

PRINCIPLES OF PATENT LAW

CASES AND MATERIALS

SIXTH EDITION

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HENRY E. SMITH

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SIXTH EDITION

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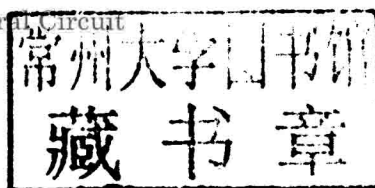
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FOREWORD TO THE FIRST EDITION

By

Giles S. Rich

Don't accept everything you read in this book just because it is in print or written by some court. Judges, like other authors, are not infallible. Controversial and disputed material is included to further one of the objectives of the authors—to make you THINK.

Patent law was long ago referred to as “the metaphysics of the law,” suggesting that it is complex, obscure, arcane, and difficult to understand. There is some justification for the charge, but in its essence patent law is quite simple.

Patents are granted to further the constitutional purpose of promoting progress in the useful arts, on *useful* processes, machines, manufactures, and compositions of matter which are *new* and *would not have been obvious* to persons of ordinary skill in the art. (35 U.S.C. §§ 101, 102, 103). That is the essence. The complications arise because the precise meaning of practically every word in the previous sentence and the cited statutes becomes the subject of controversy at one time or another in litigated cases.

Why are patents granted—for what more specific policy reasons? There are several. Basically, they create an incentive system; and its objectives are diverse: (1) to encourage innovation, the creation of new things and processes; (2) to induce inventors to make early public disclosure of their creations and discoveries; (3) most importantly probably, to encourage the investment of risk capital in the commercialization of inventions so that the public gets to enjoy the benefits thereof; and finally, (4) the inducement of “inventing around” the patents on successful inventions to bring even more improvements to the public—a “we can do it differently, or even better,” sort of thing.

In what way do patents provide these incentives? In one simple way: by giving to the inventor or inventors or their assignees—whoever owns the patent right—a single, simple thing, *the right to exclude others* from making, using, or selling whatever the patent covers. This legal right the law regards as a “property right.” In recent years it has acquired the name of “intellectual property”—one form of it—or “IP.” The power of the federal courts is made available to patentees for the enforcement of this *right to exclude others*. Who are these “others”? Competitors, of course. The patent right, while it lasts, because it is limited in time, is an anticompetition device, a limited-in-time monopoly in the limited sense that the patentee has the potential to be the sole seller of what is protected by the patent. This monopoly power is the mainspring that drives the system. We have other laws that frown on monopoly in other forms—the antitrust laws—and this has caused periods of confusion in the courts, persuading them at times to look askance at patents as monopolies. But this attitude seems to have been dissipated. Perhaps the courts have come to see the distinction between the limited power of the patent right and the extensive market power with which antitrust laws are concerned. There is nothing inherently evil about monopoly power. Property rights in general are a form of monopoly. It is simply power which can be put to either good or bad uses. The patent system puts it to good use as an incentive to innovation.

What you hold in your hands—this casebook—is in major part a collection of court *opinions* and commentaries thereon by the authors and others, in cases involving disputes over patent rights, mostly suits by patentees against alleged infringers, those accused of making, using, or selling patented inventions without the permission of the patent owners. Many people, including lawyers and judges, have the careless habit of calling these opinions “decisions,” which they are not. The opinions may state, at the end usually, what the decision is, but the decision is a thing apart from the opinion, which is an explanation or rationalization of the decision showing how it was reached. Decisions are usually stated in final judgments, short, concise statements of the result or results reached by the court for the reasons stated in the opinion. Many decisions these days, due to the pressure of heavy case loads, are rendered without opinions.

* * *

A particularly innovative and intriguing feature of this book is the “*SIDE BAR*” commentaries. They are contributed by judges, including some of my colleagues on the Federal Bench as well as a British IP judge; lawyers, many of whom were former law clerks on the Federal Circuit or its predecessor, the Court of Customs and Patent Appeals; current law clerks; a former Commissioner of Patents and Trademarks; and other professors. There are twenty-two *SIDE BARS*, as of this writing, on as many different topics.

One problem with teaching and learning the law from cases is that the law is not static and to give historical perspective to it both old and new cases are presented. The old cases have often produced opinions the reasoning of which is obsolete. Even some terminology has changed. A warning is therefore in order that in a couple of important respects major changes in patent law have occurred.

