TAMING THE DOCTRINE OF EQUIVALENTS IN LIGHT OF *PATENT FAILURE*

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ABSTRACT

In their book *Patent Failure*, Jim Bessen and Michael Meurer show that patents outside the fields of chemistry and pharmaceuticals *discourage* innovation. One reason is that, outside these two fields, patents provide poor notice of what technology is owned and who owns it. Poor notice is due in part to the doctrine of equivalents (DOE). This paper argues against abolishing the DOE, and instead proposes reforms to mitigate the DOE's interference with notice. Specifically,

- DOE protection should expire before a patent's 20-year term expires, *e.g.*, the DOE should apply only to activity that the infringer first began within 10 years of the patent's filing date;
- courts should always stay permanent injunctions against DOE infringement for a modest period of time, *e.g.*, for one year from the date of final judgment; and
- courts should treat equivalents under 35 USC 112(6) the same as DOE equivalents.

This paper also briefly reevaluates the doctrine of prosecution history estoppel in light of *Patent Failure*.

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