

## ARE PATENTS MORE LIKE CONTRACTS OR REGULATIONS?

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The patent system has long been treated as contractual in many ways. Patents are referred to as a bargain struck between the inventor and society -- an exchange of information for protection in which the patentee reveals the invention to the world in exchange for a grant of exclusionary rights. The process of granting patents has been structured as a negotiation between the patent examiner and the inventor. A contractarian frame for patents can be seen to this day in Ed Kitch's prospect theory of patents, which has proven highly influential. In this paper, I argue that although throughout U.S. patent history courts and commentators, both in their rhetoric and in their interpretive rules, have often treated patents as if they were akin to contracts; a contractarian approach to patents is sharply at odds with the *in rem* nature of patents. Such an approach also militates against patents being used as regulatory instruments. Patent law needs to move away from using rules for interpreting patents that have their basis in contract law. Instead, we need to reconceptualize and interpret patents through a regulatory frame, using rules of statutory construction and regulatory interpretation. Whether we conceptualize and interpret patents as being akin to contracts or akin to regulations has implications for a number of questions in intellectual property, such as the debate about whether patents are property, the role of the PTO, the appropriate interpretation rules to be applied to patents, and the constitutional status of patents in patent takings cases.

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