Removing Property from Intellectual Property:
(Intended?) Pernicious Impacts on Innovation and Competition

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Popular View Today: Property Rights in IP Cause Problems

- Hold ups – stop things from getting done
- Hold outs – extract too much, breakdowns, etc.
- Buzzwords: trolls, patent thickets, anticommons
- Government shutdown and economic collapse
  - Blackberry’s given to VIP’s to pump brand and get hooked
  - Then fears of violent withdrawal if crackberries enjoined for even a moment
  - Our lives and way of life are at stake
Popular Response: Modest Proposals

• Just a few targeted uses of “pressure-release-valves”
  – One or both sides has large number of parties, thereby triggering problems of coordination, free-riding, holdouts, etc.
  – Even when both sides are each individuals, still face problems of bilateral monopoly, strategic behavior, and cognitive biases
  – Mixed sized models raise a mix of both problems
Impact: Not So Modest

- Focus misses the slight of hand
- Like in Jonathan Swift’s story, title is not forthright
- Innovation’s discontents have removed property from IP
  - We had plenty of liability rule release valves already
  - Now no property (except for large players who don’t need it)
  - Now some big problems (caused by liability rules)
  - And getting worse (caused by new contracting rules)
Intuition of the Paper

• Liability rules force too many deals
  – 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 contracting rules block deals
  – Licensees now can always renegotiate
  – License to one may now license all
Longstanding Liability Rules (good)

- Corporate, bankruptcy, litigation
- Uncertainty
- Limited experimental use but Hatch-Waxman Act for FDA
- Government Immunity
Recent Removal of Property (bad)

- Injunctions after eBay (2006)?
  - Only large players?
  - Paice v. Toyota not a compulsory license?
- Enhanced damages after Seagate
  - No duty of care, no need to get opinions
  - Now test may be whether preliminary injunction is granted
  - But if no permanent injunctions and more uncertainty how will you get preliminary relief?
- Experimental use after Merck (2005)
  - “all uses … ‘reasonably related’ to … information for submission under any federal law regulating…”
  - In a regulated industry, what doesn’t meet this test?
- Increased uncertainty
  - KSR (2007) and obviousness
  - Comisky & Nuitjen (2007), Bilski (2008) and subject matter
Recent Changes to Contracting Rules (bad) (1)

- Licensees now can always re-negotiate
  - *Lear* (1969) allowed licensees to challenge but post *Lear* cases made clear licensees had to breach to do so
  - *Medimmune* (2006) now allows licensees to challenge while holding patentees to rest of deal
  - Contract fixes like covenant not to challenge won’t work
    - Likely invalid under *Lear*
    - What would remedy be? Patentee wants licensee bound to all terms of original deal
    - Structured deals with stock options like those offered by Sean O’Connor would help; but still don’t reach non-price terms
Recent Changes to Contracting Rules (bad) (2)

- License to one may now license all
  - *Quanta* (2007/8?) raises tension between freedom of contract and freedom from restrictive servitudes running with chattels
  - Petitioners want a first sale rule that is super strong and immutable
  - But would give undue windfall to opportunistic third parties who would be able to assert licenses they never thought they had.
  - And would frustrate reasonable expectations of everyone who settled cases and struck patent license agreements in reliance thinking limits would be respected (transition issue, but long and broad impact)
  - And would make settling future disputes significantly more difficult (high price and high coordination problems)
Where Do We Go from Here?

• More to come?
  – New patent bill in Congress
  – More cases in SCT (Labcorp 2?) and Fed. Cir. (various)
  – FTC and DOJ actions (Rambus)
  – EC competition actions (Intel, Qualcomm, Apple, MS)
  – WHO, WTO, WIPO (development & health agendas)

• Bottom Line
  – Frustrating good coordination
  – Facilitating bad coordination
Studying Market-Oriented, Property-Rights Approaches to Innovation

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Core Components:

- **Intellectual Property and Innovation**
  The ways laws, rules, and norms can help private and public sectors work to facilitate the complex processes of innovation and its commercialization

- **Corporate Governance and Securities Regulation**
  The ways individuals can order their private affairs within collective organizations, or firms, and the ways in which governments can regulate securities markets

- **Property Rights, Finance, and Developing Economies**
  The role of property rights in intangible assets in the developing world

- **Antitrust**
  Market structure and performance and the ways antitrust regimes can best promote competition

- **Bankruptcy**
  The ways the possibility of bankruptcy can influence the way business deals are structured, even at the earliest stages of a venture