

# Pros and cons of pharmaceutical patents



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## Pros and Cons of Pharmaceutical Patents

Considering that patents were originally designed to protect the work of an individual, and that in the pharmaceutical industry it is usually the company that hold the patent rights, what is the theoretical justification of maintaining the current system.

Consider only the US market and use models that address the issue from an economic perspective

This essay concerns the advantages and disadvantages of patents in the USA. Broadly, two main arguments stem from the idea of patents in relation to the American pharmaceutical market. One is that, since patents were designed to give protection to the work of the individual the idea that patents are now used to confer rights on third parties such as pharmaceutical companies is a situation which is undesirable because it goes beyond how patents were originally intended to function. The second argument defends the rights of third parties such as pharmaceutical companies to be protected under patent laws on the basis that this function of a patent has evolved pragmatically and remains to be an important element of patenting rights law in the USA. Various economic arguments have been advanced in support of the later argument, whereas various ideological and economic arguments have been advanced to support the traditional interpretation of how a patent should function and in what circumstances. This essay will consider these arguments in depth. As a prelude to this analysis however, the idea of a patent will be defined and

explained, and there will be a discussion regarding models of patent functioning.

A patent

Patents are rights granted, endorsed and enforced by government <sup>[1]</sup>. The rights associated with patents are exclusive rights and these prevent others from selling, manufacturing, making, advertising or otherwise using the invention or idea over which an individual has a patent <sup>[2]</sup>. Grubb (1999) gives us the following definition of patents:

‘ A patent may be defined as a grant by the state of exclusive rights for a limited time in respect of new...useful invention. These rights are in general limited to the territory of the state granting the patent, so that an inventor wishing protection in a number of countries must obtain separate patents... <sup>[3]</sup>’.

Patents have been compared with property rights as patents effectively convey rights which are akin to property rights to the patent holder <sup>[4]</sup>. Importantly, in the context of this question, a patent or certain rights associated with it may be legally transferred to another <sup>[5]</sup>. The process of obtaining a patent involves compiling a detailed specification of the idea or invention which the patent is sought in respect of. This procedure makes it more clear what the patent holder will regard as an infringement of their patent rights. In the USA, this process of description and specification is referred to as the patent specification. This patent specification must comply with national patent laws. Attempts have been made to ensure that patent

laws are applied with uniformity on an international level <sup>[6]</sup>. These attempts have been organised, in large part by the World Trade Organisation <sup>[7]</sup>.

Why do patents exist in the pharmaceutical market?

Without patents, there would be no incentive for inventors to divulge their ideas and inventions to the general public. Where inventors of drugs and pharmaceutical innovations are concerned; without the protection which patenting offers, there would be no incentive, firstly for the inventor to devote time and effort to the formulation of their invention, since others could so easily replicate it and secondly an absence of patenting could encourage inventors to protect their ideas through secrecy and non-disclosure <sup>[8]</sup>. Therefore, an absence of patenting laws can be tied indirectly with the thwarting of innovation and with the thwarting of the disclosure of technological advances to the general public <sup>[9]</sup>.

Some advocates of patents have argued that the process of patenting contributes to the economy, since it encourages companies to invest in research and development <sup>[10]</sup>. The absence of patents imputes the converse of this rationale. The reason for this is that companies invest in research and development because the development of technological advancement can be productised and marketed; often generating huge profits for the company with successful research and development projects. Patenting makes this productisation process very profitable, since the patenting process ensures that others do not replicate the product concerned to gain a share of the potential profits <sup>[11]</sup>. This creates an

incentive for companies to invest money in research and development and this investment leads to technological advancement <sup>[12]</sup>. The incentive would not exist without the protections which patents can provide.

Critics of patenting processes also argue that patents encourage monopolies <sup>[13]</sup>. Companies, for example pharmaceutical companies who patent drugs can sell those drugs at quite high prices. The process of competition would ordinarily discourage this method of artificial pricing, but the operation of a patent can preclude most forms of competition <sup>[14]</sup>. Patents have also been critiqued given that they preclude competition even where another inventor has created the same or a similar product using independent methods.

The theoretical justification for maintaining patents in their current form in the pharmaceutical market

Patents are particularly important within the pharmaceutical industry in America. As explained above there are large costs involved in the research and development process. Conaway (2003) illustrates this:

‘ The Pharmaceutical Research and Manufacturers of America, the pharmaceutical industry’s trade association, estimates that the U. S. pharmaceutical industry spent over \$30 billion just on research and development in 2001.... In total, each new drug that makes it to market can cost half a billion dollars to develop... <sup>[15]</sup> ’.

As Conaway goes on to argue <sup>[16]</sup>, this means that where innovations are discovered in the pharmaceutical industry, the profits which emanate from this have to be maximised to make the large levels of research and  
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development investments worthwhile. These constraints are what make patents in the pharmaceutical industry so important, as without patents, technological innovations in the pharmaceutical field can be pirated, which in turn thwarts profit.

How can this be reconciled with the idea that patents were intended to protect the work of the individual, which was the original function of a patent? The answer is that it does not have to be reconciled in this way, since patents continue to protect the work of the individual, albeit in a more complex way. To see how the current system continues to operate to protect the work of the individual one simply has to unravel the dynamics of corporate pharmaceutical processes and examine them more closely. As we have seen in the last section, the rights in patents are in many ways akin to property rights. These rights are transferable. Individual inventors may transfer, license or otherwise confer patent rights upon corporate pharmaceutical actors. This transfer benefits the individual inventor, since the individual can expect to be remunerated in exchange for the patent rights or in exchange for certain rights in patents. Therefore the current system continues to protect the work of the individual, albeit indirectly.

Where an individual who works within industry invents a patentable idea, and they have invented it through the use of the research and development money/resources available from their employers or sponsors, the individual often waives their rights to claim an interest in the idea they create, since it would not have been possible to do this without the investment of the employer/sponsor. It may not be reasonable to expect a patent to operate to protect the work of the individual in these circumstances since the individual

no longer has an individual claim to the invention. In these circumstances the patent may be held by the pharmaceutical company, as individuals can only legitimately expect to have an individual claim to the patent rights where the idea is the product of purely their own efforts and investment. In another indirect way however, this arrangement does operate to protect the work of the individual since, although the individual may have waived their rights to claim individual patent rights, these individuals are often engaged in high income jobs.

Another example of why there is a theoretical justification for the current system involving the protection of the rights of the individual in the pharmaceutical market is as follows. It is also often the case that inventors in the pharmaceutical industry in the USA want to concentrate their efforts on what they are good at, which involves the research and development of new drugs. The idea of patents which protect the work of individuals therefore still exists since many inventors wish to transfer their interest in the invention in exchange for remuneration. The inventor would not be remunerated were it not possible to transfer patent rights in this way. Therefore, the patent operates to protect the rights of the individual before the transfer occurs. It is surely reasonable to sanction the idea that the individual may then use this benefit in the way that he or she sees fit.

This essay has discussed the pros and cons of patents in the pharmaceutical industry. It has explained the rationale behind economic models which advocate and repudiate the modern operation of patent rules and laws. However, this system works and although it represents a deviation from the original conception of patent law; pointing to this deviation in itself is not

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enough to effectively critique the transition. This is because patents continue to protect the work of the individual. This usually happens in a more indirect way, but this system has not disenfranchised the individual. Therefore systems of patent transfer and the processes where patents are used have evolved pragmatically and these processes continue to protect the interests of individuals, albeit in a more complex way.

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### Footnotes

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