

The Information Value of Patent Claims

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The standard rationale for patent claims is that they describe the invention and provide notice of patent infringement to competitors. This notice theory, however, is simply untrue—because patent litigation is highly unpredictable, claims do not provide notice of infringement. Accordingly, a large literature argues that claims are valueless, and that courts should instead determine patent scope using other sources such as the patent specification, and then either abolish claims outright or creatively construe claim text to conform to the externally-determined results.

This Article defends patent claims by providing a new theory. Claims do not provide notice to competitors, but they provide information to courts. An analogy to contracts of adhesion illustrates the intuition. Like patent claims, contracts of adhesion can be portrayed as self-serving statements drafted by corporations that detract from the real bargain, and many have argued that courts should determine the real bargain by looking to extrinsic evidence instead. But for a court to reassemble a bargain (e.g. the price, the timeline for performance, etc.) using only parol evidence will require much judicial effort and high adjudication costs. For courts, even a biased written contract is better than no written contract at all. In the same manner, claims have an information value: the real invention is not costless for courts to discern, and claims reduce adjudication costs even if they are also self-serving.

Recognizing the information theory makes two contributions to the literature. First, it provides a better explanation for the value of patent claims than the discredited notice theory. Second, it follows that, in order to incentivize patentees to draft claims and convey information, courts must generally (though not always) enforce claims as written and cannot engage in too much creative construction.