The first such major change is with respect to the statutory prerequisite to patentability, now known as non-obviousness and found in Section 103 of the 1952 Patent Act. Section 103 had no statutory predecessor and replaced a judge-made case law requirement for the presence of “invention.” It was a sort of mystery. The Supreme Court once said that invention could not be defined. The requirement realistically said nothing more than that to be patentable an invention had to be the result of invention, a sort of “you know it when you see it” proposition. Beware, therefore, of opinions prior to January 1, 1953, when the act took effect, and to be safe, for a decade thereafter, because the courts, the Patent Office, and many lawyers were slow to take in the effect of Section 103. Old habits of thought are broken slowly.

Another source of possible confusion in pre-1953 opinions is with respect to the patent right itself. What did the government grant to the patentee? Before 1953, the old statute, Revised Statutes, § 4884, provided for a grant of “the exclusive right to make, use, and vend the invention or discovery.” Just what did that mean? Did the patent grant a right to make etc.? Even the U.S. Department of Justice was misled by that ambiguous language into arguing in a brief that it gives the patentee only the privilege or permission to make, use and vend the invention. However, long before that the Supreme Court had solved the puzzle, holding in *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1852), that “The franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented. . . . This is all that he obtains from the

patent.” Wherefore, the 1952 Patent Act changed the statute to say that the patent grants “the right to exclude others,” thus ridding us of the ambiguous “exclusive right,” a term you will still see, however, when people quote old opinions, the old statute, or the patent and copyright clause of the Constitution, Art. I, Sec. 8, Cl. 8, which foisted the term “exclusive right” upon us.

Having posted these warnings about what to watch out for in reading old cases, here is a final thought to ponder in reading any opinion right down to date.

We know that the patent grants the right to exclude, and that is all, and we know that the patent right is limited to what the patent *claims*. The statute providing for claims, § 112, ¶ 2, says that the “specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.” That language was carried forward in 1952 from very old statutes enacted when claims were very different from what they are today. It is anachronistic. What the inventor regards as his invention has very little, if anything, to do with most claims. Claims are drafted by attorneys and agents. Their wording ultimately must satisfy patent office examiners that they distinguish, distinctly and with particularity, from all prior art known to them. When litigated, they have to satisfy the judiciary to the same effect and probably with respect to prior art the examiner did not know about, which has been found by the defendant’s attorneys. And when all is said and done and the court has spoken, *what is it that the claims point out?* What the inventors invented? Or the scope of the invention? Not likely! It is the claims that have determined what infringes the patentee’s right to exclude, construed in the light of the specification—or, more accurately, the “written description” portion of it, because the claims are also a portion of the specification. The prosecution history of the application is also considered in construing the claims. Infringement, in turn, is a violation of the patentee’s *right to exclude*—which is all he gets from his patent—so why is it not the reality of the situation that *the claims are the measure of the patentee’s right to exclude* rather than the measure of what was invented. Stated another way, aren’t the claims *really the measure of the scope of the patent right, which is the right to exclude* rather than definitions of the invention?

And as a kind of postscript to that final point, is it really *the patent* that is infringed? The patent is the government document giving to the patentee the right to exclude others. Isn’t it that right to exclude others that is violated by the infringer rather than the patent which granted the right to the patentee? If yes, then “patent infringement” is at least a misnomer. Perhaps, strictly speaking, there is no such thing as patent infringement, but only infringement of the right to exclude, the property right granted by the patent. After all, if someone trespasses on your land, you don’t prosecute for violation of your title but for violation of your rights as a property owner. Patent infringement is a form of trespass, a tort. The Black’s Law Dictionary (2d ed., 1910) definition of “infringement” is interesting in this connection: “A breaking into; a trespass or encroachment upon; a violation of a law, regulation, contract, or right. Used especially of invasions of the rights secured by patents, copyrights and trademarks.”

Read on and learn all about it, but be careful. I believe that progress in legal thinking is not only possible but essential and that this generation

should have a clearer understanding of patent law than previous generations, notwithstanding *stare decisis*. So THINK!

Washington, D.C.
22 May 1998

PREFACE TO SIXTH EDITION

The time since the Fifth Edition of *Principles of Patent Law* has seen many important developments in patent law, chief among them the 2011 passage of the America Invents Act, key provisions of which have now become effective. While the America Invents Act did not end up satisfying either those who saw property rights in patents as features or those who saw them as flaws, this recent statute was nonetheless the most significant patent law to be enacted in many years, possibly the most significant since the Patent Act of 1952.

