

Patent Law, Technological Dissemination and the Forgotten Non-Creative User

Gaia Bernstein

Legal scholars generally believe that patent law is charged with promoting both innovation and dissemination, yet, they disagree as to whether it succeeds in advancing these twin goals. This Article argues that patent law fails to encourage dissemination because of an inherent limitation in patent law doctrines. It analyzes patent law doctrines that target the invention post its market entry and shows that patent law regularly uses competition as a proxy for dissemination, focusing solely on the effects of the actions of the patentee and his competitors on dissemination.

The Article argues that the patent system fails to encourage dissemination because it focuses on the actions of the patentee and his competitors and ignores the user. It argues that the user in his everyday decisions to adopt or not to adopt a technology plays an important role in determining whether a new technology will be disseminated. Specifically, it analyzes the sources of user resistance dividing them into two broad categories: resistance due to novelty and resistance due to perceived consequences.

Traditionally, the adoption process of new technologies is governed by the market rule, that is, the market should decide which technology is adopted. Yet, this Article proposes that government intervention gently nudging the user could be particularly effective in accomplishing the dissemination goal. It concludes by suggesting two instances, in which government intervention is particularly warranted. First, when market failure occurs because a technology is dependent on network effects and the accumulation of a critical mass of users. Second, when time is of the essence and there is a critical need to disseminate a technology quickly.