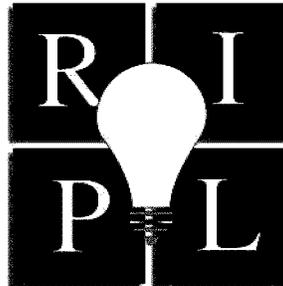


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



FOUR OPINIONS BY CHIEF JUDGE MARKEY ON LIMITING PATENT
ENFORCEMENT

JOSEPH R. RE

ABSTRACT

Many commentators have characterized Judge Markey and the United States Court of Appeals for the Federal Circuit as being biased in favor of patent holders. These four opinions exemplify Judge Markey's support of a strong patent *system*, a system that must include strong defenses against parties that have either wrongly obtained or misused patent rights.

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FOUR OPINIONS BY CHIEF JUDGE MARKEY ON LIMITING PATENT ENFORCEMENT

JOSEPH R. RE*

In the interest of time, I want to first shed some light on how this panel selected our topics and the way we divided them up. This was really John's idea; that we break up the topics as we have done so far. If we were to stop right now and break for lunch, many of you who do not know Judge Markey would probably say, "Oh, he was just a strong pro-patentee member of the Judiciary." I cringe every time I hear people characterize Judge Markey that way (or other current Federal Circuit judges such as Judge Newman, or Judge Rader). Other judges on the Court are viewed as pro-patentee or pro-alleged infringer. Judge Markey did not like that characterization at all. He would say, "I'm not pro-patentee. I'm pro-patent system."¹ "I'm pro-patent system" was one of his favorite lines, because he knew that a strong patent system would have to have both strong rights as well as strong defenses. So when John gave each of us our particular areas to cover—and to cover Judge Markey's impact on patent litigation in an hour and a half is just physically impossible—I was given the topic on limitations on the patent owner's enforcement rights; any limitation I could think of. I agreed, so I picked four cases that I thought typified Judge Markey's view that with every strong force there must be a strong and equal reactionary force. I picked the four cases within minutes. I picked them and then I read them carefully, and I realized there was a recurrent theme in all four of the cases that I selected.

First of all, it just so happens that the patentee lost all four cases.² Now, you would not attribute that to Judge Markey right away unless you really studied and understood Judge Markey better. The second thing I noticed, other than the first case I will discuss—a declaratory judgment case called *Arrowhead Industrial Water, Inc. v. Ecolochem, Inc.*³—the District Court was affirmed across the board.⁴ That is another aspect of Judge Markey that could get lost in all of this: Judge Markey really tried to be very deferential to the District Court judges. I think that is reflected throughout his cases. And the last thing I noticed is this recurrent theme

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¹ See Rouget F. Henschel et al., *Chief Judge Howard T. Markey Oral History Project*, 1 J. FED. CIR. HIST. SOC'Y 47, 63 (2007).

² *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 739 (Fed. Cir. 1988) (Markey, C.J.) (holding that the patentee should not have succeeded in having a declaratory judgment action dismissed); *Perkin-Elmer Corp. v. Westinghouse Elec. Corp.*, 822 F.2d 1528, 1535 (Fed. Cir. 1987) (Markey, C.J.) (affirming a finding of noninfringement); *Gardco Mfg, Inc. v. Herst Lighting Co.*, 820 F.2d 1209, 1215 (Fed. Cir. 1987) (Markey, C.J.) (affirming a finding of unenforceability due to inequitable conduct); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 669 (Fed. Cir. 1986) (Markey, C.J.) (affirming finding of patent misuse on summary judgment).

³ 846 F.2d. 731 (Fed. Cir. 1988) (Markey, C.J.).

⁴ *Perkin-Elmer*, 822 F.2d at 1535 (affirming district court's holding); *Gardco*, 820 F.2d at 1215 (same); *Senza-Gel*, 803 F.2d at 669 (same).

that we have been talking about today—that there should not be “such and such a test.” We all look to see if a test is satisfied. Judge Markey hated those kinds of tests, and lo and behold, there are quotations in three of the four cases where Judge Markey criticized a party for trying to amplify or hammer home a test.⁵ Let us take a look at these cases quickly.

