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Governing the Patent Commons
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Thousands of patents underpin the technologies that power the digital economy. Coordination among firms developing and implementing these novel technologies has notably been facilitated in large part by Standards Developing Organizations (SDOs). Despite the evident benefits of standardization in general and SDOs in particular, certain aspects of these processes have come under severe scrutiny from scholars, antitrust authorities and courts. These critics argue that the standardization space suffers from two crippling market failures, namely "patent holdup" and "royalty stacking". They thus conclude that opportunistic firms will squeeze their rivals' profits, harming consumers and stifling innovation in the process. However, recent empirical scholarship strongly suggests that patent holdup and royalty stacking rarely, if ever, occur in the standardization space.

Against this checkered backdrop, our paper argues that standardization is an emergent phenomenon, where parties have strong incentives to design institutions and contractual relationships that mitigate the scope for opportunistic behavior (including patent holdup and royalty stacking). The paper explores how these incentives have likely enabled firms to avoid severe market failures. We argue that ignoring these complex market dynamics may cause antitrust authorities and courts to do more harm than good (notably by exacerbating patent holdout behavior). The paper then reviews recent regulatory interventions and questions whether this has indeed been the case. Finally, we suggest that antitrust authorities and courts should draw inspiration from acclaimed scholarship regarding both the evolution of cooperation and the management of common-pool resources.

"The greatest improvement in the productive powers of labour, and the greater part of the skill, dexterity, and judgment with which it is anywhere directed, or applied, seem to have been the effect of the division of labour."

Adam Smith

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