

Has the Academy Led Patent Law Astray?

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Scholarly commentary widely asserts that technology markets suffer from a triplet of adverse effects arising from the strong patent regime associated with the establishment of the Court of Appeals for the Federal Circuit in 1982: “patent thickets” that burden innovation with transaction and litigation costs; “patent holdup” resulting in excessive payouts to opportunistic patent holders; and “royalty stacking” resulting in exorbitant patent licensing fees. Together these effects purportedly depress innovation and inflate prices for end-users. These repeated assertions are inconsistent with the continuing robust output, declining prices and rapid innovation observed in the most patent-intensive technology markets during the more than three decades that have elapsed since 1982. Recent empirical studies relating to each of these assertions have found little to no supporting evidence over a variety of markets and periods. Nonetheless courts, antitrust agencies and legislators have taken, or have proposed taking, actions consistent with these assertions. Most importantly, policymaking entities have sought to mitigate thickets, holdup and stacking effects by limiting injunctive relief for important segments of the patentee population and placing significant constraints on damages awards. Substituting monetary relief for injunctive relief—what I call the “depropertization” of the patent system—yields three potential efficiency losses. First, depropertization impedes efficient resource allocation by shifting the pricing of technology assets from the relatively informed marketplace to relatively uninformed judges and regulators. Second, depropertization distorts markets’ organizational choices by inducing entities to undertake innovation and commercialization through vertically integrated structures, rather than contractual relationships now clouded by the prospect of judicial re-negotiation. Third, depropertization may facilitate oligopsonistic efforts to depress royalties on patent-protected inputs, resulting in wealth transfers to downstream entities and discouraging innovation by upstream R&D suppliers. This possibility is consistent with the revealed preferences of downstream intermediate users in the smartphone market, who advocate limiting injunctive relief and damages awards for certain patent holders. These potential welfare losses, combined with the paucity of evidence for thicket, holdup and stacking effects, recommend against policy actions that have weakened patent protections in technology markets.

* Professor, University of Southern California, Gould School of Law. I am grateful for comments received from Prof. David Teece and other participants at a workshop on antitrust and standard essential patents held at the Haas School of Business, University of California, Berkeley, on October 29, 2016. I thank the library staff of the University of Southern California, Gould School of Law, for invaluable research assistance. Comments are welcome at jbarnett@law.usc.edu.