative markets: empirical studies on who obtains IP rights, who enforces them and who wins; how IP rights affect stock performance; industry-specific studies about what drives creativity in almost every field imaginable, including those protected by patents, by copyright and by no IP at all. We have surveys of innovators and creators that ask about their motivations. And we have psychological studies that that explore why people create and how much money is required to affect that creative impulse.

Intellectual Property Rights: The Upshot

The upshot of all this is "something rather less than a complete vindication of the theory of IP regulation". Yes, we now have a lot of evidence, but the picture that it paints is complicated.

A) the relationship between patents and innovation seems to depend greatly on industry, with evidence suggesting that that the system is worth the cost in biomedical industries but not elsewhere, and

B) money does not seem to be the prime motivator for most creators, and sometimes it can suppress creativity. An amazing number of people are perfectly happy to create and share for free, now that the Internet allows them to do so.

So, the evidence is ambiguous, which ought to be troubling.

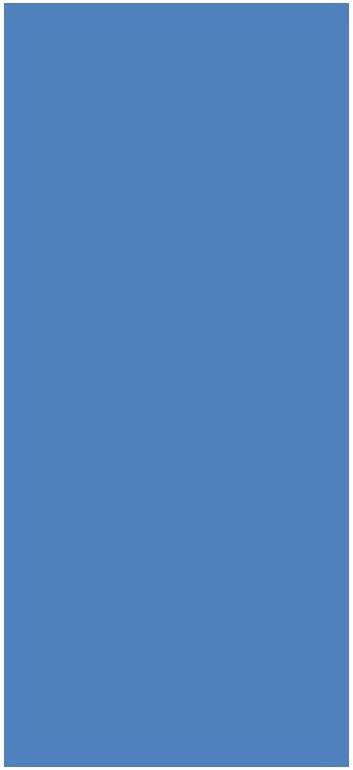
What is the cause for concern?

- Partly because we are not simply maintaining the status quo. In the past several decades the US has passed a slew of new IP laws, almost all of which expand IP rights, as the evidence casts doubt on the efficacy of those laws. Patent law has recently reversed course somewhat, reined in by Congress and the courts after 25 years of unchecked expansion, but copyright continues to expand unabated.

Continued Defense of IP

- Many academics and some policy makers have resisted the empirical findings, not because they question their science or because they have other, better studies to draw from, but because they have a 'faith-based' attachment to IP rights, seeing them as "natural", or "moral", and thus non-utilitarian. Some of these academics, such as Rob Merges at Berkeley, had spent decades at the forefront of the economic analysis of the patent system, but now, confronted with data, he says that in spite of the empirics questioning the social value of IP his “faith in the necessity and importance of IP law has only grown". He is hardly alone in that approach, which marks a retreat from evidence and a move to what Lemley calls "faith-based" IP, which he compares to a form of religious belief.

What are the implications for antitrust?



U.S. Example

- In the US, the approach to the issue of a dominant firm's refusal to license powerful IP is very permissive, affording almost complete discretion to the monopolist, as per Xerox and Kodak. This rests in significant part on the notion that intrusions into that discretion will on the margin reduce incentives to innovate, across the board. There is no empirical support for this proposition -- it's doubtful that there could be -- but in the US we take it as a matter of faith.

U.S. Example Continued

- So, too, with our approach to error. We have a stated preference in our law, see Trinko, for avoiding false positives and accepting false negatives.
- This preference is rooted in the untested proposition, often asserted but never proved, that the market can correct the latter more easily and quickly than courts can correct the former, and more significantly perhaps that the social costs of the former, harm times frequency, exceed the costs of the latter.

Additional Thoughts

- The same holds for our choice of which kind of economic analysis to apply, Chicago or post, a choice based in part on assumptions about juror and judicial competence in the face of complexity, assumptions that are untested.
- And also with our view about the role of dominant firms, see Verizon, which are thought to deserve some leeway to act aggressively, lest incentives for new entry and aggressive competition are dampened. But how much, and at what cost, and when, are all unknown.