

Patent Law's Audience

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Patents, as a variant of property, are also necessarily imbued with aspects of communication. For any property system to work, necessarily owners and non-owners must understand the nature and limits of property. Of course, disputes may arise over boundaries and ownership, but in the main property communicates messages between parties. Thus notice is a crucial feature of a properly functioning property regime. The “fence” we use in patent law are the claims, words that attempt to delineate the scope of the right to exclude others. Thus, the knowledge of the “public” about the scope of a patent is essential if we expect third parties to respect patent boundaries.

Moreover, patents are unique as a form of property in that they are vested with a public interest far greater than typical property. While property by its nature can encourage the efficient use of resources, the constitutional purpose of patent law is to “to promote the Progress of ... useful Arts.” Standard economic accounts of the patent system claim that the patent right exists to provide innovation incentives, and scholars have devoted substantial energy to deconstructing the meaning of innovation in this context -- for example, by distinguishing between incentives to create an invention and incentives to invest in the commercialization of an invention. But patent theory to date has had little to say about the task of communicating these incentives to their intended recipients. We simply assume that we know who patent law's audience is, and that the audience receives the message when patent law speaks. Existing accounts are both descriptively and normatively incomplete.

Similarly, patents themselves require disclosure of the invention in a manner that enables a person of ordinary skill in the relevant technological field to make and use the claimed invention. Patents are presumed to “teach” the world about the invention, guaranteeing that, at expiry, others can copy and practice the invention. Moreover, because the patent is published prior to its expiration, the knowledge contained therein is available to enhance the storehouse of information, permitting others to improve upon the claimed invention. The disclosure function of patents, however, begs the question of who is reading these patents.

Finally, more recent scholarship has recognized that patents can transcend these incentive and teaching functions. Recent economic literature has applied theories of the firm to explain certain aspects of patent law. Others have explored how patents can interact with market participants as signals of innovation of a firm. Yet another group have scholars have explored potential normative messages that patents may send by affording exclusive rights over aspects of the self and identity.

All of these theories regarding the patent system entail considerations of notice and the “public.” Absent from the literature, however, is a comprehensive evaluation of

who is the patent audience. Necessarily, for the patent system to effect all of the espoused goals, the law must communicate to the appropriate audience.

This Article fills the gap in the literature by considering the various theories of patent law and exploring to whom the patent law speaks descriptively and whether the law normatively is addressing the appropriate audience(s). While our descriptive exploration of patent law's audiences itself is an important contribution, we will also take the next step of addressing whether the current law has targeted the appropriate audience. For example, the Federal Circuit and commentators have all expressed concern about whether the notice function of patents is being satisfied under the current law. The glaring oversight by both the courts and scholars on the identity of the appropriate audience impedes efforts to improve patent law in this regard.