

專利排他權之新思考：將獨立研發抗辯納入禁制令之審理

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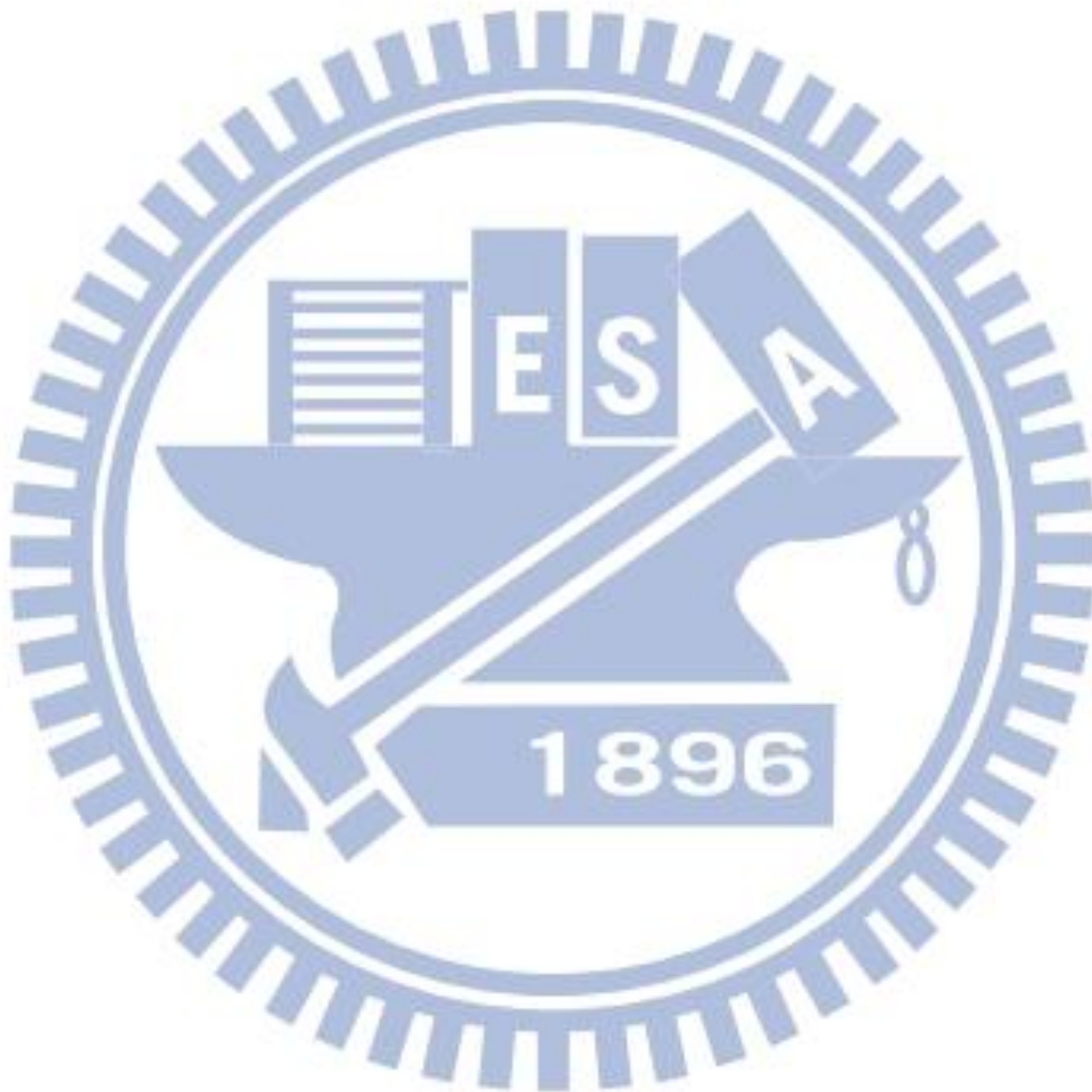
摘要

現行專利制度下，獨立研發無法做為被告在專利侵權訴訟中之抗辯事由，導致獨立研發者在專利法之評價與仿冒者並無二致。獨立研發者必須付出研發成本卻無法實施自身開發之技術，致使獨立研發者在法律/經濟整體而言比仿冒者還糟。是以當一家公司發現其在技術開發上喪失（或可能喪失）領先地位時，最佳策略是放棄研發以避免重複研發之浪費，而非加緊研發以求迎頭趕上。本論文因而認為，現行專利制度鼓勵第二名以後之公司放棄研發，與專利制度鼓勵研發以促進科技進步之本質背道而馳。