I only have four slides and this is the first one. This case, *Arrowhead Industrial Water, Inc. v. Ecolochem, Inc.*,⁶ came right to mind because it is quoted and cited so often in today’s cases I felt it deserved to be on my list of limitations on patent enforcement.

Now, in this case—I really like this case for several reasons—the case was dismissed for lack of a case or controversy.⁷ Judge Markey, through the panel, overturned that dismissal, and he explains in this beautifully written opinion—no, I was not a law clerk at the time, but it still was a beautifully written opinion—that one of the beautiful aspects of the Declaratory Judgment Act⁸ is to prevent the very type of behavior that the patentee was engaging in here.⁹ In this case, the patentee was writing letters to customers of the alleged infringer.¹⁰ We all know, at least those of you who are practicing patent law, how patentees can sometimes get carried away writing to people downstream obviously to scare the customer not to buy from the alleged infringer, but to buy from the patentee.¹¹ Judge Markey called that the

⁵ See, e.g., *Perkin-Elmer*, 822 F.2d at 1531 n.6; *Gardco*, 820 F.2d at 1215 (“Peerless’ attempt to subject the inequitable conduct conclusion to a rigid formulation is unavailing.”); *Senza-Gel*, 803 F.2d at 670 n.14.

Perkin-Elmer’s repeated assertions that the claimed and accused devices perform substantially the same function and achieve substantially the same end result are not helpful. That circumstance is commonplace when the devices are sold in competition. That a claimed invention and an accused device may perform substantially the same function and may achieve the same result will not make the latter an infringement under the doctrine of equivalents where it performs the function and achieves the result in a substantially different way.

Perkin-Elmer, 822 F.2d at 1531 n.6 (citations omitted).

The law of patent misuse in licensing need not look to consumer demand (which may be non-existent) but need look only to the nature of the claimed invention as the basis for determining whether a product is a necessary concomitant of the invention or an entirely separate product. The laws of antitrust violation, tailored for situations that may or may not involve a patent, looks to to [sic] consumer demand test for determining product separability.

Senza-Gel, 803 F.2d at 670 n.14.

⁶ 846 F.2d 731 (Fed. Cir. 1988) (Markey, C.J.).

⁷ *Id.* at 733.

⁸ 28 U.S.C. § 2201 (2006).

⁹ *Arrowhead*, 846 F.2d at 735.

After the [Declaratory Judgment] Act, those competitors [victimized by a patentee’s guerrilla-like scare-the-customer-and-run tactics] were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests.

Id.

¹⁰ *Id.* at 733.

¹¹ See *Sticker Indus. Supply Corp. v. Blaw-Knox Co.*, 367 F.2d 744, 746–47 (7th Cir. 1966) (holding that a patentee’s notice to plaintiff’s customers indicating that their unlicensed use of the plaintiff’s product would make them infringers gave rise to an actual controversy under the Declaratory Judgment Act); Lisa A. Dolak, *Declaratory Judgment Jurisdiction in Patent Cases*:

“scare-the-customer-and-run tactic[],” all with his unit modifier.¹² He loved the unit modifier. He used the hyphens.

He also looked at the case law and realized that the “reasonable apprehension of suit” test—obviously, he does not like a test—is one suitable test.¹³ Even under that test, this case met the requirements for a case or controversy—and I think this case now deserves rereading in light of the recent Supreme Court case in *MedImmune, Inc. v. Genentech, Inc.*¹⁴ *MedImmune* struck down the Federal Circuit’s test looking for a reasonable apprehension of suit,¹⁵ and you will see how Judge Markey here obviously was not a big fan of that test, but found that, even under this test, it was satisfied.¹⁶

That was one of Judge Markey’s many skills. He would show how a judgment could be reached without having to lay down an ironclad rule that he knew would be subject to criticism no matter how it is applied in future cases. But this *danse macabre* passage is often quoted. He wrote:

This appeal presents a type of the sad and saddening scenario that led to enactment of the Declaratory Judgment Act (Act), 28 U.S.C. § 2201. In the patent version of that scenario, a patent owner engages in a *danse macabre*, banishing a Damoclean threat with a sheathed sword. Guerrilla-like, the patent owner attempts extra-judicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity.¹⁷

