Between Competition and Piracy: In Search of Learned Hand's Patent System

Oskar Liivak,
Assistant Professor of Law, Cornell Law School

The debate over the proper nature and function of the patent system has been ongoing for well over 150 years, changing surprisingly little. As the world grows ever more dependent on technology, this lack of progress is particularly unsettling. Despite their differences all the varied views of the patent system share one bedrock assumption: no competitive free market can adequately create and commercialize inventions. In a free market, competitors will simply copy the invention rendering the initial inventor incapable of recovering their sunk research and development costs. This common ground might be seen as a welcome respite amidst the otherwise highly contested debate.

Rather than a stable starting point for consensus, this article argues that it is this assumption that is the problem. It has hindered progress and it continues to cloud our discussions of patent law today. This article argues that we must critically reevaluate whether a patent system should be viewed as an isolated exception to the free market economy. The article argues that a patent system can be consistent with competition. With such a view, we might begin new discussions that break the deadlock and begin moving constructively towards a stable and robust design for a patent system.

This article still agrees that inventors need protection but the article disagrees with a secondary, implicit assumption that all too often follows: if unfettered competitive free markets cannot support inventive activity then it is further assumed that patent law needs to prevent competition. Economists, among others, have deep faith in the benefits of competition and they harbor deep suspicions towards any institution that is inherently anti-competitive. This article argues that this secondary assumption is unnecessary and wrong. Patent law need not prevent competition. Instead patent law needs to better understand which third party actions are problematic and which are not. This article emphasizes that patent law must begin recognizing the subtle but crucial difference between undesirable piracy and desirable competition.

For guidance, the article begins by examining and then emulating traditional property. Seeing only Blackstone and his rhetoric of "sole and despotic dominion," many would find it surprising that traditional property could help to reform patent law. But a deeper exploration finds that the lessons of traditional property are more complex and rather promising. Traditional property is the darling of economists not just because it provides control for the property owner but also because traditional property encourages competition. In fact, traditional property is not just compatible with free markets and competition; it is inseparable from them. From the standard view of patent law, traditional property manages a seemingly impossibly feat. Traditional property manages to prevent theft while not hampering competition. Buoyed by this example, this article constructs a patent system that is similarly competitive by design; it outlines a patent system that simultaneously prevents piracy while still encouraging competition. The article concludes by comparing such a theoretical, competitive patent system with our current patent system and with a patent system suggested by Judge Learned Hand some fifty years ago.