



*Stockholm, 12 November 2010*

*Discussion*  
of  
Anne Layne-Farrar's  
*Business Models and the SSP*

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## Introduction

- Very grateful to Rudi Bekkers, Eindhoven University, for discussion and papers
- Disclaimer: I am solely responsible for the following statements
- Paper Anne:
  - broad in scope
  - fascinating questions/developments
  - inherently dynamic
  - highly readable

## Introduction (2)

- Conclusion paper: no prejudice with regard to organizational choice
- I agree, but I think that this may not be the main problem
- The main problem is how competition law (given a certain dynamic process) can be applied effectively and efficiently, taking account of the possible effects on that dynamic process

## Questions

- Disintegration of organizational structures:
  - likely disputes: (1) what technologies to include  
(2) how to license
  - hence: 'excessive royalties' and 'hold-up'
- Problem in practice? See, e.g. *Bekkers and West, Telecommunications Policy, 2009* on UMTS
- What would I like to see included in the paper?

## Basics

- IPR: excludability property on certain ‘public goods’, e.g. ‘inventions’: the rights to ‘use’, ‘exploit’ and ‘sell/trade’
- Imperfectly so: ‘right to sue against infringement’  
(see *Shapiro, Rand Journal, 2003*)
- No presumption of dominance in the sense of competition law

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## Comments

- Section 2 of the paper: disintegration process
- What are the drivers of that process?
- One answer: IPR's that need no physical end product
- Another (telecom sector): dominant standard, restrictive (less scope for integrated firms)

## Comments (2)

- More analytical approach: institutional economics (transaction costs)
- Because we need to understand the underlying forces that drive the changes described (to be explained)
- Markets with vertically integrated firms may have totally different outcomes from those in 'hybrid' markets

## Market outcomes

- Vertically integrated firms: cross licensing with profit margins covering for R&D
- Hybrid market structure: cooperative licensing vs individual licensing. Competing complements (*Casadeus-Masanell, Nalebuff, Yoffie, Harvard Business School, WP, 2010*)
- Analytically different situations, but related by the underlying forces that create dynamics



## A practitioner's point of view

- Starting point:  
given the organizational structure of the market, what type of problems are anti-competitive and can be solved effectively and efficiently by applying competition law?
- Relevance of the underlying dynamic forces:  
illustration by web stores and financial crisis

## A practitioner's point of view (2)

- Understanding the driving forces behind a process of changing markets and organizational structures is necessary in order to be able to understand how the application of competition law might go wrong/will be right from a dynamic point of view
- Applying competition law will or might redirect the process. This might also come at a cost and this should be considered

## Back to the disintegration process

- Given the hybrid structure and a good understanding of the driving forces, any agreement, merger or behaviour by dominant firms should be assessed along the following line of reasoning:
  - (1) how will it benefit customers/consumers in the short run
  - (2) how will it affect the dynamic process (by changing incentives) and do we consider this a cost or a benefit

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## Back to the disintegration process (2)

(3) if we want the dynamics to be undisturbed:

we should not interfere if negative incentives result due to applying competition law

we should in that case only interfere if we are reasonably sure that the dynamic process cannot be negatively affected

- Forcing royalty free licensing is good now and probably bad later

## A caveat

- This discussion might seem to imply that a competition authority balances present vs future consumers' interests in a 'political' way
- CA's do not know the social welfare function
- Not so: point is to prevent emphasis on the short run effects only
- Hence the need to understand the dynamic forces and incentives

## Strategic patenting

- From an analytical point of view, a competition authority should take account of ‘false negatives’ and ‘false positives’
- An illustration: strategic patenting (*Bekkers and West, Telecommunications Policy, 2009*), essential patents (*Bekkers, Bongard and Nuvolary, Druid 2009*)
- Generally: certain settlements of patent disputes lead to cartel outcomes (*Katz and Shapiro, Rand Journal, 1985*)

## Strategic patenting (2)

- Not applying competition law will introduce ‘false negatives’, giving ‘wrong incentives’ (excessive investments in ‘invalid’ or ‘non essential patents)
- Applying competition law may give rise to false positives; given the incentives, how will this affect the dynamics negatively? Possibly it will reduce strategic patenting

## Some other considerations

- RAND-licensing and excessive royalties
- Different type of analysis: acceptable licensing terms guided by three principles  
(*Maurer and Scotchmer, Am. Law & Ec. Review, 2006*)
  - (1) Profit neutrality
  - (2) Derived reward
  - (3) Minimalism
- Excessive royalties and royalty stacking:



## Royalties

- Take account of the bargaining process and outside option
- Two examples from telecom sector:
  - entrants had high value added, which was also unique (Apple with iPhone for instance)
  - the scope and scale of entrants and their potency/commitment to do their own R&D
- Entry and dynamic developments imply countervailing power created against developers

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## Summary and recommendations

- The paper is highly readable and raises relevant questions for academics and practitioners
- No prejudice wrt organizational structure, but we need to understand the underlying forces
- Important is the implication to focus on dynamic effects of applying competition law

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## Summary and recommendations (2)

More analytical description of the forces underlying the disintegration process

Emphasis on the role of competition law in this process

Possible answers to the questions the paper raises and relevant literature