Pragmatic Patent Adjudication

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The Federal Circuit was created in large part to introduce stability and predictability into the patent law. By many accounts, it is failing to do so. Moreover, current patent doctrine does not adequately incorporate the patent system's broader utilitarian purpose. Recent decisions on the patentability of diagnostic and therapeutic methods illustrate the fundamental flaws in the Federal Circuit's jurisprudence. Doctrinal incoherence over medical methods is not simply an isolated glitch in the patent law. Rather, it serves as a case study of a larger problem with the court's approach to questions of patent scope. By maintaining a façade of adjudicative rule formalism while tacitly manipulating its rules to approximate policy goals, the court creates doctrinal confusion and perpetuates empirical uncertainty about the patent law's practical effects.

The Article proposes a pragmatic alternative whereby the Federal Circuit candidly asks the fundamental factual questions driving disagreements over the extent to which an inventor should be able to assert patent rights in after-arising technologies. It suggests that we focus not just on the substantive content of the patent law, but also on the process by which the law develops. By prompting litigants to directly address contextual issues surrounding patent disputes, pragmatic adjudication may serve an information-eliciting function and shed light on longstanding theoretical debates. The Article explains why the patentable subject matter doctrine is the best place to house this policy-based analysis. It identifies queries specifically pertinent to recent and ongoing cases involving diagnostic and therapeutic methods, and advocates that the Federal Circuit raise similar empirical questions with respect to other inventions whose patentability is contested, such as software and business methods.