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Standards and intellectual property rights: an economic and legal perspective

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Abstract

The authors are concerned with the reconciliation of private rights that intellectual property rights (IPRs) represent with the public benefit deriving from properly developed technical standards. One of the key difficulties in achieving this aim is that IPRs are increasingly perceived as conflicting with other norms; in particular, the relationship between intellectual property law and competition/antitrust law has, in recent years, been characterized as one between “evil and good”, respectively; however, both authors argue that this is an oversimplistic characterization, miscasting the roles of both bodies of law and ignoring the multi-faceted nature of their interrelationship, including the possibility of common goals.

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1. Introduction

In this paper, we consider the problem of reconciling intellectual property rights (IPRs) and technical standardization by working forward from following basic premises:

1. Standard, if simplistic, economic analysis predicts that competitive markets yield good social outcomes and that, in order to underpin efficient market operation,

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property rights are required to provide incentives and legitimize resource owners' claims on rewards from trade or production.

2. The correspondence between competitive markets and social optima holds up most readily when (a) production technology is known to all and characterized by constant returns; (b) product and process innovation are absent; (c) every firm produces to meet only final household demand; and (d) demand functions have market-determined prices as their only arguments.
3. However, much activity in modern economies simply fails to fit this description and the implications of competitive analysis need to be revisited to clarify the foundations for good public policy.

Here, we intend to examine the issues that arise when property rights of a particular kind, IPRs, operate in structurally complex markets where competitive conditions are shaped (a) on the supply side by the compatibility of complementary components and (b) on the demand side by network externalities. However, even from cursory examination of relatively simple markets where IPRs underpin the production of simple consumer goods and individuals' demand curves are independent, we note that IPRs are themselves a double-edged sword: they enhance dynamic efficiency through the incentives they create for innovation but potentially undermine static efficiency through the market power they place in the innovator's hands.

Whilst IPRs are recognized elements of legal systems, we see that, in many jurisdictions, competition/antitrust laws operate to prevent the undue exploitation of market power for private gain and encourage the operation of economic forces for public benefit. In light of this, some commentators see IPRs and standardization as necessarily in conflict but we argue that the issue is more complex: IPRs offer both private incentives and enhancements to social benefits; likewise, technical standards, whilst capable of undermining market power, may also reinforce it and thereby pose a threat to socially optimal outcomes.

Finally, in light of all the above, we put forward the proposition that, contrary to appearances, it can actually be very difficult for an IPR owner to block or hijack any given standardization process; the wide variety of legal and economic forces that we discuss below (e.g., constraints and compulsions arising from the difficulty of obtaining ownership or control of all IPRs relating to a given technology, the operation of antitrust/competition law, the regulatory effect of membership of technical standards organizations (TSOs)) all operate in ways that make the opportunities for establishing or maintaining grip on a market via IPR-grounded monopoly power very limited beyond the short term.

2. Defining and creating technical standards

2.1. The problem of definition

Defining terms is always a difficult task and this is no less true with the word "standards" than with any other. The term, left unqualified, can apply in any field

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