Can U.S. patent law help U.S. firms compete in the global economy? The traditional goal of patents is to encourage inventors to discover new ideas, and those ideas might help U.S. firms compete against their foreign rivals. However, even if changes to U.S. patent law increased incentives to invent, those changes would not improve U.S. competitiveness because treaties like TRIPS prevent U.S. patent law from favoring U.S. inventors. Both foreign and domestic firms likely would benefit from such legal reforms.

In fact, U.S. patent law may actually undermine U.S. competitiveness because patents weaken a critical determinate of competitive advantage: domestic rivalry. Intense domestic rivalry fosters competitiveness by driving firms relentlessly to improve and to expand, by spawning related and supporting domestic industries, and by encouraging the domestic development of advanced factors of production, like specialized labor forces. Consequently, globally successful firms rarely develop without domestic competition. Unfortunately, although U.S. patents limit both domestic and global competition, the restraint to domestic rivalry is greater because of limits on the extraterritorial reach of U.S. law.

Lawmakers thus have overlooked a cost inherent in U.S. patents and likely have embraced levels of patent protection that undermine U.S. competitiveness. Because patents also encourage invention, however, weakening patent protection involves tradeoffs. Fortunately, considerations of domestic rivalry and competitive advantage help to identify changes to patent law that will substantially boost domestic rivalry without significantly sacrificing incentives to invent. In this Work-in-Progress, I plan to explore the impact of three changes to U.S. patent law on competitive advantage. One revision has already been enacted in the America Invents Act: expanding administrative proceedings for challenging patent validity. In addition, I plan to examine the effects of strengthening the experimental use defense and incorporating competitive concerns into the analysis for awarding injunctive relief.