

# Anticompetitive Patents: An Incorporation Solution

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# Anticompetitive Patents

Monopoly on invention vs. market power

"monopolies are odious, contrary to the spirit of a free government and the principles of commerce" (Maryland constitution, 1776)

"perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed"  
(North Carolina Declaration of Rights, 1776)

These are state-granted monopolies...like patents



# Anticompetitive Patents

Patents as exceptions to antitrust

... and aimed at common targets

- Fostering innovation
- Increasing economic growth
- Incentivizing marketability
- Creating competition
  - For the market rather than in the market
  - In the market – for substitutes



# Anticompetitive Patents

Problematic patents:

- Monopolistic royalty rates
- Forestalling competing products
- Industry-wide standards
- Excessive litigation and patent trolls



# The Nature of Patents

## Patents as property

- The right to exclusive use
- The right to prevent use
- The right to extort (contract for) fees

## Patents as liability

- FRAND
- eBay v. Merc: four-pronged test for injunctive relief



# Incorporating Patents

## Patents as Property (or Liability):

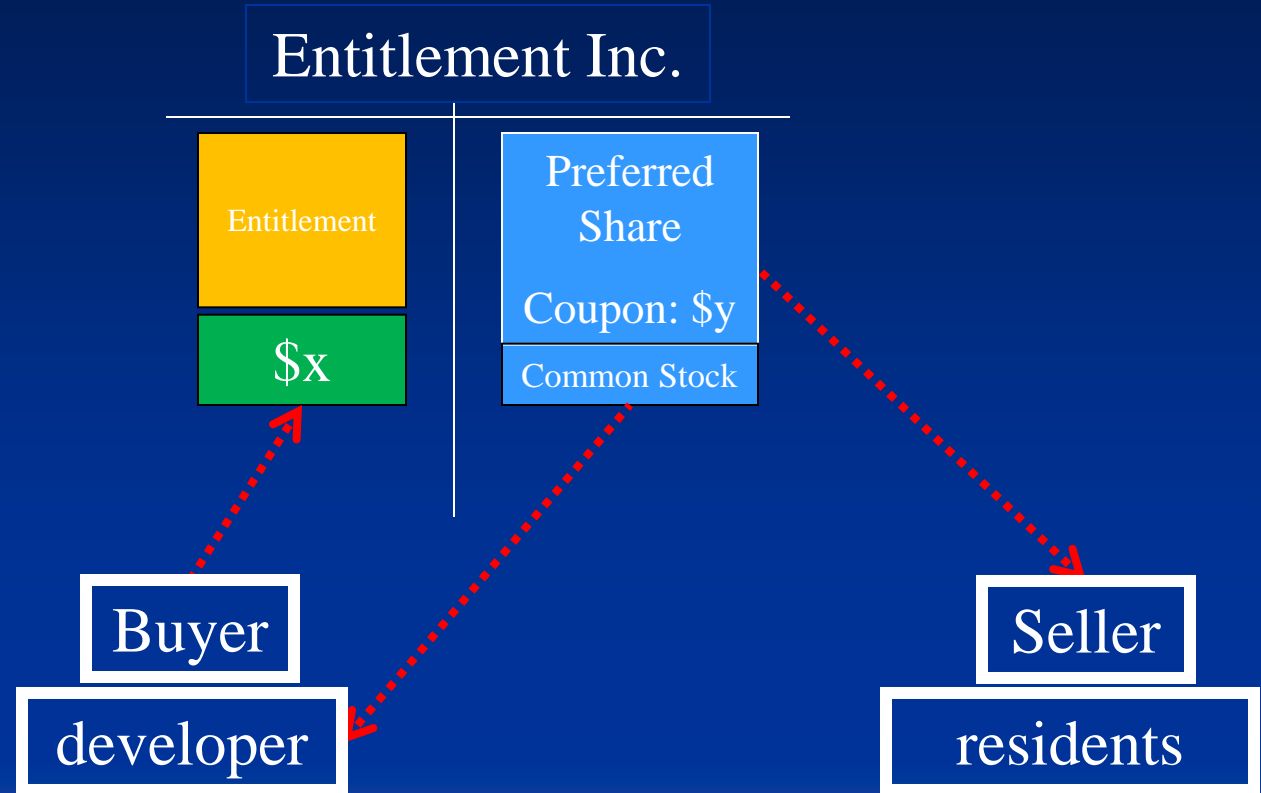
- Inventor applies for patent
- Decides (compelled?) extent of property protection vs. liability protection
- Patent is incorporated with common stock allowing basic use and preferred coupon priced for extended use



# Background – Land Disputes



# Incorporation Rules





# Fully Voluntary Regime

Patent holder assigned entire entitlement

Usage rights pre-packaged for future sale

Patent fees/taxes assessed per common stock

- Preferred stock allows for deferring payment
- Differential pricing depends on policy goals
  - Extent of term
  - Extent of fair use exceptions
  - Types of use



# Semi-Voluntary Regime

Corporate bylaws specify (accept) allowed usages with liability priced ex-ante:

- Free - fair use, voluntary donations
- Paid – FRAND, extended to all, limited by design

Exceptions and new technologies – property protection via preferred coupon



# Non-Voluntary Regime

Corporate bylaws determined by patent office / statute / case law:

- Liability protection for patents
- Property protection for excluded uses



# Guiding Example

SSO relying on patenting firms' disclosure

Firms agreeing to reveal patents, yet refraining from transferring them to SSO

FRAND obligations set out ex post

- Possibly ex ante, within SSO agreement
- But subject to courts ex post

Incorporation as ex ante liability structure

- Incentive for optimal pricing of add-on uses



# Public Benefits of Incorporation

- Clarifying Policy goals: vehicle for application
- Designing patents: clarity in the property/liability landscape
- Preemption of infringement: ex ante licensing (required / incentivized)
- Predetermined trolling: differential pay depending on production or royalty stacking?



# Private Benefits of Incorporation

- Menus of options and differential pricing
- Revenue streams and financial planning:  
buying extended use on consignment
- Protecting subjective values and production plans: freedom of design for patents
- Prepackaged patents for SSOs and patent pools: privately determined FRAND



# Open Questions

- Expiration of patent upon payment of coupon?
- Public interest patent buyouts (force-outs)?
- Patent fees and pay-per-protection: renting the law rather than owning it

**Incorporation as mechanism – not content!**

