

Competition Policy and Innovation: The Context of Cumulative Innovation

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Underlying Issue

- What is the proper domain of
 - Intellectual Property (IP) policy
 - Competition Policy (CP)
- 1995 Guidelines: clear division of powers
 - No mandate for competition policy to take incentives into account.
 - Guidelines: enforce some elusive notion of the market power that Congress “intended”.
- Should CP be viewed as a proactive tool?
 - CP is more flexible than IP policy
 - Can take costs and market structure into account

Cumulative Research: Two Views of Patent/Antitrust Objectives

- Divide profit so as to ensure both generations of research
- Kitch: Ensure efficient “prospecting”
- Both lead to the conclusion that licensing is “good”

Danger to CP/IPP of Narrow patents:

- No incentive for follow-on due to competition with prior innovator
- Then....No incentive for prior innovator, who cannot profit from follow-ons
- Can competition policy mitigate this danger? Yes, allow merger/licensing despite the lack of infringement
- (Not consistent with current practice.)

Another danger of narrow patents

- Effective life is not statutory life
- Schankerman et al

Data: Patent renewal (maintenance) systems

Even in places with a high bar to patents

(Germany), only 11% survive to 20 years

Half of patents in all jurisdictions and

technologies in France have died at year 10\

Only about 15% of the costs of R&D are covered by patenting.

Danger to CP/IPP of Broad patents:

- Stifles follow-ons if ex ante licenses do not occur.
- Stifles prior innovations if follow-ons are stifled
- Can competition policy mitigate this danger? Yes, encourage ex ante merger and licensing.
- (Consistent with current practice.)

Another Danger: Kitch Prospecting

- Pioneer patentholders coordinate research “efficiently”
- But....private efficiency is not social efficiency.
- Example: gene sequence that codes for a disease
 - By coordinating the pharmaceutical firms that would race for the therapy, race is avoided.
 - Patents on therapies might be mutually noninfringing. Nevertheless, an exclusive license on the gene can ensure a monopoly in the market for the therapy.
- Two antitrust dangers to coordinating “efficiently”
 - avoid patent race for follow-ons, and retard progress
 - avoid competition in the market for follow-on products

Conclusion

- Competition policy has more flexibility than IP policy to fine-tune incentives to innovate.
- As now written (I think) the 1995 Guidelines do not assert the right to exercise this flexibility.

Antitrust policy respects intellectual property, but does not augment it.

- It is easier to exercise the flexibility to mitigate problems of over-broad patents than to mitigate problems of too-narrow patents