

Better Patenting

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In exchange for conceiving of an invention and explaining how to practice it, patent law provides inventors a limited monopoly. In this way, patents are supposed to encourage innovation and benefit society. Yet, under current law, patents can be obtained on technology that is no better than the prior art. Patents must simply cover technology that is new and non-obvious. For the most part a “betterness” requirement is unnecessary. Most inventors don’t waste their time and money patenting inventions that are not somehow faster, stronger, more efficient or otherwise better than what was done before. Unfortunately, other motivations can lead to patenting inventions that are no better than the prior art in two notable areas. Patents that cover both interfaces and ancillary inventions in the pharmaceutical field often fail to advance technology in any meaningful way.

Companies often develop new interfaces and patent them so that they can tie two products together. This is true even when the patented technology is not better than what was done before. Such patents allow companies to exclude their competitors from the secondary market. For example, by patenting the connection between a razor handle and replacement cartridge, a company that sells razor handles can prevent its competitors from making compatible cartridges. This has unmistakable implications for high tech. Even when the patents are not better, technology companies can use their patents to close a platform and control the market for hardware and software that operate with their original product. Many patents in the pharmaceutical industry aren’t better the prior art either. Brand name drug companies often patent minor variations of their drugs. These patents can prevent competitors from bringing generic versions of a drug to market.

This work in progress seeks to explore whether patent law should impose some type of “betterness” requirement and if so how. Specifically, this work hopes to determine whether we can rid the system of patents that do not advance the prior art by relying on § 101’s utility requirement, patent misuse doctrine, antitrust law or by buttressing the obviousness requirement.