

# An Experimental Use Exception from Patent Infringement for New Zealand

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This article discusses New Zealand's approach to experimental use of patents. The article focuses on the current proposal to include an experimental use provision in the patent legislation. The history of such an exception in the common law is examined. The article concludes that the introduction of an experimental use exception has been discussed in isolation of what is the best economic and research policy outcome for New Zealand. In particular, questions are raised as to who would use the exception and what research would it attract to New Zealand. The present lack of an experimental use exception has not had the effect of increasing patent-related research in New Zealand. Therefore, the author suggests that, overall, an experimental use exception could be a good thing, but the research benefits need to be discussed more fully. Also any exception needs to be carefully crafted in a way that the current proposal, adopted from an Australian proposal, is not.

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Whether a country should allow experimental use of patented inventions, to encourage and foster research and innovation, should be a matter of economic, science and research policy of a country. The purpose of this article is to discuss what experimental use policy and law New Zealand should have.

Patentees frequently emphasize, in support of maximizing their rights, that the role of patent protection is to encourage research and innovation. In developed countries, for the most part, the goal of encouraging research and innovation does not extend to allowing unbridled experimentation with that which is patented. A patentee can prevent experimentation with its patents by refusing to license their use or by charging unaffordable licence fees. Without the permission of the patent holder there is not scope for experimentation with patented inventions in the name of research and innovation, except if such research qualified under a research or an experimental use exception to patent infringement. There is no international agreement about what the scope of an experimental use exception should be. Broadly, developing countries might favour wider experimental use exceptions and developed countries narrower exceptions. This proposition, as with many developed versus developing country distinctions, is not universally true. It is, however, hardly surprising that countries that have many locally owned patents are less likely to allow wide experimental use exceptions and countries with fewer locally owned patents may be more amenable to experimental use exceptions. The type of experimental use exception that might benefit one nation is not necessarily the same as that which might benefit another. Because of the economic differences that