The Myth of Downstream Development Suppression by Patents: Merges and Nelson’s Evidence Reconsidered

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and

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ABSTRACT

The thesis that ‘pioneer patents of broad scope’ in automobiles, radio, aircraft and incandescent lighting technologies have blocked downstream technology development has acquired widespread credence and its reexamination is important because it has been used to promote a policy of weak patent rights (Merges and Nelson 1990, p171-172; Merges 1994a; Merges and Nelson 1994). This paper marshals the extensive available empirical evidence that bears on the existence of the alleged development blocks and shows that in all these technology cases it did not occur. Therefore, the thesis that pioneer patents cause social harm through the obstruction of downstream technology development is unsupported by the evidence in these cases. Nor do any of these cases illustrate, as has been alleged (Merges 1994a), the theoretical scenario of ‘bargaining breakdown’ in patent licensing negotiation. It follows that policy recommendations for weaker intellectual property rights derived from these cases have no empirical support and are unsound. What is shown is that in each of these cases, pioneer patents faced legal challenges over the validity and breadth of their claims. Whereas the litigants may have suffered legal setbacks when patent rights were clarified, these legal setbacks did not set back or block technology development.

Keywords: Patent litigation and enforcement, claim construction, claim scope, claim breadth, downstream technology suppression, design around, licensing, infringement, Wright Brothers, Wright-Martin, Selden, Edison, De Forest, Fleming, Marconi, General Electric, Ford Motor Company, Curtiss Aeroplane Company.

Full paper is in preparation. Working version will be posted here soon.


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