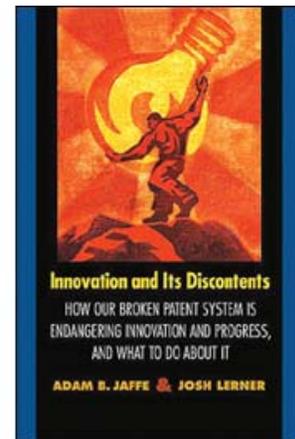


Adam B. Jaffe and Josh Lerner, **Innovation and Its Discontents: How Our Broken Patent System is Endangering Innovation and Progress, and What to Do About It**, Princeton University Press, 2006, 256 pp., \$22.95 (paperback).

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Economists Adam Jaffe and Josh Lerner set out to explain the inefficiencies associated with the United States' current patent process, and to offer tangible solutions to correct the system's inadequacies. Their main argument is that the patent system is broken, with the major cause of the problem being that, today, almost anything is patentable. Currently, patent examiners accept patents at a much higher rate, and they are granting innocuous patents. Also, patent holders have exploited their legal strength by suing the real innovators, hampering the ability of many new companies to compete. The authors contend that the rise in weak patents has severe implications on innovation because valuable innovations are tied up in litigation, limiting consumer access to new and important innovations. In clear prose, the authors shine a spotlight on a serious issue that needs attention so that future innovations are not stifled.



Innovation and Its Discontents argues that the current state of the U.S. patent system has caused an increase in patent filings for inventions that seem obvious, which has raised the cost of litigation needed to defend one's patent. The main unintended consequence is a dramatic rise in patent litigation. This increase in litigation makes the lawyers, rather than the innovators and entrepreneurs, the integral component of the patent system. The repercussions are that more firms are obtaining patents and creating a basis for more lawsuits so that they can be used as a source of income. These lawsuits make it more difficult for new, smaller companies to compete because they cannot pay the high costs of litigation to protect their inventions. Often, they are forced to settle with the larger companies that hold large numbers of patents. The rise in litigation has severe implications for the future of innovation in the United States. Small entrepreneurial innovators cannot compete with the large arsenal of patents large corporations have built, causing novel innovations to be lost. If the current system is not changed, the authors believe, more vital innovations will remain tangled in lawsuits.

Jaffe and Lerner make a persuasive argument for the necessity of a more effective patent system. They point out two major historical events that had a profound effect on the current U.S. patent system: a change in the way in which appeals of patents were heard in federal court, and then a shift in the patent office's financing structure. The first modification made the Federal Circuit Court of Appeal the sole forum for appealing District court rulings on patent disputes. This move made patents both more difficult to attack and more likely to be held valid if challenged in court. The second shift changed the funding source for the U.S. Patent and Trademark Office from tax dollars to collection fees. This switch has

made it much easier to obtain a patent, since funding comes from the number of patents awarded. Jaffe and Lerner show how these changes weakened the effectiveness of the U.S. patent system. Their analysis supports the idea that these transformations expanded patent-holder rights, causing an increase in the issuing of "bad" patents, as well as an explosion of costly litigation that harms innovation by discouraging the small inventors.

The work is divided into an introduction and seven chapters that lay out how the patent system works, what is wrong with it, how it got to the state it is in now, and what should be done to reform the U.S. patent system. Chapter 1 describes how the patent system works and introduces the legal requirements for patents—utility, novelty, and nonobviousness. Chapter 2 explains the problems with the current patent system. Chapters 3, 4, and 5 discuss the trajectory of patent policy that led to the current state of the patent system. Chapter 6 considers the necessary requirements to make patent reform possible, and the concluding chapter proposes tangible reforms. They urge the U.S. Patent and Trademark Office to create better incentives to discover prior art, such as issuing a public notice of an "intent to issue" so parties could submit information relevant to the invention's novelty. They suggest putting in place several levels of patent review, so that trivial patents could be examined at lower levels, leaving the thorough investigations for more important cases. They also favor replacing jury trials with judges, because juries are often easier for well-funded patent holders to sway. Finally, they suggest the U.S. move from our current system of the "first to invent rule" to a "first to file rule", which would grant the patent to the first person to file for the patent, rather than first to invent it, thereby eliminating much of the litigation over priority.

Executives, policy makers, and innovators seeking to understand the current patent policy and its pitfalls are the intended audience for *Innovation and Its Discontents*. The authors are clear and to the point in their arguments and convincing in their presentation, so general readers will also have no trouble following their argument. Despite the dry subject matter, Jaffe and Lerner's wit makes the book engaging and quick to read.

The authors use engaging stories to illustrate their points, which helps to counteract the dryness of the economic data and statistics that they present. For example, they present the case of Smuckers, a peanut butter and preserves manufacturer, which sued another company over their patent of crust-less peanut butter and jelly sandwiches. This example highlights the absurdities with the current patent system. They also illustrate the history and evolution of the patent system, which helps explain the context in which the current patent system is based.

Some of Jaffe and Lerner's claims about how the current system severely harms innovation could be supported more strongly. The evidence they provide for the negative impact of the current patent system is limited. Although their argument that the high cost of patent litigation is detrimental to progress in innovation seems solid, the other costs of the current system need more quantifiable evidence to demonstrate the connection between certain inadequacies of the system and their direct impact on innovation.

The authors provide anyone concerned with patents and intellectual property a strong background and understanding of the process. Jaffe and Lerner make a compelling case that the United States' current patent system has detrimental effects on the progress of innovation.