Boy, this is just the first couple sentences of the opinion. It goes on and on, and it states, “[m]ost, if not all, ‘tests’ employed in the art of judging arise in a particular factual milieu. Hence they must be read, applied, and perhaps modified in light of the facts of subsequent cases.”¹⁸ That is Judge Markey in a nutshell for you. And sometimes when we would stand by his side and he would be writing something, he would say, “Get a cite for this. Get a cite for that.” Sometimes I would have to say, “Judge, there is no authority for that.” He would respond, “There is now!”¹⁹

The next case I picked was *Perkin-Elmer Corp. v. Westinghouse Electric Corp.*²⁰ Many of you may not know this case and may not know how it fits into the world of

Restoring the Balance Between the Patentee and the Accused Infringer, 38 B.C. L. REV. 903, 905–06 (1997) (noting that prior to the Declaratory Judgment Act’s passage, patentees had the ability to “effectively paralyze[] an alleged infringer’s business dealings with threats of future action).

¹² *Arrowhead*, 846 F.2d at 735.

¹³ *Id.* at 736 (analyzing tests used in evaluating complaints for declaratory judgments in patent cases).

¹⁴ 549 U.S. 118 (2007).

¹⁵ *Id.* at 137.

¹⁶ *Arrowhead*, 846 F.2d at 737 (applying the reasonable apprehension of suit test and noting the difficulty in imagining “how a prudent Arrowhead executive confronted with the totality of Ecolchem’s conduct could resist the onset of a most reasonable apprehension that Arrowhead is next.”).

¹⁷ *Id.* at 734–35 (citations omitted).

¹⁸ *Id.* at 736.

¹⁹ Joseph R. Re, *Chief Judge Howard T. Markey: Leadership Through Wit*, 1 J. FED. CIR. HIST. SOC’Y 13, 17 (2007).

²⁰ 822 F.2d 1528 (Fed. Cir. 1987) (Markey, C.J.).

patent law. But I was very familiar with this case because this case was decided during my clerkship. I was able to see how things could snowball once somebody takes a stand and shows some leadership. This was one such case.

In the mid 1980s, there was a great deal of controversy over the extent to which a patentee could rely on the doctrine of equivalents, and after Judge Markey wrote his 1983 decision *Hughes Aircraft Co. v. United States*,²¹ there was some question on whether the patentee had to show some corresponding element in the accused device for each and every limitation of the claim.²² That is, could a patentee rely on the doctrine of equivalents even though there may be something missing in the accused device that could possibly correspond to the claim? Or, must there be something the patentee could point to that corresponds equivalently to each and every limitation of the claim? We call that requirement the “All Elements Rule.”²³

At the time of *Hughes Aircraft*, people thought that the Federal Circuit was going the way of the patent holder and that the All Elements Rule was not a rigid requirement.²⁴ Well, they got a dose of reality when *Perkin-Elmer* came out in 1987 when Judge Markey said, “yes, there must be something that corresponds,” but he did not say it like that. He would not talk like that. He would just say something more like this:

[A] court may not, under the guise of applying the doctrine of equivalents, erase a plethora of meaningful structural and functional limitations of the claim on which the public is entitled to rely in avoiding infringement Though the doctrine of equivalents is designed to do equity, and to relieve an inventor from a semantic strait jacket when equity requires, it is not designed to permit wholesale redrafting of a claim to cover non-equivalent devices²⁵

This was important. Judge Newman now writes a scathing dissent, longer than the majority opinion itself, showing that Judge Markey was—she said, “rewriting the

²¹ 717 F.2d 1351 (Fed. Cir. 1983) (Markey, C.J.); *see id.* at 1364 (finding that the district court erred by failing to “apply the doctrine of equivalents to the claimed invention as a whole”).

²² *See* Martin J. Adelman & Gary L. Francione, *The Doctrine of Equivalents in Patent Law: Questions that Pennwalt Did Not Answer*, 137 U. PA. L. REV. 673, 676–78 (1989) (describing the Federal Circuit’s struggles in the mid-1980s defining the doctrine of equivalents as either an “element-by-element” test or a “claim as a whole” (or “entirety”) test).

