ANTITRUST AND IP RIGHTS: TOWARD A NEW SCHUMPETERIAN APPROACH

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ANTITRUST AND IP RIGHTS

- Current Dynamics:
  - Antitrust Populism => Critical of the corporate *scale*
  - IP Reformers => Critical of the property *lever*

- Historical Tension:
  - Antitrust v IPRs on monopoly, competition, market power, platform exclusion, capitalism…

- Both areas of law "failed" us:
  - For some: antitrust over-protects inefficient competitors and IPRs over-protect IPR holders
  - For others: antitrust under-protects competition and IPRs under-protect innovation.

CONTRIBUTION OF THE ARTICLE

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- Weigh in the current Antitrust/IP debate:
  - Against the current antitrust and IP trends to weaken IPRS, the case for "intellectual monopoly" is stronger than ever, subject to a reconceptualization of the word "monopoly"

- Theoretical conceptualization of the commercialization process of innovation:
  1. Commercialization through corporate scale : Firm-based development, under attack by antitrust populists
  2. Commercialization through property lever: Market-based development, under attack by IP reformers

  ⇒Scale and lever as the instruments of innovation

  ⇒Under-protection of these instruments lead to a "tragedy of the uncommons" (under-provision of beneficial commons that innovation generates)

- Policy Implications
  - Avoid the "tragedy of the uncommons" by protecting the two instruments of innovation
  - Revise policies on the antitrust/IP interface:
    - Short-lived "New Madison Approach" of the US DOJ should be replaced with a "New Schumpeterian Approach" that fosters "monopolistic capitalism"
    - Antirust should not apply to the regulatory treatment of SEPs negotiations
    - Good faith principle inspired by German law should help determine the right balance between licensors and licensees rights

LAW AND ECONOMICS OF THE INSTRUMENTS OF INNOVATION

	PROPERTY LEVER	CORPORATE SCALE
Exchanges	Market-based	Intra-firm based
Organizational effect	Integration-neutral	Integrated
Corporate Size	Size-irrelevant	Size-dependent
Third-party effect	Externalities	Internalized
Leveraging	Through Contracting (Sale, Licensing)	Through Distribution (Scale and Scope Economies)
Legal Rule	Property Rule	Liability Rule
Optimal Damages	Injunctions	Damages
Prevalent Form of Capital	Human Capital	Financial Capital
Regulatory Response	Attacked by IP Reformers and Implementers	Attacked by Antitrust Populists

TOWARD A NEW SCHUMPETERIAN APPROACH

- In 2015, US DOJ issued a Business Review Letter (BRL) made injunctive reliefs by SEP holders against infringements more difficult
  - Antitrust clearance to limit SEP holders' rights: Licensees could limit SEP holders' ability to seek injunctive reliefs in case of SEP infringements, could limit SEP holders on their ability to negotiate FRAND rates.
  - Concerns for patent holdups took precedence over concerns for patent holdouts.

- In 2020, US DOJ reversed its 2015 BRL with an "extraordinary" supplement.
  - Makin Delrahim justified the 2020 Supplement because concerns over patent holdouts took precedence over patent holdups.
  - "I submit that the true father of the US patent law was the Founding Father principally responsible for drafting the Constitution, James Madison"
  - The "New Madison Approach"
    - Patent hold-up is not "an antitrust problem"
    - Antitrust laws poorly suited to interfere with FRAND negotiations and commitments by SEP holds to SSOs
    - Patent holdout is a genuine problem
    - IPRs are property rights = right to exclude ought to remain available
    - Antitrust should consider per se legal unilateral and unconditional refusal to license a patent.

- In April 2021, the US DOJ reclassified the 2020 Supplement as "mere advocacy" = New Madison Approach is over.
- Which US policy? How to reconcile with Europe's holdout focus since the 2015 *Huawei v ZTE* decision from the ECJ?

TOWARD A NEW SCHUMPETERIAN APPROACH

- Case for "monopolistic capitalism" protecting both corporate scale and property lever
  - Antitrust should embrace the corporate scale as one way to commercialize inventions
  - IP should embrace strong IPRs as one way to encourage and incentivize inventions

- Why Schumpeter?
  - Transatlantic
  - German-speaking => German courts have been active in articulating a balanced approach in light of the German principle of "good faith"
  - Prophet of innovation – for both antitrust and IP scholars and enforcers

NEW SCHUMPETERIAN APPROACH

1. Legal clarity is the optimal incentive for innovation

2. Clarifies what "good faith" means in FRAND negotiations: Principled approach of the German "good faith" is useful
    1. Good faith from implementers = products available at reasonable rates
    2. Good faith from SEP holders = injunctive reliefs available

3. Role of antitrust: per se legality of SEP negotiations and disputes

4. SEP disputes exclusively governed by patent law considerations and contract law principles, not antitrust or market monopoly considerations

5. Transatlantic : DOJ's new approach need to be part of the current transatlantic partnership tech and digital => If not global, royalties can be granted to a multiple important jurisdictions (EU, US, UK, Canada…)

Thank you !

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