

A Reply to A Response

Roger Milgrim*

Professor Vermont's first sentence alone is so welcome and endearing and his response so civilized (declining any provocation that a lesser person could have taken from my article) that he sets the tone for productive dialogue. Let's see if I can meet his high standard.

If one starts, as does Professor Vermont, by equating suing for patent infringement as an effort to "ensnare," doesn't that sort of load the dice? In patent and other litigation, I start with the premise that if a plaintiff's lawyer conforms - as we are obliged to do - to Rule 11, the suit has valid factual and legal footing.¹ My article urges that if he doesn't so comply, the court's wrath should be upon him.

With his starting point, relying on economists' assessment, Professor Vermont posits that "outside chemistry and pharmaceuticals" innovators find the

costs of infringement suits against them exceed the expected revenue from their own patents, and as a consequence, outside those two fields, the current patent system imposes a tax on, and overall discourages, innovation.

Just as accountants cannot be relied on to fully grasp and imaginatively handle sophisticated tax law problems, because they do not understand the law, so I argue that economists should not be relied on to supply unleavened statistical data to tell us what's wrong with the patent law system. Admittedly unburdened by the substance of PATENT FAILURE, on which Professor Vermont places unhesitating reliance,² I nonetheless wonder whether the economist's statistical, quantitative approach reckons with the complex procedural, substantive and strategic legal system landscape, in which patent litigation

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1 Pausing, for a moment, on Professor Vermont's stated "gotcha" concerns, I submit they'd be more productively addressed to securities and personal injury class actions, where on top of the most dubious claims (the share price declined, and, even though every sentient person who decided to smoke knew it, cigarettes are bad for you), it is now a matter of public record that numerous prominent plaintiffs' practitioners in those actions were engaging in criminal conduct.

2 By logical extension, that book should persuade Professor Vermont to expand his recommendation about adding an "independent development" defense to infringement to also narrowing patentable subject matter to chemicals and pharmaceuticals. However, I don't think it would pass.