

Marks on Markets and Competition

Author : Shubha Ghosh

Date : March 22, 2013

Mark A. Lemley & Mark P. McKenna, [*Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*](#), 100 **Geo. L.J.** 2055 (2012).

Lemley and McKenna's recent collaboration is an article I like (lots) because it highlights a provocative anomaly. Antitrust law offers special treatment to markets for products protected by intellectual property. But as Lemley & McKenna point out, if you apply antitrust market definition principles to such markets, there are doubts as to their competitiveness. There is no price at which some loyalists will switch from Pepsi to Coke, the Beatles to the Rolling Stones, Dan Brown novels to Stephen King ones, or Apples to PCs. Because of this lack of consumer response to a price change, the authors conclude, antitrust law should scrutinize more closely markets defined by the existence of intellectual property rights.

Lemley & McKenna take their cue from Professor Louis Kaplow's examination of market definition in antitrust law.¹ Building on Kaplow, the Lemley and McKenna article offers alternative approaches to address intellectual property cases that make reference to market effects without the use of market definition. I think this is correct. At the same time, there is another lesson to be gleaned from antitrust law that I think can be developed. Antitrust law is a branch of competition policy; the normative foundations of desirable competition inform antitrust law. My point is that intellectual property doctrines should be based on a deeper appreciation of the norms of competition.

But, what are these norms? Lemley & McKenna state in their article: "Competition doesn't occur in a vacuum; a company must compete with others in some market." (p. 2077.) Of course, competition has to occur in some space, physical or conceptual, but competition occurs in arenas outside of a market. Lobbyists compete for legislative attention. Bloggers, advertisers, and commentators compete for the attention of consumers. Artists and inventors compete with each other for reputation and professional achievement. What can we say about competition norms?

Some guidance can be found in trade secret law, an area that is surprisingly absent from the article, perhaps because of its focus on federal intellectual property policy. But trade secret law provides a model for IP competition, with its focus on rules of disclosure and improper means as instruments for regulating the competitive process in information creation and dissemination.² Competition norms also arise from alternative mechanisms and informal rules for creating and disseminating creative works, such as in areas like gourmet cooking, stand-up comedy, fashion, and databases.³ What I like about the Lemley & McKenna article is how it sets the stage for more discussion of competition norms in intellectual property (and in antitrust law).

One bigger lesson from the article is the relationship between formalism and realism in law. Market definition was intended to provide structure to the inquiry of market power by basing it in empirical measures of markets and elasticities. The good intentions of realism, however, eventually lead to a stale formalism unmoored from the goals of addressing antitrust policies. Articles like Lemley and McKenna's guide us back to the policies and goals of intellectual property, to the ideas of competition presented in this essay as well as to many other salient ones. Future research can incorporate the work of thinkers like George Stigler and Albert Hirschman on the dynamics of competition. Hirschman's work

on exit, voice, and loyalty provides some innovative and unfathomed ideas for looking at intellectual property law. Given the research paths paved by Lemley and McKenna, there is truly a lot to like and be thankful for.

1. See Louis Kalpow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437 (2010).
2. See, e.g., Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 Yale L. J. 1575 (2002).
3. See Kal Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (2012).

Cite as: Shubha Ghosh, *Marks on Markets and Competition*, JOTWELL (March 22, 2013) (reviewing Mark A. Lemley & Mark P. McKenna, *Is Pepsi Really a Substitute for Coke? Market Definition in Antitrust and IP*, 100 **Geo. L.J.** 2055 (2012)), <https://ip.jotwell.com/marks-on-markets-and-competition/>.