

## *Competitive Patent Law*

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In his 2011 State of the Union Address, President Obama argued that to obtain economic prosperity, the United States must “out-innovate . . . the rest of the world.” Because innovation is a prominent goal of patent law, this Work-in-Progress examines the extent to which U.S. patent law can and should provide U.S. business and inventors with competitive advantages over foreign competition. Currently, U.S. patent law does not explicitly favor U.S. interests. In fact, international treaties prevent the United States from enacting such protectionist patent laws. As a result, U.S. patent law operates as an international commons in which inventors and companies from different national economies compete for exclusive rights enforceable throughout the United States.

U.S. patent law nevertheless may be able to provide competitive advantages for U.S. businesses and inventors to innovate. Even within a commons, competition for resources can be affected by factors external to the commons. For example, although a stream may be a commons for the purpose of fishing, differences in training and equipment may help some people catch more fish than others. Similarly, while U.S. patent law cannot explicitly favor U.S. businesses or inventors, some people are more successful than others in discovering and patenting new inventions. Moreover, in at least one respect, patent law can help to create an advantage that is external to formal patent law: U.S. patent law can, to a certain extent, shape U.S. culture, and culture can affect innovation. U.S. patent law consequently can provide a domestic competitive advantage by fostering in the United States a culture that promotes innovation, particularly within certain industries. Moreover, such pro-innovation effects are likely pro-competitive and should be encouraged.

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