

The Federal Circuit and the Doctrine of Equivalents

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Perhaps the central teaching of modern patent law is that the claims of a patent define the invention to which the patentee is entitled the right to exclude. Yet the truth of this canon is belied by the venerable-and controversial-judicial creation of the "Doctrine of Equivalents" ("DOE"), which allows patentees to exclude others from subject matter beyond the literal scope of the claims. While the oft-stated purpose of the doctrine is to protect patentees-and therefore the incentive structure of the patent system-from copyists who would make trivial changes in the practice or construction of the claimed subject matter, thereby retaining the substance of the invention but avoiding the literal reach of the claims, the utility of this purpose is countered by the uncertainty the doctrine produces-the unpredictable expansion of a patentee's right to exclude in any given case-as well as the perverse incentives it gives to patentees, particularly the incentive to externalize the cost of defining the boundaries of the subject matter for which an applicant seeks the right to exclude. The jurisprudence of the US Court of Appeals for the Federal Circuit reflects an ongoing struggle to balance the benefits and costs of the DOE, and the issue has captured the attention of the Supreme Court twice in the past decade. In the study reported here we analyze a novel dataset spanning the entire history of the Federal Circuit to systematically examine its jurisprudence of the DOE. Using a number of indicia, we assess the performance of the Federal Circuit in regard to the DOE against that court's basic premise: that as compared to prior regional circuit involvement, centralization of legal authority in the Federal Circuit has led to a clearer, more coherent, and more predictable legal infrastructure for the patent law. For updates, all data, and more, see THE DOCTRINE OF EQUIVALENTS PROJECT <http://www.doctrineofequivalents.com/> A production of the Federal Circuit Assessment Project [www.fedcir.org]