

An Independent Invention Defense to Patent Infringement: The Academy Talking to Itself: Should Anyone Listen?

Roger Milgrim*

An article in a prestigious law review,¹ and an ensuing endorsement of its argument that "genuine" independent development should be a defense to a patent infringement action,² are prime examples of how the academic community, often uninformed of, or unconcerned by, practical considerations, is getting unwarranted support-by-association from the kindred law review community.

The proliferation of articles of this character merits reflection on several levels. To put the problem in perspective, in 1931, Judge Benjamin N. Cardozo observed that "Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of universities."³ However, in 2007, at the

* A member of the New York bar and the author of Roger M. Milgrim, *MILGRIM ON TRADE SECRETS* ("TRADE SECRETS") and Roger M. Milgrim, *MILGRIM ON LICENSING* ("LICENSING").

1 Sampson Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 MICH. L. REV. 475 (2006) (for brevity, this article is cited as "Vermont," with the volume and pertinent page). Reference to the author, as distinguished from the article, would be to Professor Vermont.

2 Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?* 105 MICH. L. REV. 1525 (2007) (for brevity, this article is cited as "Lemley," with the volume and pertinent page). Lemley not only endorses (albeit circumspectfully and with the stated conclusionary reserve: we'd have to weigh costs versus benefits (*id.* at 1535-6 and *id.* at 1528) the Vermont contention: Prof. Lemley was recognized in Vermont for his "helpful comments." Vermont, 105 MICH. L. REV. 475 at n.* [90 JPTOS at n.*]. Reference to the author, as distinguished from the article, would be to Professor Lemley.

3 Quoted in Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 50 (1992) ("Edwards").