為求貫徹專利法鼓勵研發之立法目的，本文主要研究目的之一在於建構一個法律體系，使得獨立研發者在法律/經濟整體上優於仿冒者，以鼓勵企業積極從事研發，無論其是否在研發上居於領先地位。本文由歷史面向、憲法面向、實證面向、及經濟面向之研究，指出在專利侵權糾紛中接受獨立研發抗辯是合理且可行的，且可達到讓獨立研發者在法律/經濟整體上優於仿冒者之研究目的。為期在保護專利排他權及鼓勵研發間取得平衡，本文更建議法院在審理暫時禁制令及永久禁制令時，將被告之獨立研發抗辯納入考量。本文指出，若被告可證明其所製造販賣之被控侵權品確實是自己獨立研發而得，法院在個案審酌暫時禁制令

及永久禁制令之四個衡平因素時，都有不核發禁制令之考量空間。

關鍵字：專利排他權、獨立研發抗辯、暫時禁制令、永久禁制令



Rethinking of Patent's Right to Exclude: Implementation of Independent Invention Defense to the Adjudications of Injunctive Remedies

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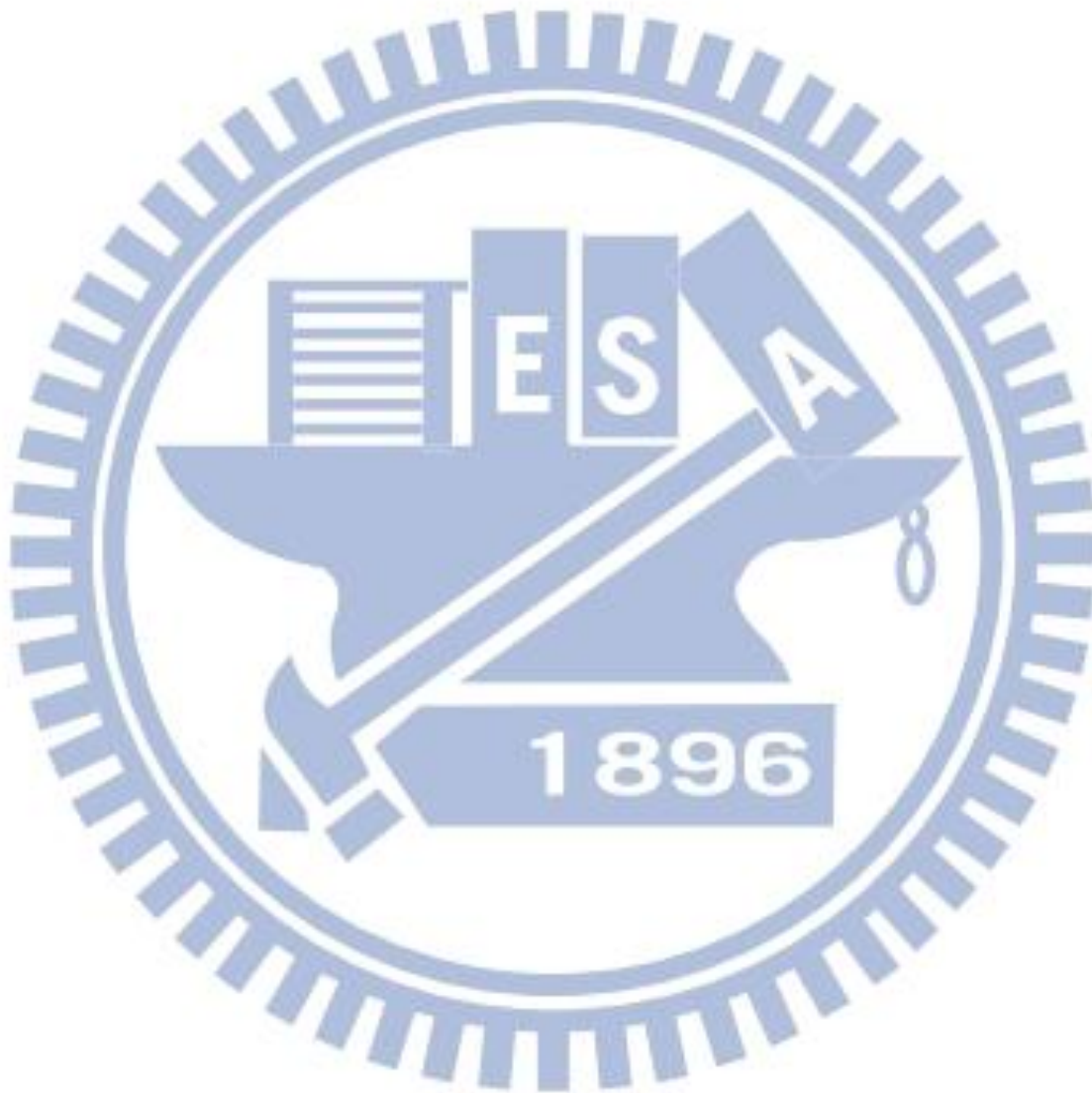
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ABSTRACT

As the independent invention is unacceptable under the current patent system, an independent developer is poorer than a free rider. Whenever a company finds that it has lost (or is likely to lose) the lead in technology development, the best policy for the company is to give up research activities to avoid wasteful duplication, rather than to catch up. This dissertation finds that it is absurd to establish a patent system to encourage a second-lead company to give up its research activities.

