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WHAT CARRIER DOESN'T ADDRESS

Philip J. Weiser[*]

It is trite to say that "we are all Schumpeterians now." But when it comes to appreciating the importance of innovation and entrepreneurship, we are.[1] Joseph Schumpeter's writings,[2] while prescient in many respects, failed to provide a theory of innovation that lends itself to easy public policy prescriptions.[3] By highlighting the role that antitrust law and intellectual property policy can play in spurring innovation, Michael Carrier has done the field a great service. In short, *Innovation for the 21st Century*[4] is an impressive, ambitious, and important book. Rather than discussing Carrier's contributions, however, this short comment will underscore three important points his book does not address.

My first critique of Professor Carrier's proposals rests on a concern that he misreads the doctrinal implications of the Supreme Court's decisions at the intersection of antitrust and regulation. In particular, Carrier suggests that the *Trinko/Credit Suisse* double header is, at worst, benign and, at best, on the money.[5] Notably, his view of *Trinko* leads him to predict that the Supreme Court will take an aggressive posture as to "pay for

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1. The debate about the nature of innovation, however, features a number of perspectives, with some commentators quarrelling with Schumpeter's view that the gales of "creative destruction" operate most effectively with a series of successive monopolists fighting for the market. For one alternative vision of innovation, see Richard N. Langlois, *Technological Standards, Innovation, and Essential Facilities: Toward a Schumpeterian Post-Chicago Approach*, *in* DYNAMIC COMPETITION AND PUBLIC POLICY: TECHNOLOGY, INNOVATION, AND ANTITRUST ISSUES 193, 207 (Jerry Ellig ed., 2001) ("[I]nnovation normally proceeds fastest when a large number of distinct participants are trying multiple approaches simultaneously.").

2. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-90 (3d ed., Harper and Brothers 1950) (1942).

3. *See* J. Bradford DeLong, *Creative Destruction's Reconstruction: Joseph Schumpeter Revisited*, CHRON. HIGHER EDUC., Dec. 7, 2007, at B8, *available at* http://chronicle.com/free/v54/i15/15b00801.htm.

4. MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW (2009).

5. *See id.* at 371-73; Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

delay" pharmaceutical settlements that have developed as an unintended consequence of the Hatch-Waxman Act.[6]

The problem with Carrier's argument is that it overlooks the most disturbing aspect of *Trinko*—it made the judgment about the effectiveness of the regulatory regime (in that case as to the FCC) on a motion to dismiss. By contrast, this issue was a question of fact in *United States v. AT&T*[7]—and not presumed based on the mere presence of a regulatory regime. The same concern applies to *Credit Suisse*, which took a generous view of the SEC's regulatory effectiveness not long after that agency (and the self regulatory organization upon which it relied) failed to unearth a cartel arrangement at the NASDAQ that was only revealed through antitrust litigation.[8] But, as Carrier acknowledges,[9] I have written about this before, suggesting that the issue is not as clear as he implies.[10]

My second point relates to the Microsoft antitrust litigation and whether the presence of intellectual property rights (IPRs) should justify a firm's decision to withhold access to application programming interfaces or protocols necessary to facilitate interoperability. I agree with Carrier's conclusion that IPRs should not displace antitrust oversight.[11] Again, to invoke *United States v. AT&T*, consider that, had the relevant interconnection issue in that case involved patented interfaces, it would have come out differently under the theory pressed by Microsoft.[12] Particularly in light of the controversy surrounding software patents,[13] it is hard to justify awarding the recipient of a patent on an application programming interface or communications protocol a get-out-of-jail free card.[14]

6. CARRIER, *supra* note 4, at 373.

7. United States v. AT&T Co., 552 F. Supp. 131, 223–24 (D.D.C. 1982) (approving the breakup of AT&T and the imposition of equal access mandates to address AT&T's discriminatory practices against long distance competitors and rival equipment manufacturers), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

8. For the Department of Justice action in that matter, see Antitrust Division, U.S. Department of Justice, Competitive Impact Statement, United States v. Alex Brown and Sons, Civ. No. 5313 (S.D.N.Y. 1996), *available at* http://www.justice.gov/atr/cases/f0700/0739.pdf.

