

*Interdependent Invention:
A Limited Defense of Absolute Infringement Liability in Patent Law*

Robert Merges

Professor, Berkeley Center for Law & Technology
Berkeley, CA

I propose a partial defense of patent law's absolute liability rule. This rule makes it irrelevant whether an infringement defendant copied from the patentee or independently invented the patented invention. I draw from two literatures to make my point. I look first to studies of how technological information is communicated or "diffused". These studies, together with research by psychologists on "inadvertent copying", demonstrate that ideas are sometimes copied in obscure and subtle ways, leaving little or no evidence that copying has indeed occurred. Next, I turn to the literature on optimal standards of care in tort law. I use it to describe what would happen if U.S. law changed to require patentees to show copying. Potential patent infringement defendants - a class that includes virtually all people and companies performing research and development (R&D) - might well impose strict limitations on receipt of technological information, so as to rebut allegations of copying, thereby reducing the risk of legal liability. That would be bad. Technological communities thrive on ubiquitous and unregulated communication. Patent law as it stands encourages this, by making proof of copying irrelevant in patent cases. As a consequence, under the current regime researchers (as potential patent infringement defendants) have no reason to restrict their access to technical communications. For further support, I look to both copyright law and common law rules on the theft of ideas - both of which require proof of copying, and both of which have led potential defendants to invest in restrictive measures to guard against access to third party information. The obvious downside of the current regime is that sometimes, an infringement defendant will really be a true independent inventor; no copying, subtle or otherwise, takes place. Under these circumstances, a recent innovation in U.S. patent law, the new "prior commercial use" defense under the America Invents Act (AIA), may prove helpful. At least the prior commercial use rule encourages activity that has independent social value, in the form of rapid movement toward the market. Given that there are real benefits to the longstanding rule of absolute liability in patent law, this may be the best we can do.

Merges

Email: rmerges@law.berkeley.edu