



Andrei Iancu, Co-Chair
David Kappos, Co-Chair
Judge Paul Michel (Ret.), Board Member
Judge Kathleen O'Malley (Ret.), Board Member
Frank Cullen, Executive Director

Addressing Patent Myths

Activist groups routinely accuse companies of “abusing” the patent system by engaging in practices such as “patent thickening,” “evergreening,” and “product hopping,” 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.

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.

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 “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.