
Abstract: The patent exhaustion doctrine operates to extinguish a patent owner’s right to exclude others from practicing the invention with patented articles sold under authorization of the patent owner, and this policy has been debated on several points, including whether a patent owner may contract around the doctrine at any point. Because the debate touches on property rights, contractual freedom, and competitive concerns, students and scholars alike find it difficult to articulate and apply practically. The Supreme Court recently addressed this issue after a sixty-six year hiatus in Quanta Computer, Inc. v. LG Electronics, Inc., but the opinion received mixed reviews and leaves several questions unanswered.

In this article, I suggest a modern interpretation of the doctrine as a “pliability rule,” where the protection of the patent entitlement transitions from a property rule prior to an authorized sale to a liability rule once the patented article has been sold and moves in commerce. By reducing the tension between entitlement to the intellectual property and entitlement to the purchased article that embodies it, the parties have a greater ability to bargain to a more efficient result on both sides of the sale. In the second, post-sale stage, licensors would either face a zero liability rule, with licensors seeking remedies in contract law if possible, or a traditional liability rule with judicial determination of a compulsory licensing rate, similar to a reasonable royalty now established in many patent infringement cases. Although shifting the rule in this manner would limit the patent owner’s right to exclude (thus contracting the boundaries of the patent), I argue that the shift promotes both efficiency and fairness by ensuring that the patent owner collects just one reward for his invention, reducing transaction costs, reducing expensive litigation in the downstream supply chain, enhancing competition for end products, and encouraging cooperation in patent-rich industries where overlapping permissions create hold up problems.