

HOW TO MAKE A PATENT MARKET

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Imagine a stock market in which buyers and sellers couldn't find out the prices at which anyone else sold a share of stock. If you wanted to buy (or sell) a share of stock, you would have to guess what it was worth. The result, everyone would agree, would be massively inefficient. Willing buyers and sellers would often miss each other. The price at which a sale did close would vary widely from sale to sale. And those who had a source of private or inside information would be able to exploit others. Some trades might occur in such a system, but surely not anything like the volume in today's stock markets. Surely no one would intentionally design a system in which trades had to be "blind" in this way.

Patents, however, exist in just such a blind market. Want to know if you are getting a good deal on a patent license or technology acquisition? Too bad. Even if that patent or ones like it have been licensed dozens of times before, the terms of those licenses, including the price itself, will almost invariably be confidential. Patent owners who want to put their rights up for sale face the same problem.

The result? Willing licensors and licensees can't find each other. Patent auctions often fizzle, because without a thick market—one with an array of buyers and sellers bidding on price—no one can know whether they are getting a steal or being had. When parties do license patents, the prices are (to the extent we can tell) all over the map. And the rest of the world has no idea what those prices are. This, in turn, means that courts lack adequate benchmarks to determine a "reasonable royalty" when companies infringe patents. The lack of a real, rational

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companies to disclose all their licenses.

The only people who stand to lose from mandatory disclosure of licenses are those who are taking advantage of the current state of ignorance, whether by holding up defendants or by refusing to pay for technology that everyone else is paying for. But just as we wouldn't prevent the development of a new financial instrument just to protect the interest of an insider trading on their knowledge, we should not use claims of secrecy to prevent the development of a robust market in technology.