²³ *Id.* at 688.

Under the element-by-element approach, each element of the claim is examined to determine whether it or its equivalent exists in the accused device. If there is no correspondence, the accused device will not be deemed to operate in substantially the same way as the claimed invention. There can be no infringement under the doctrine of equivalents under two conditions: if an element is missing completely from the accused device and there is no equivalent of the missing element or if an element has been changed in the accused device and the changed element does not operate in substantially the same way.

Id.

²⁴ *See, e.g.*, Stephen G. Kalinchak, *Obviousness and the Doctrine of Equivalents in Patent Law: Striving for Objective Criteria*, 43 CATH. U. L. REV. 577, 603 (1994) (“[S]tatements by the Federal Circuit that the ‘as a whole’ rule articulated in *Hughes Aircraft* has not been overruled also cast doubt on the certainty of the element-by-element comparison.”).

²⁵ *Perkin-Elmer*, 822 F.2d at 1532.

law, ignoring precedent,” and it goes on and on.²⁶ I remember bringing that dissent to Judge Markey and saying, “Judge, Judge Newman’s dissent has arrived. Would you like to see it for any appropriate modifications?” He told me—I learned this line—“It takes two to tango,” meaning he was done. He already had the second vote by the time that dissent came in. No changes were made to the majority opinion whatsoever, and he would say, “Send it up the flag pole and see who salutes.”

The reason why this was very significant at the time was the Federal Circuit’s en banc decision in *Pennwalt Corp. v. Durand-Wayland, Inc.*²⁷ was pending throughout my entire clerkship. For over two years that en banc case was pending. Once *Pennwalt* came out, the new judge on the court was assigned the writing assignment in *Pennwalt*, and that was Judge Jean Galloway Bissell.²⁸ Judge Bissell wrote the majority opinion in the en banc *Pennwalt* decision and quoted at length *Perkin-Elmer*, and *Pennwalt* became the law of the land.²⁹ Lest there be any doubt about that, *Pennwalt*’s All Elements Rule was then affirmed by the Supreme Court in the *Warner-Jenkinson*³⁰ case, and now we all take the All Elements Rule today as basic black letter law of patents.³¹

My next case, *Gardco Manufacturing, Inc. v. Herst Lighting Co.*,³² is the case John was kind enough to leave to me. Again, a strong right to trial by jury is only a strong right if there is another right that would tell you otherwise. Judge Markey here solidified the rule that there is no right to trial by jury on inequitable conduct.³³ That rule was unclear until 1987. The parties did not really argue over that rule too much because, as we saw from the prior presentations, inequitable conduct is a creature of equity and there is no right to trial by jury on equitable claims.³⁴ But the issue here was much more interesting and significant; in this case the District Court judge tried the inequitable-conduct issue first (before the legal claims of infringement and validity) and found inequitable conduct.³⁵ So now on appeal, the patent owner was arguing that his right to trial by jury was violated because there was overlap in the legal and equitable claims.³⁶ Under the Supreme Court case law of *Beacon Theatres, Inc. v. Westover*³⁷ and *Dairy Queen, Inc. v. Wood*³⁸—I am sure you are

²⁶ *Id.* at 1535–36 (Newman, J., dissenting) (“The district court did not follow this court’s precedent in deciding the question of infringement. Nor does the majority, which has, in addition, undertaken to rewrite this precedent.”).

²⁷ 833 F.2d 931 (Fed. Cir. 1987) (en banc).

²⁸ *Id.* at 932.

²⁹ *Id.* at 935 (quoting *Perkin-Elmer*, 822 F.2d at 1532–33).

³⁰ *Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997).

³¹ *Id.* at 40 (“The determination of equivalence should be applied as an objective inquiry on an element-by-element basis.”); see also 7 DONALD S. CHISUM, CHISUM ON PATENTS § 18.04[1][b] (indicating that the all elements approach remains legal precedent).

³² 820 F.2d 1209 (Fed. Cir. 1987) (Markey, C.J.).

