THE PREDATORY INNOVATION PARADOX: ANALYZING EXCLUSIONARY DESIGN CHANGES IN ANTITRUST LAW

DRAFT ABSTRACT

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If antitrust law is meant to encourage innovation, can new product designs be anticompetitive? Antitrust cases and literature are deeply divided on this "predatory innovation paradox." Some argue a monopolist's design change must be condemned by antitrust law if it has a sufficiently negative impact on competition. Others insist that antitrust law must tolerate product design changes to promote innovation, even if the modification blocks competition. Even the analytical approach for assessing predatory innovation claims is contentious, and the subject of a recent Circuit split. The Second and Third Circuits disagree on whether or not weighing the pro-competitive benefits and anticompetitive effects of a product redesign is appropriate in the judicial analysis.[1] I explain this divide using recent product hopping cases, which allege that incremental pharmaceutical product redesigns are an anticompetitive use of patent protection.

I then take a critical look at the underlying assumption that a "weighing" step is either always or never appropriate in assessing predatory innovation claims. I argue that, in analyzing predatory innovation claims, antitrust law must heed its own admonition to "always be attuned to the particular structure and circumstances of the industry at issue."[2] By insisting the weighing analysis is always or never appropriate, courts are treating innovation as a monolithic phenomenon. In fact, I draw on patent law research that suggests innovation models are highly distinct in pharmaceuticals and software—the two fields in which predatory innovation is often claimed. I argue this distinction informs the antitrust approach to predatory innovation analysis. A weighing analysis is more relevant and justifiable in pharmaceutical product hopping cases than in technology cases, because: i) product hopping cases involve an interaction between antitrust law and patent law and ii) market forces are less likely to correct misconduct in pharmaceutical markets, relative to software and other technology markets in which predatory innovation arguments are also frequently raised.

[1] Compare New York ex rel. Schneiderman v. Actavis Plc (Namenda), 787 F. 3d 638 (2nd Cir. 2015) (balancing pro and anti-competitive effects of a product design change) to Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Limited Company 838 F. 3d 421 (3rd Cir. 2016) (refusing to apply a balancing analysis).

[2] Verizon Comm'ns., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).