

The (Relatively) Easy Case for Patents on Inventions

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This article aims to justify (at least part of) the current patent system. It argues that the normative purpose of the patent system is to form a private property market for inventions. Three concepts makes this objective notable: justify, market, and inventions. The patent system is quite old yet it still lacks a solid normative justification. Current patent theories focus on incentives, access and exclusion. Those theories have never been able to prove that the system actually promotes technological progress. This article aims to build its justified alternative patent theory around the existing private property market by adapting and extending that institution to the problem of technological production and exchange. That is notable because towering work in economics has long argued that, as a general matter, such an extension of the market is ill-conceived and unlikely to succeed. This article agrees with those objections *for ideas and information generally* yet this article argues that patent law (descriptively) does not and (normatively) should not have such broad reach. Instead the system should focus on inventions. Notably modern patent theory has largely ignored exploration and appreciation of the invention as a unique link between technological and economic parameters. Inventions are special packets of information whose characteristics enable us to build private property markets in inventions despite the fact that we cannot easily do so for ideas and information generally. In addition to providing a much-needed normative account, this narrative also reorients the focus of the system and provides limiting principles for that system. Current patent theories see the patent system as a strange kind of market where naked exclusion and permission are exchanged. The narrative developed here rejects that vision and returns the focus to the exchange of useful things, in particular inventions. Property and exclusion are still necessary in this story but they are instrumental, background features. Furthermore, the narrative provides a much needed account of the limitations of the patent system. Recent decisions by the Supreme Court have limited patentable subject matter yet they have lacked a workable normative principle. The normative focus on inventions makes sense of those doctrinal limitations. The characteristics that make inventions suitable for market commodification also explain why abstract ideas are rightfully outside the bounds of patentable subject matter.