One of the primary purposes of this dissertation is to suggest a system in which an independent developer will have a better position than a free rider, in order to encourage enterprises to continue to research and develop despite whether they take the lead in technology development. From different perspectives, including historical, constitutional, empirical, and economic, this dissertation finds that the independent invention defense is reasonable and worth being considered in patent-related disputes. To create the aforementioned system and to harmonize the measures of protecting patent rights with the purpose of promoting the progress of useful art, this dissertation suggests considering the independent invention defense in evaluating the four factors of preliminary injunction and permanent injunction proceedings as a mechanism to balance a patentee's right to exclude and the public's productive uses of science and technology.

Keywords: Patent's Right to Exclude, independent invention defense, preliminary injunction, permanent injunction



誌 謝

回首科法所的求學生涯，心中滿是暖暖的回憶，恰似外頭難得暖暖的冬陽。猶記八年多前之入學考試，當時博士班一年僅錄取一位學生，我是當年九位考生中唯一非法律科班出身的考生，心中根本不敢抱持任何希望。口試時，有位老師邊翻我在清華科法所的碩士成績單，一邊問我（大意）：「你的基礎法學成績是都很高啦，但不知是否程度真有這麼好，你的競爭對方都至少唸過七年法律，你只唸過三年，你如何證明你基礎法學唸得比他們好？」想來老師是對我的基礎法學的程度不放心吧，我坦白答曰：「我基礎法學當然唸得沒有其他競爭對手好，但就因為我深知如此，我每天都會唸書不斷加強」。老師再問：「你要如何說服我？」我鼓起勇氣回答：「我若有幸能獲錄取，我跟老師承諾，我會在博士班畢業前通過律師高考」。老師聽了不置可否，我心想完了，一定考不上。沒想到三天後所辦通知我考上了！我知道，我必須為這個諾言付出代價。儘管這位老師早已轉往他校任教，我也不相信在場幾位老師還有人會記得這個諾言，但是諾言就是諾言，我既然說出口就要做到。徵得指導教授之體諒，我從2006年投入律師國考，在忙碌工作之餘還分神準備考試，終於在2008年通過考試。在此謹藉由這個機會，跟當年入學口試老師們報告，我的諾言，我做到了。

猶記得放榜是2008年11月11日上午10點，我在第一時間由網路查榜得知上榜後，立即撥電話跟內人報喜。正當電話還在講時，手機嘟了一聲，我知道有簡訊進來了，我猜想是賀喜的電話。但我心中納悶著，除了考生自己之外，應該不會有人在上午10點準時去查榜啊，可是在同年考生中，我又一時想不起有誰跟我有那麼「麻吉」。掛上電話後打開簡訊一看，我驚嚇得連話都說不出來，賀喜簡訊來自我的指導教授劉尚志老師，當時是10點12分。這件事，我一輩子銘感於心，怎會有老師關心學生，能關心到這種程度！在學習方面，感謝劉老師極為宏觀且具開創性的諄諄教誨，特別是老師強調的實證研究方法，讓我的研究方法有極大之突破；在論文寫作方面，感謝老師百忙之中多次撥出寶貴的時間與我討論，鼓勵我、支持我，在瓶頸關鍵處給我燈塔般的指引，讓我的論文更完整，更有說服力；在為人處事方面，感謝老師的言教及身教，讓我懂得什麼叫認真與奉獻。特別要感謝老師的提攜，讓我在許多課程、演講、研討會的場合有參與甚至獨當一面之機會，對我的學術及實務生涯皆有突破性之助益。

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不週之處。另外要謝謝劉尚志教授、倪貴榮教授及王敏銓教授等科法所名師在許多課程中的指導，讓我對科技法律有更深刻一層之理解與認識。

在科法所除了學術上之追尋外，最可貴的是能認識多位相互砥礪學問的好伙伴。我要特別感謝：惠如學姐，每次碰面時總是關心並督促我的論文進度，讓我不敢懈怠；三元學長，在我進科法所之後熱心地教導我「生存之道」、伴我挺過擔任二期科法評論主編及一屆全國科法研討會「爐主」之巨大壓力、聽我分享喜悅聽我訴苦、鼓勵我無論如何要咬緊牙根拼出論文；群顯同學，在我論文接近完成及準備口試階段，熱心地提供許多資料並分享經驗，讓我能順利地完成論文並通過口試。

