

The Bargain Theory of Patents
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Abstract

It is axiomatic in patent law that the patent defines the rights that have been granted. Patents are frequently described as setting the “metes and bounds” of the inventor’s rights, analogous to the way in which boundary lines delineate the extent of a piece of land. This image of patents infuses patent law and drives patent doctrine, as well as theoretical debates.

In the first part of the chapter, I will argue that this conceptualization is wrong. Rather than delineating a patent holder’s rights, a patent creates no more than an opportunity to bargain. It is an invitation to enter into the process of negotiating a definition of rights. This can be distinguished from certain other legal rights, such as those related to real property. In my view, the Bargain Theory is correct both as a matter of how the patents actually work in the modern world and as a matter of necessity. Among other reasons, patents cannot possibly delineate the boundary of an inventor’s rights because those rights will be measured in relation to products that have yet to be created at the time of the patent grant. One cannot possibly create definitive measurements at a time when the tools of measurement do not yet exist.

In the second part of the chapter, I will apply the Bargain Theory of patents to current doctrinal and theoretical debates in patent law. If a patent does not confer definitive rights, debates over questions such as the optimal patent scope, whether patenting earlier or later is preferable, the extent to which patents operate as a signaling method, and the desirability of deferred examination should be evaluated through a different lens.

This is an excerpt from a chapter of my book, *RETHINKING PATENT LAW*, that is forthcoming from Harvard University Press. For IPSC, I will be presenting only the section of the chapter describing why Bargain Theory is accurate from a theoretical perspective.