

Finding Invention

Oskar Liivak
Cornell Law School

The Constitution gives Congress the power to secure exclusive rights to Authors and Inventors for their respective creations. Copyright has expended considerable effort to define *the work*, the thing created by an author and, accordingly, the thing that copyright aims to protect. Curiously, modern patent law cannot make a similar claim. Inventors create inventions yet modern patent law only grudgingly uses the term. In fact, drafters of the modern patent act deliberately tried to remove the term invention from the statute and from our thinking. At that time invention was used in multiple ways, one of which had truly become problematic. To resolve that one issue, the term, however used, was banished. But some uses should not and cannot be so easily removed. The Supreme Court has consistently reaffirmed that *the invention*, the thing actually created by the Inventor, must be the central focus of patent law. In ignoring this fundamental concept, modern patent law risks becoming unmoored from its mandated purpose. Two areas of current judicial conflict highlight this tension caused by this drift. There are serious conflicts regarding the purpose of the patent specification in limiting claim interpretation and conflicts over the existence of the *Eli Lilly* written description requirement. Both of these areas can be better understood by first considering the limits that *the invention* imposes on claim scope. By identifying what the Inventor has in fact invented, patent law can better articulate the ultimate limit of claims during claim interpretation or during invalidity via disclosure requirements. In addition, and perhaps more importantly, patent law can premise those limits firmly on the bedrock of the Constitution and long standing Supreme Court precedent. Lastly, the article takes this requirement and explores a critically important arena in biotechnology: the patenting of antibodies. The article shows that the current law in that area allows for claims that often improperly exceed this fundamental limit.