

Executive Summary



Patent rights in a climate of intellectual property rights skepticism

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A movement is underway to dilute U.S. patents, which have recently been the object of unprecedented criticism. U.S. policymakers lack clear guideposts for evaluating this criticism. Further, some emerging economies are at a crossroads in deciding how to treat proprietary technology, and they look at this U.S. debate through the prism of their own history and economic pressures. This Article defends robust patent rights based on evidence about the relationship between patents and innovation. Given the rich innovation in markets where claimed patent-related problems are most prevalent, the cautious, informed and correct response is incremental, targeted adjustment. Patents should remain a central feature of U.S. technology policy.

The cornerstone of American innovation policy, patents allow inventors to prevent others from copying their hard-earned creations, encourage firms to invest in commercializing technologies and prompt technology transfer. They also disclose cutting-edge insights to those skilled in the art, and reflect the U.S. tradition of honoring property rights. Why, then, are they so controversial today? Generally, the patent-policy debate accompanying revolutionary advances over the prior art goes to optimal breadth of the exclusive right – not to whether society should grant any such right at all. Thus, despite occasional controversy, patents have enjoyed an illustrious reputation. The maelstrom of controversy surrounding the U.S. patent system today, however, is unprecedented.

A brief overview of the economics of patents and innovation reveals a complex, interconnected web of incentives that collectively spur or deter R&D investment. Economic models predict that, for a given invention, expanding patent scope increases the incentive to invent. Weak patent protection may therefore lead to suboptimal investment in technological development. As to the royalty-stacking and anticommons effects, economics suggests that vertical integration and suitable, inter-competitor collaboration may ameliorate those conditions and increase output.

In some commentators' views, there is no empirical support for the proposition that patents spur innovation. That argument ignores abundant empirical work finding that patent strength and R&D expenditures are correlated. So, too, research shows that strong IP rights are associated with economic growth in developed economies. Firms with stronger patent holdings tend to perform better. Surveys reveal that patents contribute to incentives to invest, most acutely in the biopharmaceutical and medical device fields but elsewhere to varying degrees as well. There is also historical evidence connecting strong patent rights to technological advancement. Those who find the economic justification for a patent system convincing encounter much support in the relevant empirical research.

To justify a move from the current framework a reasonable question is whether the evidence suggests that it is more likely than not that the net effect of patents is to suppress current levels of innovation. Such evidence is lacking. To the contrary, the empirical literature yields insights that should give patent skeptics pause in making their case. Patents exhibit consistent and statistically significant correlation with private R&D investment and with economic growth, at least in developed countries. Policymakers should thus be very cautious before concluding that the government could safely disregard, abolish, or dilute patents in that setting.

The U.S. innovation experience, theory, and econometric work combined are a powerful argument against abandoning or compromising the patent system. The focus instead should be on recalibration. Lawmakers should enhance quality, boost the clarity of patent disclosure and ratchet up obviousness and novelty conditions in industries subject to anticommons and royalty-stacking

effects. They should also encourage breakthrough technologies through suitable rights over pioneer inventions, and narrow patent scope in heavily cumulative fields of innovation that are subject to high transaction costs.