我還要謝謝我的「麻吉」，在專利法學有專精的偉霖與素華。你們自己都很忙，但為了我的論文口試，你們願意花整個下午的時間陪我二次「論文口試預演」，接受我「疲勞轟炸」之餘還要「模擬」口試老師問我問題。你們的問題有些讓我瞠目結舌不知如何回答，然而也促使我更深入地思考並更充分地準備即將到來的論文口試。經過二次「論文口試預演」，讓我的心情較沈穩篤定，有踏進口試會場的勇氣，也因而能順利通過考試。謝謝你們。

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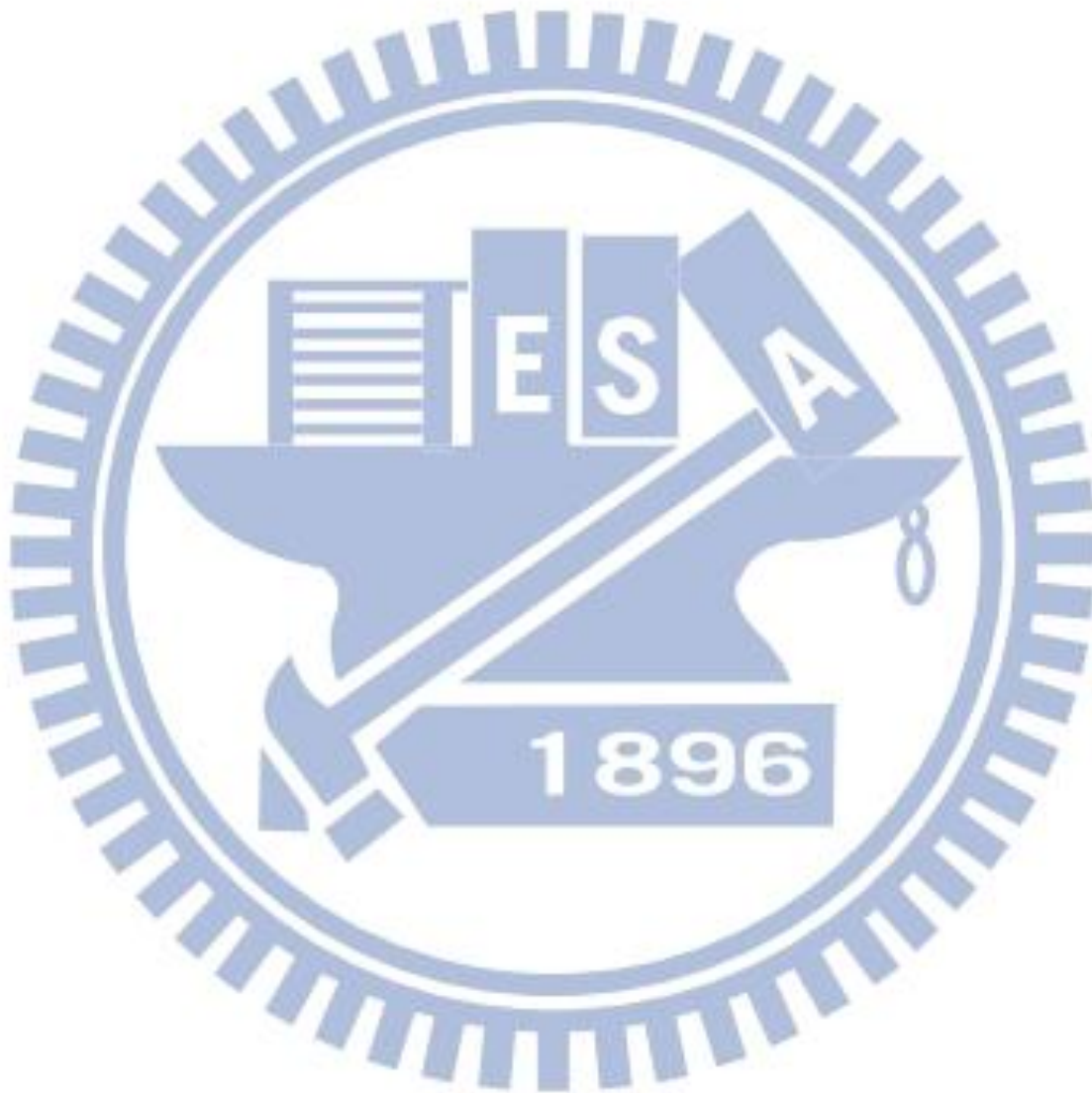
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