

# Patent Law and Policy



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## Cases and Materials

EIGHTH EDITION

**Robert Patrick Merges**

WILSON SONSINI GOODRICH & ROSATI PROFESSOR OF LAW AND TECHNOLOGY  
DIRECTOR, BERKELEY CENTER FOR LAW & TECHNOLOGY  
UC BERKELEY SCHOOL OF LAW

**John Fitzgerald Duffy**

SAMUEL H. MCCOY II PROFESSOR OF LAW  
PAUL G. MAHONEY RESEARCH PROFESSOR OF LAW  
UNIVERSITY OF VIRGINIA SCHOOL OF LAW



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# Preface to the Eighth Edition

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This edition represents one of the most comprehensive revisions we have undertaken in the history of the casebook. Throughout, we've worked hard to keep the casebook really up-to-date and also to maintain the good balance between theoretical and practical insights. The new edition includes all of the standard updating, such as adding significant new appellate decisions (e.g., the Supreme Court's *Hel-sinn* case on the meaning of post-AIA section 102(a)). In addition to such updating, we have made four important changes in the book.

First, we've reorganized the chapters so as to put patentable subject matter as the last of the "validity" chapters in the book. We made this move because we think patentable subject matter is now one of the most challenging subjects for students to grasp and thus it is very, very difficult to teach as the first subject in a course. Also, without a background in the other requirements of patent validity, students will have a hard time appreciating one of the main criticisms of current patentable subject matter doctrine — that other patent law doctrines such as novelty, utility, nonobviousness and enablement can resolve most of the hard hypotheticals that seem to be motivating the Supreme Court's more stringent patentable subject matter requirements.

Under the new organization, the initial introductory chapter is followed by two chapters on prior art and novelty, with Chapter 2 covering the AIA's first-to-file system and Chapter 3 covering the pre-AIA first-to-invent system. We think that prior art and novelty are relatively straightforward areas and thus a good starting point for the students. Chapters 4 and 5 then cover, respectively, utility and non-obviousness. Placing the nonobviousness chapter after novelty and utility makes sense for several reasons, including the historical reason that the nonobviousness requirement was developed as a part of patent law long after the novelty and utility requirements. Another good reason to order the chapters this way is that the chapters immediately after the introductory chapter now cover what's "new, useful and nonobvious" — which is the precise language, in the precise word order, used most frequently by courts to describe kind of inventions that the Patent Act is designed to encourage. *See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 151 (1989).

While Chapters 2 through 5 cover the work that must be done by inventors, Chapter 6 focuses on the work that attorneys need to do in conjunction with inventors: fleshing out the disclosure of the invention, enabling the making and using

of the invention, refining patent claim language, and so on. Chapter 7 then covers patentable subject matter. With that order of chapters, students will arrive at the topic of patentable subject matter with a good understanding of the other provisions of the statute. Thus, they should be able to appreciate the central policy question of Chapter 7, which we think is whether patentable subject matter should ever be used to exclude inventions that are new, useful, nonobvious, enabled, described and well claimed.

The chapters after Chapter 7 are in the same sequence as in the 7th edition: infringement (Chapter 8); remedies (9); legal process (10), ownership (11) and the commercial issues associated with patents (Chapter 12, covering exhaustion and antitrust).

A second major change is that we rewrote the chapter on patentable subject matter so that it now (i) focuses on the four recent Supreme Court cases on patentable subject matter doctrine (*Bilski*, *Mayo*, *Myriad* and *Alice*), and (ii) is considerably shorter because it omits discussion of the older cases and tangential issues. Our rewrite here is designed to make the chapter more “teachable” and also to avoid drawing the class too much into the doctrinal morass of patentable subject matter. The chapter includes discussion of the major theoretical issues associated with patentable subject matter, but it does not attempt to canvass the entirety of patentable subject matter case law through two centuries. Our approach to the rewrite is to provide students with all of the basic case law, and to set forth the major legal and policy issues. We recognize, however, that any course in basic patent law has to limit discussion of patentable subject matter to a single part of the course. Given the huge uncertainties associated with patentable subject matter, we think it best to have to the students read the most recent Supreme Court cases and some of the Federal Circuit cases, which together provide more than enough fodder for discussion in class.

A third major change is that we have expanded Chapter 8’s discussion of the case law on claim interpretation. In the past two decades, the Federal Circuit has developed an elaborate set of precedents concerning the interpretative methods applicable to claims. Chapter 10 now sets forth that lower court case law in much greater detail than in past editions. In doing so, however, we alert students to the very real possibility that the Federal Circuit case law in the area might at some point be found inconsistent with Supreme Court case law, which points to quite different approaches to patent infringement analysis. It is for this reason we continue to carry forward some classic case law and related discussion that epitomizes the traditional Supreme Court focus on the merits of a patented invention and a substantive comparison of that invention with the product accused of infringement.

Fourth and finally, we also expanded Chapter 10’s discussion of post-issuance proceedings at the PTO. Inter partes review, in particular, has become a major part of patent practice. Chapter 10 tries to cover the legal constraints on the PTO in running post-issuance proceedings, and the general relationship between IPRs and initial prosecution to obtain a patent. We go into considerable depth on procedural

issues, emerging strategies, and contemporary controversies. We believe PTAB proceedings will continue to impact patent practice and the innovation community in significant ways, and we want students to be on top of these important developments.

We hope that teachers and students will appreciate this edition's new organization and the new material added to the chapters. We also hope that the book continues to imbue its readers with a love for the richness of this field. Patent law is directed to the ambitious goal of providing practical property rights in intellectual creation, and achieving that goal requires a society mature enough to develop and maintain sophisticated legal machinery. Not surprisingly then, patent law is still a young area — the entire field is no more than a few hundred years old — and like a new technology, it continues to evolve and become more intricate as it develops. Our aspiration is that our book communicates some of the intricacy and beauty of this fascinating and developing field.

As always, we are deeply grateful to each of our adopters for choosing our book and are also open to suggestions as to how we can improve the book in future editions. Our most recent contact information is available on our respective law schools' websites and can be found with a simple web search. We welcome comments, questions, concerns, compliments or any other reactions to the book that teachers, students or other readers wish to share. Finally, we would like to thank the following research assistants who worked very hard to find and eliminate the errors from this edition: Anna Dyches, Morgan Graff, Chase Harris, and Daniel Shin. The remaining errors are our responsibility, but we hope our readers will not judge us too harshly for them.

Robert P. Merges

Berkeley, California

John F. Duffy

Charlottesville, Virginia

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