

# *Patents as Genre*

**Dan L. Burk & Jessica Reyman**

The growing social prominence of patents suggests that these documents deserve increased scholarly attention. Legal scholars have generally viewed patents as incentives to innovation, assessing them as legal entities within an economic or policy framework. However, patents also constitute social objects with associated meaning and societal effects. Public perception of patents, reaction to patents, and discourse regarding patents suggests these legal constructs play a role beyond that explained by economic incentive theories.

In this paper, we adopt genre theory as an approach to consider patents in this broader social role. Genre study considers the persuasive function of the formal features of texts, including the structure of a document, the rhetorical practices that are characteristic of related documents, and the employment of specialized language. However, genre study also considers the social actions performed by adhering to or resisting these formal features, analyzing the relationship between formal features and rhetorical action – the action that texts are employed to accomplish<sup>1</sup>. Contemporary genre study also examines the “intertextual” qualities of texts<sup>2</sup>, and the ways in which individual texts operate within genre systems<sup>3</sup>, rather than as single, isolated texts.

Patent documents display many of the hallmarks of genre, encompassing their own particular structure and vocabulary. By means of such formal structures, patents perform the “typified rhetorical action”<sup>4</sup> of assigning value to particular technologies in the marketplace. In this way, while patents seem to be carried out almost entirely through internal discourse, they also carry powerful meanings into related public spheres. This social action occurs within a system of prior art, office actions, responses, declarations, and technical documents. Patents also seem to assimilate with other texts by adhering to particular guidelines established by the system, but they also rework previous patents to establish their own novelty and nonobviousness.

---

<sup>1</sup> See Carolyn Miller, *Genre as Social Action*, 70, QUARTERLY JOURNAL OF SPEECH (1984) (positing that a definition of genre must be centered not on the substance or the form of the discourse but on the action it is used to accomplish in a given situation).

<sup>2</sup> See Mikhail Bakhtin. *The Problem of Speech Genres*. SPEECH GENRES AND OTHER LATE ESSAYS, 60-102 (1986) (asserting that a primary characteristic of acts of discourse are their dialogic nature; each is responsive to other discourse. Describing individual communicative acts, or utterances, as “inseparable links,” Bakhtin posits that “the unique speech experience of each individual is shaped and developed in continuous and constant interaction with others’ individual utterances.” In other words, uses of genres are filled with assimilations of others’ words and utterances; they “assimilate, rework, and re-accentuate” them).

<sup>3</sup> See Charles Bazerman, *THE LANGUAGES OF EDISON’S LIGHT* (1999) (asserting that legal genres can be best understood as instantiating, through their recurrent, situated practices, systems of social activity. In this way, they become part of larger “genre systems”).

<sup>4</sup> Carolyn Miller, *Genre as Social Action*, 70 QUARTERLY JOURNAL OF SPEECH, 151 (1984).

Perhaps most significantly, patents are generated by a discrete community of patent prosecutors through interaction with the personnel of a highly specialized federal agency, the USPTO<sup>5</sup>. Patent prosecutors are set apart from other communities, including other legal practitioners, in a variety of ways: by a separate practice examination, by their own specialized jargon and community practices, and their own specialized caselaw and appellate court. The expectations and practices of this community are reflected in the features and functions of the patents they produce. Thus, the patent genre serves to mediate the interactions of the patent prosecution community with actors outside their community, including scientists, judges, and litigators.

Consideration of patents as a genre yields important insights into the social structures surrounding these documents. These insights have implications not only in dealings of inventors and investors with the patent system, but in broader debates over patent reform, in the appointment of PTO commissioners and CAFC judges, and the professional practice of patent law. In each of these social discourses, the community reflected in and shaped by the patent genre displays distinguishing characteristics which may be better understood by considering patents as genre.

---

<sup>5</sup> See Carol Berkenkotter and Thomas Huckin. *GENRE KNOWLEDGE IN DISCIPLINARY COMMUNICATION: COGNITION/CULTURE/POWER* (1995) (showing genre as a set of habits that is owned and continually negotiated by a community).