

Questioning Patent Alienability

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The standard economic rationale for the alienability of property rights is that it facilitates the flow of resources to those who can put it to the most productive use, or the “highest utility user.” But patents do not come with a right to productively use some social resource—patent rights consist only of a right to stop others from using the claimed invention. The person who is most able to extract rents with a patent’s veto power is not necessarily the same as the person who will put an invention to productive use. If one simply applied the conventional economic justification for the alienability of property rights onto patents, then having patents flow to the highest rent extractor is not obviously desirable from a social viewpoint, and restrictions on alienability would seem justified.

If the unrestricted alienability of patents is to be justified on economic grounds, it must be by reference to other reasons, such as an argument that allowing alienability increases the value of a patent and therefore increases ex ante incentives to invent. But such alternative justifications come with their own limits. Alienability is neither the only means to increase ex ante incentives to invent, nor a particularly effective one, given that inventors must share the surplus generated by alienability with the (more sophisticated) transferee. The case for unlimited alienability of patents is therefore an uneasy one.

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