³³ *Id.* at 1212 (“The Seventh Amendment preserves to litigants the right to a jury trial where legal rights are to be determined. . . . [H]owever, ‘inequitable conduct’ is derived from the doctrine of unclean hands and is purely equitable in nature.”).

³⁴ See U.S. CONST. amend. VII (“In Suits at *common law*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”) (emphasis added).

³⁵ *Gardco*, 820 F.2d at 1210.

³⁶ *Id.* at 1213 (noting appellant’s argument that the issues of patent infringement and invalidity are “inherently intertwined” with the issue of inequitable conduct).

³⁷ 359 U.S. 500 (1959).

³⁸ 369 U.S. 469 (1962).

probably learning those in your Civil Procedure classes—the right to trial by jury trumps overlapping equitable claims.³⁹ Judge Markey explains in this opinion that there really was only an overlap of evidence in this case, not an overlap of issues, and affirmed the District Court.⁴⁰ Once again, affirming the District Court.⁴¹

Again, in *Gardco*, he says, “Peerless’ attempt”—Peerless being the patent owner—“to subject the inequitable conduct conclusion to a rigid formulation is unavailing.”⁴² Here we go again. Stop with the tests. Let us take a look at the facts and evidence in your case and let us see how that looks in light of the real evidence and stop looking for some test to hang onto to lead you to judgment. You see this notion throughout Judge Markey’s opinions.

Lastly, another limitation to the enforcement of the patent right, the patent misuse doctrine has been one doctrine that has fallen in and out of favor for many, many years.⁴³ It is subject to a lot of legal and scholarly debate, but you really do not see that defense raised often in many cases.⁴⁴ So, it was rather surprising that, in a matter of two years, Judge Markey had written three precedential opinions on the subject of patent misuse, and in two of them, affirmed the finding of patent misuse.⁴⁵ Still think he is pro-patent holder?

The last case, *Senza-Gel Corp. v. Seiffhart*,⁴⁶ really showed Judge Markey’s deference to the District Court and his true fairness though ruling against the patent holder.⁴⁷ The facts of this case—I do not want to get into the details of the patent,

³⁹ *Id.* at 479 (remanding for a trial by jury of factual issues because “the legal claims involved in the action must be determined prior to any final court determination of respondents’ equitable claims.”); *Beacon Theatres*, 359 U.S. at 510–11 (“This long-standing principle of equity dictates that only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.” (footnote omitted)).

⁴⁰ *Gardco*, 820 F.2d at 1213 (“[T]here is a fundamental difference between *evidence* and *issues*.”).

⁴¹ *Id.* at 1215.

⁴² *Id.*

⁴³ Robert J. Hoerner, *The Decline (and Fall?) of the Patent Misuse Doctrine in the Federal Circuit*, 69 ANTITRUST L.J. 669, 682–84 (2001) (tracking the Federal Circuit’s application of the patent misuse doctrine, which has narrowed to the point that an anti-competitive effect must be proven).

⁴⁴ *See, e.g.*, William J. Gilbreth, William H. Steinmetz & Richard G. Gervase, Jr., *The Patent Misuse Defense, Its Continued Expansion & Contraction*, in INTELLECTUAL PROPERTY/ANTITRUST 1993, at 489, 522–41 (PLI Pats., Copyrights, Trademarks, & Literary Prop., Course Handbook Ser. No. 365, 1993), available at WL, 365 PLI/Pat 489 (listing relevant decisions and placing them into one or more of three different categories of antitrust cases); Patricia A. Martone & Richard M. Feustel, Jr., *The Patent Misuse Defense—Does it Still Have Vitality?*, in INTELLECTUAL PROPERTY ANTITRUST 2005, at 145, 155–59 (PLI Pats., Copyrights, Trademarks, & Literary Prop., Course Handbook Ser. No. 832, 2005), available at WL, 832 PLI/Pat 145 (discussing the changes to the patent misuse defense based on Federal Circuit decisions).

