User Rights in Patent Law

Ofer Tur-Sinai

The concept of "user rights" is largely absent from current patent scholarship and doctrine. While various limitations on the exclusive rights of the patent owner have been acknowledged over the years under patent legislation and case law—e.g., experimental use, regulatory approval, exhaustion, implied license and prior use—each of these doctrines is generally treated in isolation and there is no unifying analytical framework that enables the evaluation and further development of such "user rights". In fact, the above referenced doctrines are generally not even explicitly referred to as "user rights." All this is in contrast to copyright law, where the concept of "user rights" is deeply embedded in the academic discourse and has been intensively discussed, particularly in the last decade.

In this article, I will discuss the importance of developing a unifying concept of "user rights" within the patent law narrative. Among other things, I will demonstrate that the recognition of "user rights" as a central aspect of patent law may enhance the awareness and understanding of consumers of their liberties and privileges with respect to patented inventions; allow better protection of such privileges against patent owners who try to undermine them; and encourage the courts to further enhance such rights, as may be needed from time to time. The need to develop a comprehensive set of "user rights" in patent law is of particular importance in the current era, which is characterized by a high degree of cumulative innovation in many industries and by the emergence of a robust practice of user innovation.

As a foundation for the discussion of "user rights," I will examine the possible justifications for such rights. Although each right has emerged separately to solve a specific need, it is possible to identify certain unifying rationales. As I will demonstrate, "user rights" can generally be justified by the very same economic theories that have been used traditionally to justify the exclusive rights of the patentee. Thus, "user rights" are, in fact, necessary in order to enable the patent system to achieve its prescribed goals. "User rights" can also be justified from other theoretical perspectives, including Lockean arguments and a "personality theory" perspective.

After establishing the general theoretical foundation for "user rights", I will discuss each relevant doctrine existing under current patent law and attempt to contextualize it within the general framework. I will discuss the substance and optimal scope of each right, while delineating the boundaries between them. I will also evaluate whether additional "user rights"—e.g., a fair use right (per O'Rourke's suggestion)—may need to be adopted in order to accomplish an optimal balance between the various considerations undergirding the patent system.

Finally, some general doctrinal questions will be addressed, including the appropriate structuring of "user rights" (i.e., whether they should be structured as mere defenses against infringement or as affirmative rights, which allow users to initiate legal proceedings and request remedies upon their breach) and the extent to which users should be permitted to assign or waive their rights.