9. CARRIER, supra note 4, at 372 n.143.

10. Philip J. Weiser, *The Relationship of Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549 (2005).

11. For my explanation of this point, see Philip J. Weiser, *Law and Information Platforms*, 1 J. TELECOMM. & HIGH TECH. L. 1, 15-22 (2002).

12. United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C. Cir. 2001) (intellectual property no more confers such a right than the argument "that use of one's personal property, such as a baseball bat" is immunized from tort liability).

13. For one example of the criticisms leveled at them, see Feld Thoughts, http://www.feld.com/wp/ (Apr. 10, 2006), *available at* http://www.feld.com/wp/archives/2006/04/abolish-software-patents.html.

14. To be sure, I reject the claim that all intellectual property protection should be denied to interfaces. *See* Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534 (2003). Rather, I argue that, in some cases, the appropriate strategy is to withhold intellectual property protection as to reverse engineering of such interfaces, thereby imposing a liability rule in lieu of the traditional property rule. For a broader discussion of the suggestion that, in some cases, liability rules (which allow access at a price) are preferable to property rules (which

Given its important status as an antitrust precedent, I would have liked to see Carrier develop his view of the *Microsoft* case.[15] Carrier may well have resisted doing so out of concerns related to space, a lack of historical distance, or that he was not sure what type of verdict to pronounce on the decree. Nonetheless, the *Microsoft* case bears close examination as evidence of the challenges of "regulating interoperability,"[16] of which the IPR issues are only a relatively small part of the overall equation.

My final point centers on the role of standard setting organizations (SSOs). The role of SSOs is potentially very important and, until recently, they operated with a limited degree of awareness of the regulatory challenges they face as to, among other issues, the threat of patent holdout. As I have explained elsewhere,[17] there is a strong argument that SSOs should be given the type of latitude that Carrier calls for in facilitating cooperation and managing the behavior of individual firms. Where Carrier could drill down deeper, however, is to evaluate the institutional challenges of how to enforce commitments by firms participating in SSOs that their collection of royalties will be on reasonable and non-discrimination (RAND) terms. Most question-begging is whether the FTC's Section 5 authority will ultimately prove to be an important tool in this regard (as used in the *N-Data* case[18]). After all, in the wake of the Supreme Court's denial of certiorari in the *Rambus* case,[19] there will undoubtedly be more pressure for the FTC to use this tool.

To be sure, one book cannot address everything. Consequently, these comments and criticisms do not necessarily highlight shortcomings in *Innovation for the 21st Century* as much as emphasize the considerable need for more scholarly engagement and discussion on these issues. In so doing, this book—and the discussions it sparks—provide more evidence of a point made effectively by Josh Wright—the challenges in developing antitrust law are not over and will require continued engagement by those in practice and the academy in the years ahead.[20]

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would enable firms to deny access altogether), see Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783 (2007).

15. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001), *aff'g in part and rev'g in part, and remanding* United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000).

16. Philip J. Weiser, *Regulating Interoperability: Lessons From* AT&T, Microsoft, *and Beyond*, 76 ANTITRUST L.J. 271 (2009).

17. Philip J. Weiser, *Making The World Safe For Standard-Setting*, *in* THE IMPACT OF GLOBALIZATION ON THE UNITED STATES: VOL. 2, LAW AND GOVERNANCE 171 (Beverly Crawford ed., 2008), *available at* http://ssrn.com/abstract=1003432.

18. *See* Decision and Order, *In re* Negotiated Data Solutions LLC, File No. 0510094 (F.T.C. Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122do.pdf.

19. Rambus, Inc. v. FTC, 522 F.3d 456, 463-64 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009).

20. *See* Posting of Josh Wright to Truth on the Market, http://www.truthonthemarket.com/ (Apr. 11, 2009, 22:05 EST), *available at* http://www.truthonthemarket.com/2009/04/11/dont-call-it-a-comeback/.