

Discussions on the benefits of creating a better functioning market for patent rights and how to create such a market are generally based on two assumptions, neither of which appears to be true much of the time, at least in the tech industries: (1) that productive technology transfer occurs along with the sale of IP rights and (2) that the market value of the IP accurately reflects value of the covered technology.

Markets for IP can only operate efficiently and patents can only provide appropriate incentives that support rather than hinder innovation if the legal system operates to assign a value to patents that accurately reflects the value of the underlying technology. A legal system that over values or inconsistently values patents relative to technology will encourage speculation, the disaggregation of portfolios, and litigation, as we have seen through the growth of NPE suits.

Although the case law surrounding patent damages has improved in recent years by eliminating or decreasing the use of evidence like the “25% rule” that have no probative value on the central question of technology evaluation, much work remains to be done. Many judges are not well-equipped to determine whether proffered damages evidence is well-grounded in economic principles or should be excluded. Moreover, the legal system contains a bias that prefers to allow parties to submit most evidence to the jury, which is then not well-equipped to evaluate it. The result is that juries receive wildly divergent damages theories and outcomes are unpredictable. The problem is particularly acute in the tech sector where products are covered by tens of thousands of patents and patent quality is low.

Development of better theories of how to value patented technology in complex products, grounded in sound economics, is desperately needed. The development of guidance for judges on how to identify reliable and unreliable evidence consistent with those theories could have far reaching consequences for the functioning of the patent system.