



The Importance of Marinating on Patents

F. Scott Kieff

Professor, Washington University School of Law
Senior Fellow, Stanford University Hoover Institution



Why Have IP? Really?!

To call it “intellectual” is misleading. It takes one's eye off the ball. “Intellectual” confers a respectability on a monopoly which may well not be deserved. A squirrel is a rat with good P.R.

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[H]owever justified the cry, “what we need here is protection” may be for an anti AIDS campaign, it is not onf892 a resp



Property Rights in IP as Keys to Innovation and Competition

- Increase innovation
 - Not just incentives to invent
 - Get inventions put to use
 - By facilitating coordination among complementary users of the invention (investors, managers, marketers, laborers, owners of other inventions, etc)
 - Specialization, division of labor, and modularity
- Help new companies compete
 - Anti-monopoly weapons
 - Vital slingshot for David against Goliath
- History: Judge Giles Rich, 1952 Patent Act – don't focus on inventing!
(also note Judge Learned Hand and Judge Jerome Frank)



Mechanisms of Coordination for IP

(See Kieff, *Coordination, Property & Intellectual Property: An Unconventional Approach to Anticompetitive Effects & Downstream Access*, 56 Emory L.J. 327 (2006))

(See Kieff, *On Coordinating Transactions in Information: A Response to Smith's Delineating Entitlements in Information*, 117 Yale L.J. Pocket Part 101 (2007))

- Good coordination by property rules to facilitate innovation
 - Beacon effect, not control – start conversations
 - Bargaining effect – get deals struck
- Compare liability enforcement rules
 - Boil everything down to \$\$, but what about unique assets?
 - Help get bad, anticompetitive coordination done among large established players (Keiretsu effect)



Popular View Today: Problems of Property Enforcement Rules for IP

- Hold ups – stop things from getting done
- Hold outs – extract too much, breakdowns, etc.
- Buzzwords: patent trolls, thickets, & anticommons



Popular Response: Modest Proposals (But Impact is Not So Modest)

- We have all but removed property treatment from IP
- We had plenty of release valves already (what scholars call “liability rules”)
 - Corporate form, bankruptcy, government immunity, Hatch-Waxman, etc.
- Now no reliable “property rules” (except for large players who don’t need it)
 - Injunctions after *eBay & Paice v. Toyota*
 - Enhanced damages after *Seagate*
 - Increased uncertainty after *KSR, Bilski*



Overlooked Problem: Transacting in the Shadow of Liability Enforcement Rules & Mandatory Rules for Contracts

- Liability rules make transactions too forced and too frequent
 - Some deals shouldn't get done, and a forced "yes" is not a deal
 - Intervention when disagreement encourages disagreement
 - Harder for patentee to attract and hold constructive attention of a potential contracting party (can't hold-in the counterparty)
 - Removes patentee's option to terminate the negotiations in favor of striking a deal with a different party (can't hold-on to option)
 - Hits small firms worse since big firms have easier time holding-in
 - Have more \$\$\$ to finance litigation
 - Have leverage with reputation effects, relationships, bargaining power
- New mandatory contract rules block deals
 - Licensees now can always renegotiate (*Medimmune*)
 - License to one may now license all (*Quanta*)



Conclusion

- A well functioning patent system is critical to our economy
 - Fosters innovation, jobs, and capital investment
 - But a patent system can also be plagued by frivolous suits, unending process, and extreme uncertainty

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