This edition of *Principles of Patent Law* incorporates the host of changes in case law and regulatory law since the prior edition and begins the process of incorporating the changes brought by the new America Invents Act. These changes are an ongoing process, and some of them will only take shape over the years to come as patent applications are examined under the America Invents Act's new prior art rules and the resulting patents are challenged in court.

At the same time—and for the next twenty years or so—an enormous body of pre-existing patents and applications will continue to be judged under the old law. For some practitioners—particularly litigators—the old law will be more relevant to their practice. But all practitioners and students of the law should be aware of the cases and history that preceded the America Invents Act for several important reasons, the least of which is that many of the doctrines that evolved under the prior statutes are incorporated into the new statute. The Act is an evolution of what came before, and it can only be understood in context. It is with this in mind that we have endeavored to craft this edition to cover both the old and new law.

As with prior editions, this edition of *Principles of Patent Law* provides comprehensive coverage of the policies, laws, rules, and practices of the U.S. patent system in a format accessible to students, lawyers, government officials, and businesspeople. The Sixth Edition builds on the strengths of prior editions in providing an indispensable combination of the law and economic theory of patents with extensive and diverse legal analyses and practitioner insights. It also continues to offer unique perspectives from the theory and practice of those who use and study property rights more generally and the history of the patent system more specifically. Not only has the Sixth Edition been updated to cover the extensive developments in the law since the Fifth Edition, including the America Invents Act, this new edition also includes materials that contrast the common, utility patent, with other patent-like regimes including plant patents and design patents.

A wealth of supplementary materials are provided in the accompanying website: www.innovation.hoover.org/ppl, including full versions of background documents such as patent files, unedited versions of important cases, extra reading, and special materials designed to help students during their studies as well as while seeking a job. In addition, instructors will have access to extensive supporting materials including a teachers' manual, syllabi, teaching notes for reviewing each section of the readings, supplementary Q&A for class discussion and review, sample exams, and sample exam answers.

On June 9th, 1999, at the age of 95, the 20th Century's preeminent patent thinker, U.S. Circuit Judge Giles S. Rich passed away. On that day,

the nation lost a great asset; and we lost a dear friend. While the patent law community will never be the same, we echo the encouragement he provided us all in his Foreword to this book—to always THINK! This book is dedicated to Judge Rich and his work, which spanned 70 years in the patent field. While it has been over ten years since Judge Rich's passing, his vast work on the patent system continues to be tremendously relevant to today's debates, which feature precisely the same themes from those of the 1940's and '50's that he and other leading centrist thinkers like Judges Learned Hand and Jerome Frank so elegantly guided.

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May 2013

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We also thank the many people who contributed so much to the patent system, generally, and whose excellent work is reproduced, cited, or otherwise reflected herein. The patent system stands today as a testament to their efforts. We thank the prominent members of their professions who generously prepared *SIDE BARS* written especially for this book. The patent system of tomorrow will be shaped by their work. We thank our teachers, advisors, mentors, colleagues, families, and friends, who gave us what we know. We hope to pass the same on to readers of this book. As we worked to do so, we could not have been helped more by any single source, than we were by the vast works of Judge Rich, which span nearly 70 years in the patent law business. Lastly, our acknowledgment would not be complete without also specifically thanking the following individuals and institutions for their critical contributions to this book: Hollie Baker, Roxy Birkel, John Bloomquist, Chris Bracey, Stephen Burbank, Michael Christman, Marie Chow, Laura Coruzzi, Joe Condo, Emil Dabora, Richard Epstein, Steve Errick, Jonathan Fanton, Gerald Fink, Jennifer Gordon, Bob Gorman, Steve Haber, Terri Hitt, Carol Hoffman, Jan Horbaly, George Hutchinson, Paul Joskow, Horace Judson, David Kane, Leo Katz, Seth Kreimer, David Kieff, Elizabeth Kieff, Elliott Kieff, Jacqueline Kieff, Nelson Kieff, Melinda Lindeman, Geoff Manne, Leslie Misrock, Michael Moore, Stephen Morse, Ralph Oman, Troy Paredes, Josephine Pizza, John Raisian, John Reilly, Vince Roccia, Lindsay Russell, Ronald Silverman, Steven Shavell, Michael Schill, Stephen Tapscott, Joel Weiss, Robb Westawker, Miriam Witlin, Henry Wixon, the students and instructors in patent law courses at numerous law schools, The Federal Circuit Bar Association, The Giles S. Rich American Inn of Court, and The Association of Former Law Clerks and Technical Advisors of the Court of Appeals for the Federal Circuit. For those previously unaware of the help they provided, our thanks is overdue. And, to be sure, all errors are our own.

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