

REVIEWING PART III OF *INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW*

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I have very much enjoyed reading Professor Michael Carrier's important new book on the intersection of law and innovation,¹ and greatly appreciate his contributions to the field. In this short Essay, I will focus my discussion on my sole area of expertise—patent law. Carrier takes-on the subject of patents in Part III of his book. I agree with most of what Carrier writes. To make this Essay more interesting, I focus on some of our areas of apparent disagreement.

As other commentaries have noted, the book is long on conclusions and proposals but somewhat short on justifications for the conclusions. In the words of Geoffrey Manne: “with what seems to me to be little support (and with only essentially-anecdotal empirical support), Carrier then chooses sides.”² On the patent side, Carrier rather consistently chooses sides in favor of reducing patent rights.

Thank you Supreme Court: Like many academics, Carrier sees the year 2006 as an endpoint of a dark era in patent law. The problems stemmed from the Federal Circuit and its “formalistic rules”; from “*patent trolls*, [who] do not manufacture products and thus do not face patent infringement counterclaims, emboldening them to file lawsuits”; and from the PTO and its insufficient resources.³ In Carrier's history, the pendulum had swung too far in favor of the patent applicant and litigious patent holder, but in a series of cases, the US Supreme Court at least partially saved the day by weakening the patent rights and the potential market power of the patent holder.⁴ In *eBay, Inc. v. MercExchange*, the Supreme Court limited patent holder's access to injunctive relief even to stop ongo-

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1. MICHAEL A. CARRIER, *INNOVATION IN THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW* (2009).

2. Posting of Geoffrey Manne to Truth on the Market, <http://www.truthonthemarket.com/> (Mar. 30, 2009, 9:38 EST), available at <http://www.truthonthemarket.com/2009/03/30/manne-on-carriers-innovation-in-the-21st-century/>.

3. CARRIER, *supra* note 1, at 200.

4. *Id.* at 200–01.

ing adjudged infringement;⁵ in *KSR International v. Teleflex, Inc.*, the Supreme Court eased the requirements necessary to prove an invention obvious;⁶ and in *MedImmune, Inc. v. Genentech, Inc.*, the Supreme Court offered greater access to court through declaratory judgment actions for companies operating under the shadow of another's patent.⁷ Seeing the light, the Federal Circuit also rolled-back the scourge of treble damages for willful infringement in a way that "promises to promote disclosure and innovation."⁸ And, although the case developed only since Carrier's book published, the Supreme Court appears poised to further limit patenting through the doctrine of patentable subject matter in the case of *Bilski v. Doll*.⁹ I agree with Professor Carrier that these cases all weaken the potential antitrust harm caused by patent rights. However, we disagree as to whether weaker rights clearly benefit the patent system, or that they will lead to better innovation in the 21st century.

From an antitrust harm perspective, *eBay* and *MedImmune* are theoretically important because they help prevent potential holdups. We are left without any answer, however, as to whether it is worth the added litigation expense and reduced patent incentive in order to shadow box with the mythical patent created holdup problems. Interestingly, the best example provided is the BlackBerry case which Research In Motion ("RIM") eventually settled for over \$600 million.¹⁰ In that case, RIM was sued for patent infringement and had taken on the risk of a large payout by declining early opportunities to settle. Because of the competitive nature of the wireless market, there is no indication that the lawsuit or settlement raised prices or limited access in any way. Rather, in that case—as in many others in the past—the strong patent right and threat of looming injunction led to an agreement where the accused infringer is able to continue to operate after paying rents to the patent holder.¹¹

On the Supreme Court's obviousness decision of *KSR International Co. v. Teleflex, Inc.*, my reading is that Carrier sees this case as benefiting patent quality by making it easier to prove that a patent is obvious and consequently avoid antitrust problems.¹² In his discussion on postgrant opposition, Carrier links elimination of invalid patents with a procompetitive benefit:

5. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

6. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007).

7. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007).

8. CARRIER, *supra* note 1, at 201 (citing *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007)).

9. *Bilski v. Doll*, 129 S. Ct. 2735 (2009).

