

Blocking Patents and the Scope of Claims

by

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Abstract

The patent statutes expressly authorize patents for improvements to earlier inventions, but they do not address the allocation of rights between the patents for the original inventions and the improvements. Numerous cases have held that improvements can give rise to blocking patents in which the permission of the patentees on both the original invention and the improvement is required for either patentee or anyone else to make, use or sell the improvement. Unfortunately, blocking patents may lead to costly negotiations and create the possibility of deadlock in which nobody can exploit an improvement. The enactment of the nonobviousness requirement for patentability in 1952 appears to have eliminated blocking patents on improvements, however, because an improvement cannot be both nonobvious and within the scope of patent protection for the original invention. Consequently, cases prior to 1952 that recognize blocking patents on improvements are no longer controlling or persuasive. Nevertheless, several cases arising out of the massive litigation in the 1970's and 1980's over the patent rights to polypropylene developed a theory of the enablement requirement for patentability that would permit blocking patents for improvements. This precedent has been substantially undercut by a number of recent Federal Circuit decisions, though. As a result, blocking patents now appear to be limited to patents for processes for making or using products that are subject to patents and to combinations of components that are separately patented.

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