Rigorous empirical research on intellectual property

Research paper summary and key messages

Report title: Patent = Monopoly – a legal fiction
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Overview

The paper casts doubts on the equation that patents are akin to monopolies, that holders' patent-protection strategies are abusive, and that such strategies warrant scrutiny under the antitrust rules. The authors explain that the term "monopoly" used in competition law, stands miles away from the meaning of the same term used in the context of Intellectual Property Rights (IPRs). Moreover, the patent=monopoly theorem also possibly serves a hidden bureaucratic agenda, that of limiting patent protection through the backdoor, by using ex post antitrust remedies to alter the protective – and innovation-incentivising – patent statutes adopted ex ante by elected democratic organs.
There is abundant evidence that in certain sectors, absence of IP protection will hamper innovation and that the presence of IP protection will not generally lead to an antitrust monopoly.
The authors conclude that it is not a sound policy to lower IP rights protection or regulate their use even more, merely because of some potential negative effects. Courts and regulators must avoid "*throwing out the baby with the bathwater*".

Key messages

Message

The "*Patent=Monopoly*" theorem that a patent right is akin to an antitrust monopoly, is a flawed legal doctrine yet which is making way through the judiciary and (scholarly) opinion - like a computer virus which replicates by copying itself into other files.

Proof points

- The patent=monopoly theorem takes root in several unfortunate views expressed by prominent authorities. The European Union ("EU") judiciary has for instance affirmed that: "*a medicine is protected by a patent which confers a temporary monopoly on its holder*". Administrative agencies have voiced concern about "*the surge in the strategic use of patents that confer market power to their holders*" and some influential academics have claimed that "*the patent system is designed to create market power*".

Message
The fact that decades of case law discuss patents in relation to monopolies is key to explaining the enduring traction of the patent=monopoly theorem, mainly inspired by the literature on US case-law.

Proof points
- Several pieces of legislation adopted well before the XXth century have equated patent to monopolies, such as the UK Statute of Monopolies of 1623. Since that time, the idea that patents were akin to monopolies has been sticky, and has spilled over IPRs.
- The US antitrust case law has often referred to monopolies when discussing patents. For instance, in the late XIXth and early XXth centuries, the US courts regularly held that patents were out of reach of antitrust law, despite their "*monopolistic nature*". This approach was reversed in the 1930s and 1940s and, finally, in 1982 by the Court of Appeals for the Federal Circuits.

Message
In the antitrust case law and literature, judges and scholars occasionally assimilate patents to
monopolies. This is unfortunately incorrect. In the same sense, the argument floats that dominant patent holders' strategies would be presumably suspicious under the antitrust rules. Again, this is wrong. Under Article 102 TFEU, patent holders' strategies are *per se* lawful.

Proof points
- According to prof. K. N. HYLTON (Boston University) "a monopolist is the single supplier of a good" and means the "*absence of competition from other firms*". Under the contemporary antitrust law definition of "*single supplier*", the invalidity of the patent=monopoly theorem shines out. In real life markets, the possession of a patent does not unravel into a "*single supplier*" setting. On the contrary, a patent holder often has rivals in the market for the patented good.
- In 2011, approximately 1,000,000 patents were granted across the globe. This would mean that 1,000,000 monopolies would have been created worldwide. This clearly, cannot be true. But even if a patent holder is the sole supplier of his technology, this comes nowhere close to what economists label a monopoly, because patented technologies have substitutes and there are several parameters that constrain the pricing power of patent holders, such as the existence of technology substitutes, the pressure of technological complements and the presence of countervailing technologies. Monopoly over an invention does not equate to market power.

Message
In competition law, patent holder strategies are *per se* lawful and not all patent strategies fall within the remit of EU competition law.

Proof points

- The EU case law makes clear that patents only play an anecdotal role in the assessment of dominance. In some decisions, patents are relevant. For instance, the European Commission has found patents to raise barriers to entry in *Intel* and *IBM*. In other decisions, however, patent neutrality has prevailed. In *Microsoft*, patents held by the dominant firm played no role in the analysis. In *Magill*, the Court observed that "*so far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position*".
- Furthermore, even when antitrust enforcement is warranted, it is limited to "*exceptional circumstances*" determined by case law.

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