10. *See* Patently-O, <http://www.patentlyo.com/> (Mar. 3, 2006, 23:36 EST), available at http://patentlaw.typepad.com/patent/2006/03/the_war_is_over.html.

11. Associated Press, *Settlement reached in BlackBerry patent case*, MSNBC, Mar. 3, 2006, <http://www.msnbc.msn.com/id/11659304/>.

12. CARRIER, *supra* note 1, at 200.

An added bonus of the [postgrant opposition] proposal would be its effect on antitrust. By providing a low-cost avenue to remove invalid patents, it would reduce the incidence of market power. Market power allows parties to increase the price paid by consumers and to reduce innovation. . . . [M]arket power resulting from invalid patents is undesirable and bogs antitrust courts down in unnecessary cases.¹³

Here Carrier's argument perhaps proves too much. It is not only invalid patents that raise prices and bog down antitrust courts—it is all patents. The marketplace may well be more competitive without patent rights, but that competition comes at the cost of a reduced incentive to innovate. By changing the standards of patentability to make it easier to invalidate a patent, the court in *KSR* may well have reduced the potential for antitrust problems. If that is the case, however, the decision most certainly reduced the incentive to innovate as well.

Post-Grant Opposition: Chapter 9 is devoted to a new postgrant opposition layered over the reexamination and interference procedures. Carrier's proposal is a close parallel to the proposals in the Patent Reform Act of 2009,¹⁴ and I agree with his rejection of current systems for eliminating would-be invalid patents. As Carrier notes, (1) it would be prohibitively expensive (and I would argue detrimental to innovation) to ensure that only valid patents issue on the first pass through the PTO;¹⁵ (2) challenging patents during litigation is expensive and financially risky;¹⁶ and (3) current reexamination proceedings are too limited in scope and procedure (and I would argue too slow).¹⁷

I have a small problem with Carrier's explanation of the benefits of his proposed system. He first indicates that stronger postgrant review will lower prices because competitors will less often need to spend money to design around a would-be invalid patent.¹⁸ Then, in the next breath, Carrier promises spillover technology benefits derived from money spent on reviewing competitor's patents for opposition.¹⁹ Of course, these two arguments are on the same coin. If money spent designing around is wasteful, so is money spent reviewing the validity of patents. Likewise, if reviewing competitor's patents leads to additional innovation, so will time spent designing around.

13. *Id.* at 299.

14. H.R. 1260, 111th Cong. § 1 (2009).

15. CARRIER, *supra* note 1, at 209.

16. *Id.* at 210.

17. *Id.* at 212–13.

18. *Id.* at 215.

19. *Id.* at 216.

Carrier also notes the “antitrust benefit” that invalidated patents will no longer create any market power problems.²⁰ Glaringly absent from the discussion is how the opposition proceedings would impact the innovation incentive—especially under the PTO’s current mantra favoring rejection.

Material Transfer Agreements: Carrier includes Chapter 12 on MTA’s in the patent section as well. It is an important topic, although it is unclear why it fits in patents. The closest link to patent law is that many material transfer agreements include restrictions on public disclosure and a declaration of ownership of any future patent rights. MTA’s are generally negotiated.²¹ A researcher typically wants access to some materials such as a stem-cell line, seed-line, or tissue.²² The owner of those physical items ordinarily demands some consideration from the researcher as inducement for sharing.²³

Carrier’s problems with the current MTA approach appear threefold. First, some researchers are unwilling to pay the consideration and thus cannot access the materials. Second, the negotiation has high transaction costs—including delay.²⁴ And, third, the public loses when the researchers are restricted or delayed from publishing.²⁵ His solution: require all agencies receiving federal funding to agree to a standard universal MTA (the UBMTA).²⁶ The proposal is nice, but we really don’t know its impact. Parties that care about nonstandard terms would still do side-deals—adding more complexity than before the rule. Alternatively, those parties may simply walk away because the terms are not acceptable—further limiting access to the materials.

20. *See id.* at 216–17.

21. *Id.* at 280.

22. *Id.* at 279.

23. *See id.*

24. *See id.* at 282.

25. *Id.* at 283.

26. *Id.* at 287.