Lawyers suggest better labeling on prophetic patent applications

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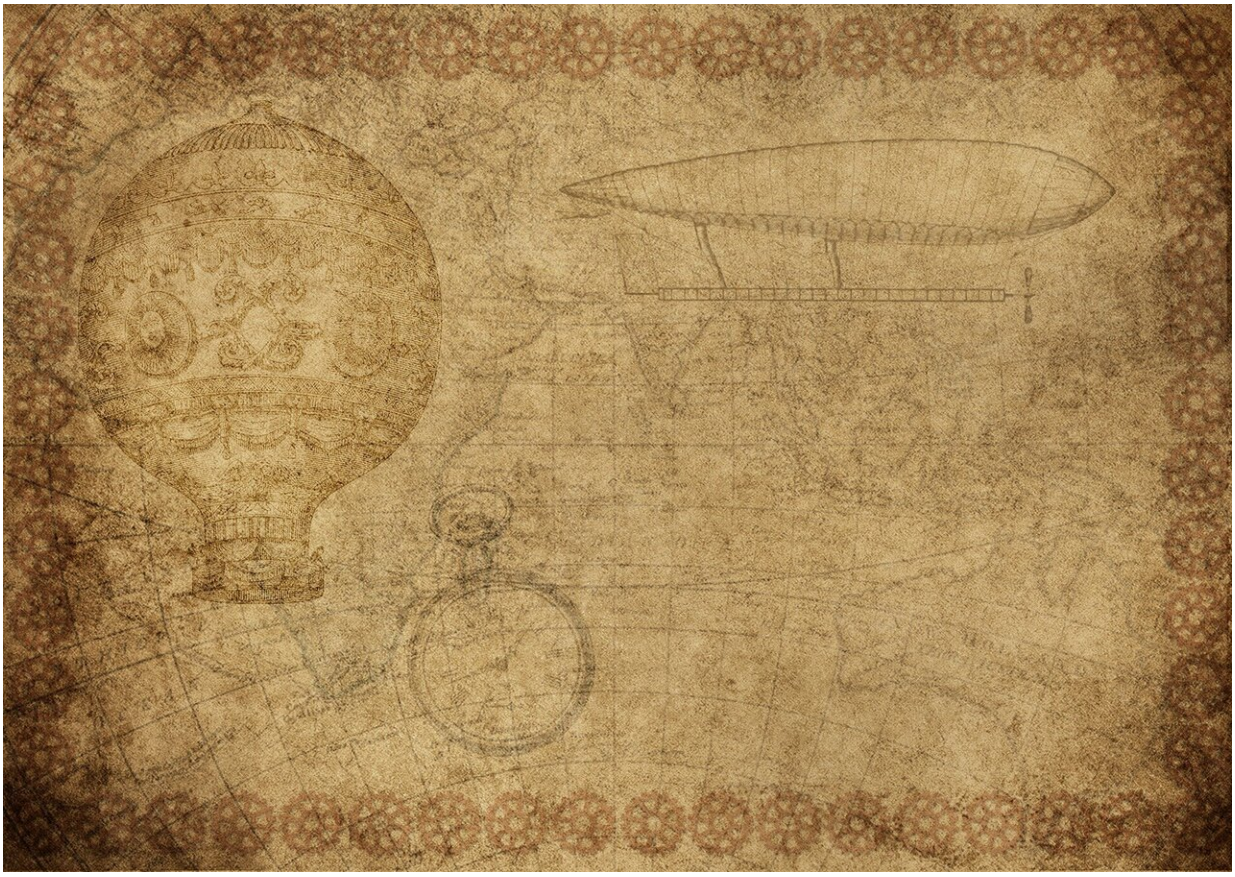

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A pair of lawyers, one with Fordham University, the other, Stanford Law School, have published a Policy Forum piece in the journal *Science* in

which they decry the use of poor labeling on prophetic patent applications. In their paper, Janet Freilich and Lisa Larrimore Ouellette point out that it is possible to apply for and receive a patent on an invention that has not yet been demonstrated. They note that such applications can be confusing to scientists, who may not realize that claims made in such patents may not actually be true.

As Freilich and Larrimore Ouellette note, it is perfectly legal to apply for a patent for what they describe as "predicted experimental methods and results." They further note that it is a common practice in biology and chemistry research, especially when researchers are working on time-sensitive experiments. The reason a company would apply for a patent before actually creating a product is concern about being scooped by a competitor. Freilich and Larrimore Ouellette have no quarrel with the process. What disturbs them is the way that many researchers fill out their application forms.

They note that very often, researchers describe their prophetic projects as if they have already demonstrated that a technique works. To prove their point, they did a search on 100 randomly chosen patent applications found to be prophetic in nature—99 of them were written in a way that made it very difficult for non-lawyers to see that the patent author had not actually conducted the work of demonstrating the product. The problem arises when such applications are accepted and a patent is awarded. Typically, there is no second step for updating the application once researchers have demonstrated whether or not a technique works. This means that other researchers looking at the patents have no way of knowing if the work was ever actually conducted.

Freilich and Larrimore Ouellette note that there is a simple solution to the problem—to require appropriate labeling in patent applications. They also suggest encouraging people who write patent applications to avoid using language that fails to make a distinction between work that

has been done and work that has not.

More information: Janet Freilich et al. Science fiction: Fictitious experiments in patents, *Science* (2019). DOI: 10.1126/science.aax0748