

*Patent Remedies in Your Face*

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**Abstract**

Once a joint domain of inertia and arcana, questions about remedies for patent infringement now generate heated public debate. A recent Supreme Court decision has spawned conflicting answers from courts and commentators about when courts should issue injunctions forbidding continued infringement. On Capitol Hill, Orwellian-named entities representing a variety of industry heavyweights have poured millions into lobbying for or against patent reform bills, with a major focus of dispute being legislative language regarding damage awards.

Amidst all the commotion, one fact remains clear. We have little specific sense of what the value of patent remedies either generally is or should be. Such ignorance might inspire despair. I argue that it in fact suggests that policymaking should take guidance from three principles of adaptation and two principles of implementation: (1) nonabsolutism in the formulation and application of legal doctrine; (2) antidiscrimination with respect to business models; (3) learning, an interest in fostering the production of useful information; (4) devolution of significant decisional responsibility to private or government parties nearest to the facts of an individual case; and (5) administrability. Although these principles do not uniquely determine any single best system of patent remedies, they provide a framework for assessing the relative merits of policy proposals and for suggesting ways in which proposals can be improved. In particular, the principles have implications for current debates regarding the availability of permanent injunctions, the calculation of reasonable royalty damages, and the possibility of remedial exemptions for prior users or independent creators.

