Why patents?

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We might as well begin at the beginning: the U.S. Constitution, which is very clear about why patents may be granted [Art. I, §1(8)]:

> The Congress shall have power to [...] promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

So right there in the Constitution we see why patents are granted: to promote the progress of science and useful arts.

The simplest way to explain it is that patents are an after-the-fact research grant. Because writers and researchers in many fields may spend years working on a single, simple output, we grant them a limited monopoly in their work so that they can recoup the costs of production.

Or more simply, patents are a market intervention by the government to overcome a certain situation where the market can't function without intervention. I'll have much more on this later.

Thomas Jefferson, who had the main rôle in writing the patent clause, was clear in his understanding that patents are a monopoly—in one letter, he used the term "the embarrassment of an exclusive patent." Section II of the write-up of Graham v John Deere goes into great detail on the evolution of Jefferson's beliefs, and how clearly he understood that patents are a limited monopoly to be granted for the evocation of innovation.

It seems so easy, yet many people impart a great deal of meaning on the patent. Some compare it a little too closely to ordinary property, and presume that a mechanical or chemcial design can be "found" like a nickel on the street, and the first person to find it is the owner of the design, and gets to charge others for its use under the "finders keepers" doctrine.

Others take this even further and make an ethical case: the first to discover a new chemical *deserves* ownership of the design. You often see this in claims of patent infringement, which often read more like a tirade that the patent-holder's daughter was wronged than a statement that a limited monopoly was infringed. For example, in this press release[1], competitors are "misappropriating" technology, even though they may

[1] `http://www.foxbusiness.com/markets/industries/industrials/article/voip-eyes-patent-infringers-uspto6501837_475509_6.html`

have independently developed the system [More on this later]. "These patents [. . .] will be utilized to provide the shareholders with the value they deserve."

The Constitution's authors (with TJ in the lead) did good with the clause above that disregards the natural-rights theory and the moral rights theories of intellectual property law, because ethical arguments just don't go anywhere. Does the second-to-invent deserve a share of the patent or deserve to get sued? It rubs most people the wrong way to think that laws of nature, such as the law of gravity or mathematical formulæ, could be held in a limited monopoly by one person, and that we'd have to pay to make use of them. That is, there are ethical arguments against patenting laws of nature, even though others comfortably make ethical arguments supporting the same. And whether the shareholders of the above stock deserve to be paid is more a question for their family, friends, and religious leaders than for the Patent and Trademark Office.

Let me mention one company that gets it right: Microsoft. When you dig up direct statements from Steve Ballmer or Bill Gates, you find that they frame the whole patent thing entirely in terms of a game that businesses have to play. There's no claim (that I've seen) that the game makes for a better world, or ethical claims about Microsoft owning or deserving anything. They simply point out that there's a law that dictates that a game must be played, and that some people play the game willingly and some people are going to get forced into playing.

I'll conclude with an emphatic re-statement of my original claim: patents are intended to promote the progress of science and the useful arts, and the U.S. government does not have the power to grant them for any other use. But the restatement won't be mine, it will be from Justice Clark's decision in the above-mentioned Supreme Court case of Graham v. John Deere [383 U.S. 1 (1966)], regarding the "promote the progress" clause:

> The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices - eventually curtailed by the Statute of Monopolies - of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. [...] The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. [...] This is the standard expressed in the Constitution and it may not be ignored.