⁴⁵ *Hodosh v. Block Drug Co.*, 833 F.2d 1575, 1580 (Fed. Cir. 1987) (Markey, C.J.) (answering a certified question on interlocutory appeal that effectively affirmed holding of patent misuse); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 669 (Fed. Cir. 1986) (Markey, C.J.) (affirming holding of patent misuse); *Windsurfing Int’l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1002 (Fed. Cir. 1986) (Markey, C.J.) (reversing holding of patent misuse).

⁴⁶ 803 F.2d 661 (Fed. Cir. 1986) (Markey, C.J.).

⁴⁷ *Id.* at 669 (affirming summary judgment of patent misuse).

but I do want to mention that in this case, there was a trial.⁴⁸ The patent was found valid and infringed by a jury.⁴⁹ Judgment as a matter of law was denied post trial, and then before final judgment was entered, there was a motion for leave to amend to add the misuse defense.⁵⁰ The motion for leave to amend was filed after the denial of judgment as a matter of law and was granted.⁵¹ Then summary judgment was granted for patent misuse.⁵² Judge Markey, through the Court, affirmed the leave to amend,⁵³ and that was the predominant part of the briefing. He notes in this case that there were 145 pages of briefing and nobody addressed the certified questions that were presented to the Federal Circuit on appeal.⁵⁴ So, when he sees things like that, he feels compelled to mention it in his opinions.

He affirmed the finding of misuse, affirmed the District Court's treatment of the misuse doctrine in the certified questions and did not mention any need to show an "anti-competitive effect,"⁵⁵ a comment that he made in an earlier case called *Windsurfing Int'l, Inc. v. AMF, Inc.*⁵⁶ After that case, some people thought misuse required a showing of some anti-competitive effect similar to antitrust law.⁵⁷ Judge Markey made note of that in *Windsurfing*, but then you will notice how Judge Markey does not note that in subsequent opinions, because, as he says in these subsequent cases, misuse requires no effect, because requiring that would require changes in the law by the United States Supreme Court.⁵⁸ He was very deferential to the Supreme Court, even though the Supreme Court cases were subject to a lot of criticism on the subject of misuse.⁵⁹

So, those are my four cases. I hope I stayed within my time. As you can see, generalizations are dangerous, tests are dangerous, and characterizations of Judge Markey can be dangerous, because he was complicated and multifaceted. So be careful. He was pro-patent system, not pro-patentee. Thank you.

⁴⁸ *Id.* at 662 (indicating that the issues of patent validity and direct infringement were tried separately before all other issues).

⁴⁹ *Id.*

⁵⁰ *Id.* at 662–63.

⁵¹ *Id.* at 663.

⁵² *Id.*

⁵³ *Id.* at 667.

⁵⁴ *Id.* at 665 ("Incredibly, though they filed briefs totalling [sic] 145 pages, neither party addresses certified question No. 1 in those briefs.").

⁵⁵ *Id.* at 667–69.

⁵⁶ 782 F.2d 995, 1001–02 (Fed. Cir. 1986) (Markey, C.J.) ("To sustain a misuse defense involving a licensing arrangement not held to have been per se anticompetitive by the Supreme Court, a factual determination must reveal that the overall effect of the license tends to restrain competition unlawfully in an appropriately defined relevant market." (footnote omitted)).

⁵⁷ See Joel R. Bennett, *Patent Misuse: Must an Alleged Infringer Prove an Antitrust Violation?*, 17 AIPLA Q.J. 1, 10–11 (1989) (noting that patent misuse is intertwined with anti-trust issues); Robin C. Feldman, *The Insufficiency of Antitrust Analysis for Patent Misuse*, 55 HASTINGS L.J. 399, 418–19 (2003) (analyzing the affect Markey's decision in *Windsurfing* had in subsequent patent misuse cases).

⁵⁸ *Senza-Gel*, 803 F.2d at 665 n.5 ("We are bound, however, to adhere to existing Supreme Court guidance in the area until otherwise directed by Congress or by the Supreme Court.").

⁵⁹ See, e.g., J. Dianne Brinson, *Patent Misuse: Time for a Change*, 16 RUTGERS COMPUTER & TECH. L.J. 357 (1990) (arguing that the patent misuse doctrine should be eliminated).