

Intellectual Property for Market Innovation

by Michael Abramowicz* and John F. Duffy**

Intellectual property protects investments in the production of information, but the literature has largely neglected one type of information that intellectual property can protect, information about the market success of goods and services. A first entrant into a market often cannot prevent other firms from free-riding on information about consumer demand and market feasibility. Despite the existence of some first-mover advantages, the incentives to be the first entrant in a market may sometimes be inefficiently low, thereby giving rise to a net first-mover disadvantage. Intellectual property can sometimes counteract this inefficiency by providing market exclusivity, thus promoting earlier entry. The goal of encouraging market experimentation may help explain some otherwise puzzling doctrines observed across many areas of intellectual property law. Nevertheless, traditional branches of intellectual property law are generally constructed to address other economic concerns and are now poor vehicles for encouraging optimal market experimentation. A possible remedy would be for the patent system to protect inventions that are technically obvious but whose commercial success is nonobvious. Although existing patent doctrine could be modified to provide such protection, the patent office is unlikely to be institutionally capable of judging commercial risks. An alternative approach would be to rely on market-based incentives to provide information about whether commercial success is sufficiently nonobvious to merit protection. Such an alternative is a promising avenue for legislative experimentation.

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