

Freedom to Experiment: Toward a Concept of Inventor Welfare

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Abstract

The article analyzes and reshapes the experimental use defense to patent infringement as the foundational stage of a project to re-map the political economy of invention. It begins by showing how an exaggerated profit logic that emerged in the 1980s reduced independent experimentation to the status of patent infringement. This distended profit logic is an overstatement of incentive theory, the intuitively attractive theory that has long dominated patent policy despite its profound difficulties. The resulting jurisprudence has short-circuited analysis of interactions between key patent law concepts of public benefit and private right, idea and invention, process and product. In this light, the second section lays the foundation for a revised patent policy that is more faithful to the constitutional norm of promoting progress and practically superior to the current approach and its unworkable incentive theory. In particular, the section introduces a concept of

inventor welfare and, with it, begins to reformulate dynamic efficiency as the logic of progress. The final section presents a phenomenology of the invention process to serve as the framework for restoring independent experimentation to its vital role in the constitutionally inscribed process of invention.

Introduction: Progress and Profit

The First Federal Congress exercised its constitutional power to "promote the Progress of Science and useful Arts" by passing the Patent and Copyright Acts of 1790. The twin statutes and their successors have encouraged invention both technological and literary by granting inventors and authors the exclusive right to their creations.¹ This exclusive right has always been understood as referring to commercial exploitation and, so, from the beginning progress has been hitched to profit motive. A proverbial understanding

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¹ "To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8. Cf. Patent Act, 35 U.S.C. § 271 (a) (2000) (direct infringement).