

Purging Patent Law of 'Private Law' Remedies

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This paper rejects the fundamental premise of patent law remedies that courts should always attempt to make the patentee “whole” in the event of infringement. The overarching aim of patent law is to promote innovation. As such, the patent system and its associated remedies should be viewed as part of a public regulatory regime designed to further societal goals, rather than a system that protects individual interests by providing private law remedies designed to compensate victims for the infliction of harm.

In this vein, I argue that precluding injunctions for non-practicing and practicing entities alike is often optimal, even when the infringer is a direct competitor that sells a substitute, infringing product. Specifically, I propose that when (1) the infringing device or process is a relatively minor component of a complex product or method, and (2) the infringer’s switching costs are abnormally high relative to the value of the infringing device or method, injunctions should generally not issue regardless of the business model of the patentee. Additionally, I contend that an injunction may thwart optimal innovation incentives when it generates large consumer deadweight losses, results in substantial duplicated costs during the pre-invention R & D process, or creates transaction costs far in excess of the value of the invention. In other situations, a patentee should be made more than whole. For example, when infringement is difficult to detect, damages multipliers may be appropriate.

More broadly, I contend that the notion that patentees should be returned to the *status quo ante* is a private law concept that should play no fundamental role in determining optimal remedies in patent law. On this ground, the statutory remedies provisions of the Patent Act themselves rest on a flawed foundation. In general, instead of providing remedies for private wrongs inflicted on private parties, patent law should be tailored simply to promote the types and levels of innovation that most benefit society.