

The Patent Treatise Boom

Saurabh Vishnubhakat[†]

Benjamin N. Cardozo School of Law

The 1836 Patent Act invigorated U.S. patent law by reintroducing ex ante examination, establishing a professional examiner corps, and creating a prior art library. These reforms spurred both intellectual and economic growth in patent law. This study examines a parallel underexplored development: a proliferation of patent law treatises that systematized doctrine for the legal community. The Act triggered a boom in treatise production, part of a broader legal publishing boom already underway since 1820. As Michael Hoeflich has shown, 1820–1851 marked the “golden age” of the antebellum legal book trade, moving beyond local manuals and imported English texts. Patent law mirrored this shift: prior to 1836, only two major treatises existed: one by Thomas Green Fessenden (1810, updated 1822) and Oliver Evans (1816). Afterward, at least ten new treatises rapidly appeared within fifteen years, including influential works by Willard Phillips (1837) and George Ticknor Curtis (1849). A key puzzle is why post-1836 patent treatise publishing was so atomized—mostly new works by new authors rather than updates. This is in potential tension with Daniel Hulsebosch’s thesis of elite lawyers crafting a unified, scientifically derived common law through canonical texts—a thesis Hoeflich adopts and in which he situates the role of publishers. Whether this unifying vision extended to patent law, and whether it succeeded because of, or despite, the proliferation of competing works, remains an open question. This atomization also offers historians discrete, detailed snapshots of evolving patent doctrine, enriching our understanding beyond traditionally dominant reliance on judicial opinions.

[†] 2024–2025 Visiting Scholar, NYU Law Engelberg Center on Innovation Law & Policy; Professor of Law & Director of the IP and Information & Law Program, Benjamin N. Cardozo School of Law; Research Fellow, Duke Law Center for Innovation Policy.