

## *“Overbreadth” As Oversimplification*

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Courts and commentators alike often cite concerns about patent scope overbreadth, but the concept of patent “overbreadth” itself seems overly broad. Everything in patent law is arguably about patent overbreadth, to some extent, although what we mean by “overbreadth” in any given context obviously will depend on the context.

In many instances of reputed “overbreadth,” the overarching concern seems quite understandably to be about granting patents that are broader in scope than the patentee “deserves.” This concern is most easily understood in cases of anticipation or obviousness, where the patentee has claimed what has effectively already been invented by others. A similar argument can perhaps be made where enablement, claim indefiniteness, or even an acceptable written description – is lacking, suggesting that the patentee has not truly invented what she has claimed.

With regard to other doctrines, particularly patentable subject matter, the overbreadth concern seems merely a vague proxy for other concerns. As the Federal Circuit itself stated in *Bilski*, patentable subject matter concerns about preempting a field are merely a symptom, not the disease. For example, if overbreadth were truly to motivating concern, “token” efforts to narrow patent scope, such as field-of-use restrictions, post-solution activity, or Beauregard claims, would be acceptable and even desirable. Similarly, patents on truly pioneering inventions would be treated like “abstract ideas” and barred from patentability because both will block their later downstream applications. In these latter instances, then, patent scope “overbreadth” seems not only to mean something different but also to advert to different dangers than in the former instances of “just desert.”