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Legal and Economic Issues in the Commercialization of New Technology

Comment

by

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"Put no trust in antitrust!" is the (almost tautological) maxim which emerges from GILBERT's [1991] and other papers given at the conference. The paper provides an introduction to antitrust issues which are raised by the introduction of new technology, nicely illustrated by US cases. It is made clear that the theoretical foundations for antitrust activism as well as for antitrust abstinence seem quite weak, and I will stress this in my comment.

1. Static and Dynamic Competition

What should be the proper aims of antitrust policy with regard to the introduction of new technology seems quite unclear. The aim could be the maximization of a stream of economic surpluses, properly discounted; it could involve growth maximization; or the enhancement of competition could be regarded as a goal in itself. There is obviously not much to be said with regard to the latter point, and so it will be neglected in what follows, but it does seem to be of some importance in the legal context. If competition is considered as a means to achieve a large economic surplus or rapid growth, the policy implications need to be spelled out, but it seems difficult to do so.

In the static context, i.e. with a given technology, economic surplus will be maximized by the decentralized actions of self-seeking households and firms. Non-pecuniary externalities must be internalized, no doubt, but there are private incentives to do so since the efficiency gains can be captured privately. However, this no longer holds with respect to dynamic competition in technology, by which I mean the process of innovation and imitation: innovation may be stimulated by internalizing its positive externalities as well as by *not* internalizing its negative externalities, but *the ultimate benefit to society rests entirely upon the positive externalities which are not internalized,* and the spreading of these gains is, to everybody's advantage, the result of free-riding by the imitators. Full internalization of the net benefits of innovation may imply *some* kind

of optimality, but nobody would gain from that except the innovator himself. In other words, technological competition builds on market imperfections.[1] As a consequence, research joint ventures (RJV) should not be defended because they internalize some additional benefits, since this would imply in the extreme that society at large would not benefit if all externalities were fully internalized; nor should RJV be evaluated according to whether they stimulated or retard technological progress, since technological progress is not a good thing irrespectively of the resources used to generate it, and there is no reason to suppose that optimal progress, whatever that might mean, is systematically greater or less than current progress. If technological progress were always a good thing, we ought actually to engage in many strange policies: we should subsidize R&D by an amount close to GNP, externalize the costs of technological progress more than we do, or enforce rigid administered prices to curb price competition and force firms to compete exclusively in the quality dimension.

2. Deterrence of Litigation

To my mind, antitrust law should be devised in such a way that it deters from socially harmful and unproductive courses of action. Since the lawyers and the courts do not contribute to the production of commodities, a prime objective of public policy should be to render their services unneccessary.[2] For example, if a law introduces efficiency considerations, or if a contract entails "best effort" clauses, this invites litigation, especially if the courts depend on the opinion of experts and are essentially perceived as random noise generators by the economic decision makers. It may then be advisable to use cheaper randomizers or, in fact, any fast formula, however inefficient in itself, just as it may be advisable to take the toy away over which two children are quarreling, even if the adult has no use for it and, in this sense, causes a Pareto deterioration. A clear abstract legal principle, detached as far as possible from the uncertainties of academic fashion, may thus be advisable.

This kind of argument leads, however, to the problem of why risk-averse firms use the courts at all rather than settle for the expected outcome directly

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[1] It may be argued that an innovator should compensate all those suffering a loss as a result of the innovation, but this neglects the fact that the benefits are not captured fully by the innovator, and it is precisely this which renders the innovation useful for society at large. These problems are, it seems, insufficiently understood to-day. WITT [1987] presents an analysis, however, of the way in which transaction rights channel and shape innovative activity through their impact on pecuniary externalities and redistribution of surplus.

[2] This must be qualified, however. In so far as contracting costs are reduced because of the legal framework, litigating activities, albeit unproductive in themselves, are necessary consequences of that useful institutional setting.

in all cases, and why the presumably risk-loving firms which engage in litigation are not buying cheaper lotteries to begin with. We economists, I believe, do not adequately understand this behavior, no more than we do strikes and wars.

References

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