

Incentive-based justification for 'fairness' in antitrust and intellectual property

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Arguments about 'fairness' and 'unfairness' feature frequently when applying antitrust law to intellectual property rights (IPR). Common allegations include that royalties or other licensing terms demanded are unfair (e.g. for standard-essential patents or rights managed by collective management societies) or that holders of IPRs otherwise have conduct unfairly when obtaining IPRs, enforcing them or in other business practices. Conversely, it is also increasingly alleged that IPR holders are victims of unfair conduct, including that other undertakings are unfairly free-riding on investments or refusing to pay appropriate licensing payments.

Similar discussions are ongoing also in the intellectual property context. The controversies similarly relate to what a 'fair' reward or licensing payment should be when, for instance, essential patents are licensed or copyright protected materials are available on online platforms, and which legal measures could secure them. Equally, arguments are made that IPRs should not enable excessive or unjustified rewards in support for limiting IPR protection (e.g. remedies).

This paper examines these parallel antitrust and intellectual property debates. The paper seeks to develop an incentive based, normative justification for 'fairness' in this context. 'Fairness' could in this way be provided coherent substance which, moreover, would be compatible with the objectives of antitrust and intellectual property. In various contexts standards for 'fairness' are already being formulated that are based on approximated market-based rewards commensurate to incentivizing innovation, creativity and investment. Distinctions between fair and unfair in these instances could to large extent be explained by considerations which rewards are thought sufficient or disproportionate in the circumstances.