

## *Principles of Problematic Patents*

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It is common to refer to individual patents, or larger categories of patents, as “problematic.” In many cases, a category is considered problematic because patents in that area are thought to generally impose greater social costs than the social benefits they bring. For instance, scholars often criticize business method patents as tending to impose disproportionate social costs. While the scholarship has a robust literature on specific issues that make certain patents more problematic than others in particular contexts (e.g. Bessen and Meurer, 2008, and inadequate patent boundary notice), in general, the literature has not methodically organized the theoretical dimensions along which patents tend to be more or less problematic.

The goal of this article is to analyze and to elucidate the characteristics of patents that render them allegedly problematic. Building from the existing literature criticizing and defending patents, the article creates a structured taxonomy for expressing the various characteristics that tend to make individual patents, or patenting areas, more or less problematic, along with the underlying theoretical reasons why. For instance, the article explores problematic features of definiteness, over-breath, and other aspects of patent incentive theory.

Such a structured taxonomy offers several benefits. First, it promotes productive discourse regarding patent law by providing a vocabulary for expressing in a more methodical, consistent, and finely grained manner why any particular patent, or larger category of patents, tend to impose unjustified social costs. In other words, rather than broadly condemning areas such as business method patenting, one will have the vocabulary for more precisely articulating why, for instance, business method patents tend to be problematic, and the particular dimension of social cost that they tend to implicate more intensely compared to other inventive areas. Second, the analysis in this article will provide insights as to the legal institutions that may be best equipped to mitigate specific patent problems.