

Better Mistakes in Patent Law

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This article analyzes patent mistakes—that is, mistakes made by the Patent and Trademark Office or the courts when they decide whether a particular invention has met the patentability requirements. There are two familiar types of mistakes: false positives and false negatives. These mistakes might be made “early,” during the evaluation of a patent application, or “late,” during the assessment of an issued patent’s validity. And they might occur with respect to any of the patentability requirements.

Patent mistakes have potential costs. For example, false negatives can prevent inventors from capturing the benefits of their investments in research, while false positives can create overlapping rights in information. Private actors might try to reduce these potential costs. An inventor might overcome a false negative by investing in first-mover strategies—like trademarks, exclusive contracts with suppliers and distributors, or trade secrecy—that help her appropriate returns to research investments. And inventors in tightly-knit groups may form patent pools or enter into cross-licensing agreements to overcome the patent thickets that can result from repeated false positives.

The efficacy of these private responses will often depend on the timing and doctrinal basis of a mistake. For false negatives, timing looms large—early mistakes will generally be easier to fix than late ones. For false positives, the doctrinal basis will often be crucial—it might be easier to fix enablement mistakes, for example, than novelty ones. These characteristics of patent mistakes—their type, timing, and doctrinal basis—should therefore guide patent system design.