



The Importance of Marinating on Patents

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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

Why Have IP? Ever Forward!

Mark Twain's Connecticut Yank went to Warwick Castle, England. There he was magically transported back to the time of King Arthur. He did well. He was made First Minister. He was called Sir Boss. What was the first thing he did in power?

The very first official thing I did, in my administration – and it was on the very first day of it, too – was to start a patent office; for I knew that a country without a patent office and good patent laws was just a crab, and couldn't travel anyway but sideways or backwards.

Lord Robin Jacob, Royal Courts of Justice, London, England, *One Size Fits All?* in F. Scott Kieff, PERSPECTIVES ON PROPERTIES OF THE HUMAN GENOME PROJECT 449 (2003).

Why Have IP? Really?!

Is intellectual property really so good?

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 self evident for a process of the creation of new or escalated kinds of monopoly

Lord Robin Jacob, Royal Courts of Justice, London, England, *Industrial Property-Industry's Enemy*, The Intellectual Property Quarterly, Launch Issue, (Sweet & Maxwell), 1997, pp 3-15.

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
- We now see intense lobbying with curious political alignments
 - Focusing on importance of strong patents were unions, Republicans, small business, and Big Pharma
 - Focusing on the problems of over enforcement of patents were Democrats and the big business interests of High Tech
- Focus on good ideas and practical problem solving, not compromise among loudest voices
- Sound theory and historical practice both show how to meet these dual sets of concerns by blending predictable patents with the flexibility for market actors to contract over them and adding symmetrical mechanisms to cabin abusive litigation and other legal process
- Today, we may get more by doing less
 - Every good chef knows the benefits of letting things marinate – spices need time to soak in and intermingle
 - With such a large number of potent changes over the past few years only time will tell whether more would help or hurt, let alone which type would be a good decision to try