

**The Effect of Disparate Treatment of the Experimental Use
Exemption on the Balancing Act of 35 U.S.C. § 104
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There is arguably no weapon in intellectual property law with greater wielding power than the patentee's right to exclude others from the making, using and selling of the patented invention. The provision in U.S. Patent Law, which provides the patentee with this right to exclude,¹ is in keeping with the constitutional dictate that patents shall be awarded "To Promote the Progress of Science and useful Arts."² In return for this right of exclusivity, the patentee must disclose the invention in the application in a manner which is sufficient to enable others who are deemed skilled in the art to make and use the invention.³ As this exclusivity is considered to provide an incentive for inventors to disclose to the public the results of their research, there are few exceptions to this right. However, one notable exception, which has received considerable attention recently in the drug development arena, is the experimental use defense, i.e., the exception to patent infringement that allows for the unlicensed construction and use of a patented invention under certain circumstances.