

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

F. Scott Kieff

Professor
Washington University School of Law

Research Fellow
Stanford University's Hoover Institution

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 & Nuijten* (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

**HOOVER INSTITUTION**[HOME](#)[NEWS](#)[GET INVOLVED](#)[SEARCH](#)
[ABOUT HOOVER](#)[LIBRARY & ARCHIVES](#)[RESEARCH](#)[FELLOWS](#)[PUBLICATIONS](#)[MULTIMEDIA](#)

PROJECT ON COMMERCIALIZING INNOVATION

[Home Page](#)
[About the Project](#)
[Members](#) ▶
[News](#)
[Publications](#) ▶
[Presentations](#)
[Contact](#)

Studying Market-Oriented, Property-Rights Approaches to Innovation

Directed by:

[Stephen H. Haber](#)
(co-investigator)

[F. Scott Kieff](#)
(primary investigator)

[Troy A. Paredes](#)
(co-investigator)

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

SEARCH:

Commercializing Innovati