Remedies for Monopolization

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Essential Facilities and Mandatory Access

No Sense Pretending

- If the “essential facility” and “inability to duplicate” elements of the EFD are met, a classic declining-cost situation is likely presented
- The viability of any and every regulatory alternative becomes debatable – including “do nothing”
- Likely EFD flaw – lack of capacity could be marker for benefits of intervention
- Essential IP – where “inability to duplicate” is imposed by IP law, antitrust intervention is in tension with reward rationale
Essential Facilities and Mandatory Access

Access Remedies – Costs and Complications

- Complexities of access pricing
  - Concepts and measurements debatable – return, cost, etc.
- Endless evasion possibilities
  - Reluctance to build capacity and make it available
  - Reluctance to offer and transact
  - Reluctance to install, repair, etc.
- Sacrifices economies of integration
- Specific problems of administration through judicial/executive consent-decree enforcement
- Strategic behavior – litigate rather than innovate
Essential Facilities and Access Remedies

Nevertheless . . .

Mandatory access has benefits and deserves consideration

• Can access be dealt with through an established regulatory mechanism?
  
  United States v. Terminal Railroad (1911) (ICC)
  United States v. AT&T (1982) (FCC)
  But see United States v. Otter Tail Power (1973) (FPC lacked authority to impose access obligation at the time)

• Is access already defined by commercial practice?
  
  Gamco v. Providence Fruit & Produce Building (1952)
  United States v. Associated Press (1945)

• Are there likely dynamic efficiencies?
  
  United States v. AT&T – necessary for mobile/IP/broadband?
Institutional Aspects of Antitrust Remedies

The Need for Speed

- Identified sound goals are essential to success
  
  *United States v. IBM Corp.*
  
  Expanding/shifting theories and questionable procedural approach doomed possibility of much narrower but quickly successful case

  *United States v. Microsoft Corp.*
  
  Per-processor license phase: complaint to decree in one year (not counting FTC phase) – provides flexibility and minimizes error cost
  
  Broader “platform software” phase: lessons complicated by shifts in theory/remedy fit and procedural developments

  *United States v. Western Electric Co./AT&T Co.*
  
  Theories shifted from long-lines to equipment to local monopoly
  
  Ultimately, coherent approach suggested workable remedy
Institutional Aspects of Antitrust Remedies

• Legislative Role
  A perennial challenge where economic regulation is concerned

• Administrative Regulation Role
  Reflection of the legislative challenge – unclear mandate means incoherent regulation

• Executive Role
  Traditionally somewhat better directed in terms of policy coherence
  Not immune from distractions and other agendas

• Judicial Role
  Capacity for targeted change under specific conditions
  Not immune from weaknesses of administrative regulation, distractions and other agendas
Conclusions

Successful antitrust case must have three characteristics

- Legally sound
- Based on sound economics
- Identifiable remedy that is both capable of effective administration and likely to improve consumer welfare

Identifying good candidates for structural cases

- Importance
- Long-term performance issues
- Balanced assessment of policy alternatives – do nothing, apply antitrust, “other”