Post-Chicago Economics, Post-Kodak



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What did *Kodak* resolve?

- The theory is undisputed now:
  There are circumstances under which a competitive equipment manufacturer can harm consumers and competition overall by monopolizing an aftermarket.

- Hotly disputed: *When* harm occurs, and *whether* sufficient for antitrust intervention
- Supreme Court: these are factual questions for a jury

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Agreement on the Theory

- Several reasons aftermarket monopolization may be overall profitable even if primary market is competitive
  - information costs (including policy surprises)
  - lock-in
  - limited contractual commitment
  - price discrimination

Agreement on the Theory

- N.B. Never disputed that firm with primary market power might increase power by leveraging into an aftermarket

Intellectual Property Defense

- There is a trade-off between monopoly cost and incentives to innovate
  - oldest story in the book
  - Constitution didn't grant, and economics doesn't condone, unlimited intellectual property rights
  - "As with other forms of private property, certain types of conduct with respect to intellectual property may have anti-competitive effects against which the antitrust laws can and do protect." *Antitrust Guidelines for the Licensing of Intellectual Property*, U.S. Dept. of Justice and Federal Trade Commission (1995)

IP Defense 2

- This shouldn't need saying, but the contrary has become the ex post foundation of *Kodak*-style defense:
  - (Kodak thrice said patents were irrelevant)
- Shapiro (and Kodak appeal brief): "What went wrong? … (2) the instructions to the jury…undermined the key point that forcing firms to assist their rivals will stifle innovation in the long run"

IP Defense 3

- This is silly:
  - of course limiting ability to exploit patent reduces innovation incentives -- that's the fundamental trade-off
  - this *isn't and shouldn't be* a trade-off juries try to measure
    - even economists after 40 years at best have crude measures of approximately the right patent length under the simplest of circumstances
    - Kodak offered no evidence to measure the innovation benefit vs. monopoly cost: just asserted an unlimited, absolute right

IP Defense 4

- Monopoly leveraging doctrine is workable:
  - patent on a good or process in one market cannot be used to obtain, maintain or extend monopoly power in a *separate market*
- Is this the right policy rule? Hard to say.

Burden of "Systems Competition" Proof

- Should plaintiff prove supracompetitive pricing or profits in *combined* markets?
  - Defendants argued for *prima facie* case that overall consumers can't be harmed
  - But both sides now agree the *prima facie* case is wrong
  - Now defendants argue plaintiff should have to make the factual proof that harm in aftermarket not offset by primary market

Burden of Proof 2

- Plaintiffs argue they have to show that conventional monopoly harm is *possible* and occurred, then respond to rule of reason defense that offsetting benefits are greater
- Plaintiff position seems more consistent with rule of reason case law
  - hard to implement plaintiff burden clearly: when is a linked market a "foremarket"?
  - cf. Tricom v. EDS

Lessons Going Forward

- "Aftermarket economics" not new: one example of complementary products and vertical relations
- Patent is a limited property right: constrained by other laws
- Consumers typically benefit from competition on the merits
- Look to gain competitive advantage through value-adding, not value-restricting