Addressing Patent Myths

Activist groups routinely accuse companies of "abusing" the patent system by engaging in practices such as "royalty stacking," "patent evergreening," "product hopping," "patent thicketing," and "unfair" SEP licensing rates, which they allege prevent generic competition.

By debunking these myths, the Council for Innovation Promotion hopes to foster a more honest public policy debate and correct the misconception that America's patent system needs an extreme overhaul.

Royalty Stacking

- Critics claim that SEPs become too expensive because an implementer must take a license from every owner of a patent portfolio that contributes patents essential to the standard — the argument is that "royalty stacking" will end up making licensees have to pay excessively for implementing a standard.

- **But royalty stacking is a bogeyman.** SEP owners understand the market dynamics as well, and for their business model to work, it's in their interest for SEPs to be affordable so that they can be used as widely as possible.

- It's also the law — SEP owners must offer and agree to license their patents on FRAND (fair, reasonable, and non-discriminatory) rates.

- The current system also has the benefit of the marketplace being able to assess and value the contributions of different SEP owners according to the merits of their patent portfolio. A company making key contributions to the technology should receive higher royalty rates than a company that has only made contributions on the periphery. This is another reason why royalty stacking fears have not been borne out in practice.

- The many patents involved in technological standards are just evidence of the complexity of technologies like Wi-Fi and 5G — and the hard work and investment it takes to continually improve them.

Patent Evergreening

- Some activists allege that companies file additional patents on existing products to "extend" the life of the product's original patents, a practice that's often dubbed "patent evergreening."

- But patenting a genuine improvement of an existing product **has zero effect** on the life of the original patent, nor does it deter generic competition. Patenting a new formulation of a medicine would not delay the expiration of the patent on the original version of the drug.

- So-called "secondary" or "follow-on" patents, sometimes filed years after the initial patents for a product, definitionally represent **additional, real innovations**. After all, the USPTO only grants patents to inventions that are **novel**, **useful**, and **non-obvious**.

- Contrary to what some groups claim, secondary patents are not "small" or "trivial" improvements. Updated medicines offer real benefits for patients. For instance, an updated drug might include a time-release function that reduces the chance of an adverse reaction. Or new tablets could allow patients greater dosing flexibility. New versions still require years of expensive, risky research to win regulatory approval.

Product Hopping

- Activists also claim that drug companies engage in "product hopping," an alleged practice that is closely related to evergreening. The difference between the two concepts is that firms who product hop **stop producing or marketing earlier iterations** of a product once they patent a new version. Some groups say this practice only serves to increase the market share of brand-name drugs and deter generic competition.

- It's critical to remember that virtually **all companies in every** industry eventually stop making early versions of their technologies. For instance, the top smartphone manufacturers no longer produce or support the earliest iterations of their products. Few would consider this a malicious practice, yet it still qualifies as "product hopping," at least according to activists' definition.

- In the case of drugs, generic manufacturers are still welcome to create knockoff versions of the original formulation. Whether or not a brand name manufacturer is still producing the original formulation is completely irrelevant.

- Patients' and providers' desire for updated and improved drugs — not legal barriers or product hopping — explain why some biotech companies maintain strong market share even after the patents on their original formulations expire.

Patent Thickets

- Some activists claim that companies file multiple patents for a single product to "game" the patent system. But there's nothing insidious or abnormal about this practice.

- High-tech products like smartphones and medicines routinely combine numerous inventions, each of which requires its own patent. For example, Apple filed around 200 patents for the first iPhone.

- There are often many distinct and novel innovations that go into a single medicine. Patents can cover separate — yet equally important — characteristics of a drug such as its ingredients, method of administration, and dosage.

- Deriding the patents the USPTO issues on such critically important inventions is to deride the inventions themselves.

- Crucially, if an inventor files a patent for a variant of their product that would not qualify for its own standalone patent, the new patent is given the **same expiration date** as the product's original patent. Otherwise, the patent for the new variant is denied.

FRAND Licensing Rates

- Some activists claim that the owners of **standard-essential patents** — which protect industry-wide standardized technologies like Bluetooth and WiFi — are price-gouging the firms that must license these patents in order to make their products interoperable with devices from other manufacturers. For instance, all laptop manufacturers need to license certain standard-essential patents to ensure they can connect to any WiFi router.

- The activists want the government to set licensing rates on SEPs rather than letting licensees and licensers work out terms on their own, as currently happens.

- But there is scant evidence that any price gouging occurs.
    - SEP owners commit to conduct good-faith negotiations and license their patents on terms that are **fair, reasonable, and non-discriminatory** ("FRAND") during the process of developing the next generation of a standard.
    - **Licensees and licensers almost always reach licensing agreements without needing litigation**. Nokia — one of the biggest SEP owners — notes that only 2% of its SEP licensing agreements needed litigation out of the 250 licensing agreements it has reached since 2017.
    - A 2023 study from the European Commission — the executive branch of the European Union — found **no evidence** that the current legal framework discourages "potential contributors from participating in standards development, or discourage[s] potential implementers from creating products that use technology standards subject to potential SEPs."
- The claims of price gouging are particularly nonsensical, given the low real-world costs of licensing SEPs. For instance, it costs automakers about $30 to equip a car with patented 5G technology for the lifetime of the vehicle — less than a single tank of gas.
- Letting companies work out FRAND agreements amongst themselves — with courts mediating rare disputes — will ensure that licensees can affordably access key technological standards while still preserving licensers' incentives to innovate far better than any system that relies on top-down government price-setting.

Patent "Gaming" Is Preventing Generic Competition

- Another common myth is that drug companies' "gaming" of the patent system impedes access to generic medications and keeps prices high.
- Bemoaning a lack of generic competition discounts the reality that **9 in 10** U.S. prescriptions are filled with generic drugs. When available, generics are dispensed 97% of the time.
- In fact, the United States has the highest generic rate in the developed world. Unbranded generic drugs make up 90% of U.S. prescription drug volume, and 41% of volume in other nations, according to a RAND Corporation report.