

Patent-Infringement Injunctions' Scope

John M. Golden

This article, which is forthcoming in volume 90 of the *Texas Law Review*, addresses a largely neglected issue: the scope of injunctions against patent infringement. First, the article uses an economic model for infringer incentives to show how concerns of injunction scope are substantially analogous to those of patent scope. Second, the article discusses existing U.S. law on patent-infringement injunctions and develops a taxonomy of injunction types. The article then reports results from a systematic study of patent-infringement injunctions issued by U.S. district courts in 2010. Startlingly, nearly 60% of 99 identified orders include “obey the law” language that apparently violates the United States’ Federal Rules of Civil Procedure, at least as those rules have been understood by the U.S. Court of Appeals for the Federal Circuit. The subset of actively opposed injunctions exhibits such error at a lower but still substantial rate of about 37%. On the other hand, only one of seventeen injunctions directed to biomedical-substance (BMS) technology features such error. The article considers potential explanations for high rates of error outside the BMS space. Finally, the article considers what the scope of patent-infringement injunctions should be and notes that courts currently can and do issue prophylactic injunctions that protect patent rights more or less than a more conventional “do not infringe” order would. Prophylactic injunctions might represent an underused way to balance concerns of notice, rights protection, rights limitation, and administrability.