

Equivalency and Patent Law's Possession Paradox

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Patents afford the right to exclude others from practicing the claimed invention. The scope of the patent's rights are generally commensurate to scope of the inventor's advance, as objectively assessed from the perspective of a person of ordinary skill in the relevant technological field. Patentees are afforded coverage not only for the literal scope of the claimed invention but also for equivalents of the invention claimed in the patent. The Federal Circuit has clarified that the doctrine of equivalents is most appropriately applied over later-developed technology and, particularly, technology that the patentee could not have reasonably foreseen at the time of her patent application. Of course, this doctrine creates a bizarre paradox - the patentee is given protection over something that, by definition, was not in her possession at the time the patent was granted. The doctrine of equivalents says that you also get coverage for something beyond the inventor's contribution. It makes equivalency seem like a windfall. In this paper, I will explore the theoretical and political bases for the doctrine of equivalents and provide two reconciliations of this paradox. The narrower form is that equivalents should only apply if the "later developed" technology is from without the inventor's field of technology. Patent law already has doctrinal mechanisms to make such an assessment, and I would explicitly incorporate those into the equivalency analysis. Theoretically, this approach provides a balance between affording fairness to the patentee and avoiding affording too much protection under the patent. The stronger form would be to ask the question, as of the time of infringement, would someone reading the patent be able to make the accused device? In other words, even if the technology is later developed, would the field have evolved enough to justify the patentee's contribution as covering the accused device?