The Patent System’s Property, Contract and Tort Information Flows

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Patent theory has struggled to provide a persuasive underpinning for the patent system in part because its stated goal has been rather coarse—promote innovation by providing incentives to patent. Recent work has suggested that progress can be made if the purpose of the patent system is narrowed to focus only on undergirding a market for inventions. Though that narrower focus is simple in some respects, the system actually requires fairly sophisticated coordination among its various players. The core of that system is certainly the transactions between seller-inventors and users. Yet making that system work efficiently requires orchestrating a far more complex web of information flows to mediate coordinated behavior between the various patent players. Information must flow from seller-inventors to users and from seller-inventors to other potential sellers-inventors. And information must flow from users to seller-inventors and to other potential sellers-inventors. Importantly all players in the patent system have obligations to supply and to digest their respective information flows. Using this information flow viewpoint, the requirements of patentability, the rules for patent infringement and patent remedies can be seen as aiming to orchestrate this important system of coordinated innovation. Furthermore, this framework illuminates both the property/contract aspects of the patent system as well its tort-like features. Its contract and property aspects focus on the central transactions (and their attendant information flows) between seller-inventors and users. While its tort-like features mediate the broader information flows need to coordinate innovation. The tort-like features focus on patent intentional torts like piracy as well as unintended patent ‘accidents’ associated with independent invention by others (whether seller-inventors or user-inventors). Importantly as a tort like scheme, liability for these later patent accidents depends on the reasonableness of the care undertaken by both the patent holding seller-inventor and by the later independent inventor in regards to their duties to produce and digest information about the patented invention.