

4.1. Learning from Past Mistakes - The US Patent System and International Trade Agreements

Robin C. Feldman - University of California Hastings College of Law, San Francisco

1. With the increasing importance of mega-regional agreements in the area of innovation and intellectual property, it is important that we learn from past mistakes. In particular, we should try to learn from the two areas of US law that are creating challenges.
2. First, the rapid emergence of modern non-practicing entities, those who core activity involves licensing or litigating patents, is creating problems for the US system. The costs and risks of US litigation, combined with the complexity of the system, is creating opportunities to bargain, even when the patent is weak or is aimed at a company that is not infringing.
3. Second, the US pharmaceutical system has struggled with strategic behavior that blocks or delays introduction of generic drugs, either through patents or non-patent exclusivities. Again, the complexity of the regulatory and litigation systems create opportunities for suboptimal behavior.
4. As we develop regional and global intellectual property frameworks, the focus should be on streamlining complexity and on the creation of new products, rather than the creation of new intellectual property games and stripped markets. In this era of mega-regionalism, we should export the strengths of the US intellectual property system and not its flaws.