An Improved Independent Invention Defense

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Abstract

In recent years commentators have debated whether independent invention should be a defense to patent infringement. The debate is at an impasse because it is not clear that the benefits of the defense outweigh its costs. This article proposes a tailored version of the defense that obviates its main costs.

Under the tailored version, courts should excuse infringement if, in addition to the infringer inventing independently, two other conditions are met. One is that the infringer puts the invention to more productive use than the patentee does. This condition is met if the patentee either does not practice the invention or did not start practicing it until well after the infringer had started practicing it. The other condition is that the infringer could not avoid infringing the patent at reasonable cost. This condition is met if it would cost the infringer more to find the patentee’s invention in advance than to invent it independently.

When these three conditions are met, infringement is socially beneficial. Accordingly, courts or Congress could implement the defense by making social harm a prerequisite for patent remedies or for standing. Alternatively, courts or Congress could adopt a patent fair use defense. Or, they might borrow from real property and adopt a patent doctrine akin to easement or adverse possession.