

Secondary Markets for Patents: A Framework for Evaluation

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The last several years have seen the development of a nascent secondary market for patents, in which patents are bought and sold by entities other than the inventors whose work falls within the patent claims. Transactions in this nascent market have taken a variety of forms, ranging from "over the counter" sales of patent portfolios in stand alone transactions or as drivers of M&A activity, to the collateralization of patents as securities in debt offerings, to exchange mediated through entities that purport to serve as "market makers." Most of the commentary on these developments has focused on they extent to which they have been efficient in matching buyers and sellers of patents, and on how these new markets could perform better through increased transparency, improved notice about the content of patent claims, and better pricing methodologies. But discussions about improving patent markets elide the normative question whether such markets are desirable at all. In this essay, I offer a framework for answering that question. I begin with the premise that achieving efficiency in the purchase and sale of patent assets alone cannot be the goal of policy interventions in the patent market. This is neither the goal of the patent system nor of liquid asset markets. The efficacy of any market for patents should be measured by the extent to which it promotes or retards the development and dissemination of new technologies. Patent markets can do this in much the same ways as capital markets. First, they can allocate working capital - here, ideas - to its most efficient users. In this regard, patent markets might facilitate commercialization by allowing inventors, developers, and commercializers to find each other and strike welfare enhancing arrangements for technological development. But there is a difference between markets for technology and markets for patents. Where the fit between the underlying product and the patent is imperfect, strategic behavior may result. Similarly, patent markets might reduce the risk of infringement liability and provide a way to "clear" the market of low-value patents that inevitably issue from the Patent Office. But the welfare benefits of this dynamic could be undermined if liquidity draws into the system patents that would otherwise rationally go unenforced or by skewing innovative activity toward patentability. I conclude by noting that these effects are likely to be dynamic and context-specific; the normative case for or against patent markets will therefore require empirical research.

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