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Antitrust Enforcement and Trolls[1]

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I. Introduction

A. Clayton Act § 7: solid foundation to analyze acquisitions by trolls
B. FTC § 5: more aggressive framework for incipient conduct creating significant competitive harm and not justified by purposes underlying patent system
C. Sherman Act § 1: possible if concerted activity unearthed in opaque web of troll shell companies

II. Technology Market

A. Trolls do not manufacture products, so relevant market is technology market, which consists of IP that is licensed and its close substitutes
B. Technology markets will often be narrowly confined given trolls' ability (through threats and litigation) to hold up rivals
C. Patent portfolios will often not reveal the procompetitive justifications underlying patent combinations described in the 1995 IP Guidelines
    1. Portfolios can be used offensively, and may be valuable primarily because of their size rather than the validity of each patent in the portfolio

III. Elaborate Labyrinth

A. Troll activity today is hidden beneath a labyrinth of shell companies
B. The sheer scale of such a network should offer clues about potential procompetitive and anticompetitive effects
    1. Why, for example, would Intellectual Ventures need more than 1276 shell companies?
    2. Is this complexity designed more to evade detection of anticompetitive conduct than to serve procompetitive purposes?

IV. Mergers/Acquisitions Framework: Ability/Incentive To Harm Competition

A. Ability/incentive central to merger analysis
    1. 2010 Horizontal Merger Guidelines (HMG) § 1: Ability/incentive for acquiring firm to exercise market power, resulting in price, output, or innovation effects
    2. HMG § 6: Unilateral actions can increase price, reduce innovation
B. Barnes & Noble (B&N) acquisition of book distributor Ingram: Agencies blocked since B&N could have had incentive to raise costs of downstream retailer rivals
C. Commissioner Rosch's Ovation concurrence: Ovation's acquisition of drug eliminated reputational constraints that would have prevented Merck from increasing price 1300%
D. CPTN acquisition of Novell patents: CPTN agrees to honor open-licensing commitments; Microsoft sells back Novell patents and receives license
E. Comcast/NBC: Comcast agrees to relinquish NBC's management rights in Hulu, not retaliate against networks, and license programming to online cable TV competitors
F. Google/ITA: Google required to license Internet travel site software to airfare websites on reasonable terms

V. Troll Acquisitions: Ability/Incentive To Harm Competition

A. Litigation between practicing companies constrained by *risk symmetry*
    1. Mutually assured destruction (MAD) fosters settlement and reduces litigation
    2. *E.g.*: Sued practicing entity files counterclaim based on product it manufactures
B. Troll litigation characterized by *risk asymmetry*
    1. Troll has no real disincentive to sue: No product, no chance of countersuit, no MAD
    2. Troll does not face the reputational harms that practicing companies confront when suing

[1] The trolls I refer to are patent assertion entities and not universities or small inventors.

3. High litigation costs, and defendant can't quickly dispose of case
4. High design-around costs for practicing company already using technology
5. Threats – *e.g.*, Mosaid: "overwhelming" portfolio; "complete saturation"

C. Litigation and threats of litigation are central tenets of troll business model
1. Operated under venture capital model promising specified level of returns
2. Frighten practicing entities, and reap money from threatened and actual litigation
3. Forge ahead with weak patents to reinforce bargaining position with future targets

D. Privateering, equivalent to "subterranean camouflaged trolls"
1. Use more aggressive third parties to scare customers/suppliers
2. *E.g.*, practicing company rejects license offered by troll, but is then sued for even more by privateered third-party troll
3. Troll problems escalate as "market value" of patents increases

VI. Antitrust Harm

A. Risk asymmetry, troll business model, and privateering can lead to:
1. ITC exclusion orders (exclusion) or higher royalty rates (raising of rivals' costs), which could result in…
2. Higher prices, reduced output, and stifled innovation for consumers

B. These potential antitrust harms counsel extreme caution in considering acquisitions by trolls

VII. FTC Section 5

A. Troll behavior could potentially constitute an unfair method of competition prohibited by Section 5
1. Section 5 reaches beyond antitrust but needs justifiable framework with limiting principles

B. One setting: incipient or "frontier" conduct that has recently developed and that does not fit into well-established antitrust categories
1. Antitrust has not dealt with the problem of trolls
a) Predominant use of patents seems directly connected not to innovation but to business model for extracting revenue from products already on market

C. Some required factors for use of Section 5 could include:
1. Market power
2. No non-trivial efficiency – *e.g.*, behavior not justified by purposes of patent system
3. Causation
4. Consumer harm

D. In the troll setting…
1. Market power possible in technology markets
2. Trolls' revenue-driven licensing not connected to product creation [Additional empirical evidence could be useful]
3. This behavior often will cause competitive harm
4. Higher prices for consumers [Again, empirical evidence could be useful]

VIII. Sherman Act Section 1

A. The labyrinth of shell companies makes agreements between trolls difficult to uncover

B. This makes it even more important to unearth the complex relationships between the entities

C. One potential example of agreements subject to Section 1:
1. Alleged RPX/Acacia monthly calls discussing targeted producers, asserted patents, and patent pricing

IX. Conclusion

A. Patent trolls present a challenge to antitrust law

B. But significant competitive harm (not justified by purposes of patent system), lack of procompetitive justifications, and labyrinthine networks call for potential action

C. Antitrust can address the challenge comfortably in analyzing acquisitions under Section 7

D. The FTC also could use Section 5 given the frontier-like nature of the potentially-unjustified anticompetitive conduct