

# Patent Law and Policy



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## Cases and Materials

SEVENTH EDITION

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# Preface to the Seventh Edition

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In the twenty four years since the first edition of this casebook was published, the law of patents has undergone sweeping changes both in the courts and in Congress. As we said in the preface to the last edition, the pace of change continues to accelerate, as intellectual property becomes more important to the national and world economies, and as the fit between existing patent doctrine and modern business needs is reevaluated by a variety of judges, lawyers, legislators, academics, and institutions. To keep pace with the incredible rate of change in this area, we have published three editions of this casebook in just the past six years—the Fifth Edition in 2011, the Sixth in 2013, and now the Seventh in 2017.

The three most important changes to this edition of the casebook arise out of developments that were already underway when our last edition was published but that have become even more important in the past few years. First, in perhaps the most stunning development, cases concerning the judicial exclusions to patentable subject matter have increased by orders of magnitude in number and importance. Indeed, it is now clear that the set of four recent Supreme Court decisions on patentable subject matter (ending with *Alice v. CLS Bank* (2014)) has spurred a veritable revolution in patentable subject matter law, and the effects of that revolution are continuing to play out in the lower courts and in the Patent & Trademark Office.

To accommodate this first development, we have reorganized and streamlined Chapter 2 substantially. After an introductory subchapter containing two basic cases on patentable subject matter (*Diamond v. Chakrabarty* and *Bilski v. Kappos*), each of the next three subchapters covers one of the three judicial exclusions to patentable subject matter. As luck would have it, the recent cases can be arranged nicely in sequential order, with subchapters covering principles of nature (with *Mayo v. Prometheus* (2011)), natural phenomena (*AMP v. Myriad* (2013)), and abstract ideas (*Alice*). Thus, the chapter includes all four of the Supreme Court's patentable subject matter cases—from *Bilski* to *Alice*—in chronological order. Chapter 2 also includes some of the very recent Federal Circuit cases on patentable subject matter, though we caution adopters that any of these cases might very well become outdated quickly or possibly even reversed by subsequent Supreme Court decisions. Patentable subject matter is likely to remain a challenging area to teach for the foreseeable future. Nonetheless, we believe the intuitive structure of the revised Chapter 2 will help in conveying this difficult area to students.

The second major development accounting for large-scale changes in the casebook is the enactment and implementation of the America Invents Act (AIA) of 2011.

When the last edition of our case book was published (summer of 2013), the new first-to-file priority system of the AIA had just recently taken effect. Now, more than three years later, the first-to-file system applies to all new applications and, likely, a majority of the applications pending in the PTO. Still, the set of patents currently in litigation continues to be dominated by pre-AIA patents, so both the AIA and pre-AIA must be taught to students for several years to come.

Teaching two distinct systems of priority obviously presents some challenges, and we have reorganized Chapter 5 and 6 in two significant ways to take account of this. First, the new chapters are substantially streamlined. We've left in the major cases that define the most important concepts, but we've demoted to mere notes some of the cases that were previously principal cases. For example, we have demoted *In re Kathawala* even though it is the leading case on pre-AIA § 102(d) because that subsection has arisen in litigation only with respect to a single patent in the past 20 years. Given that professors have to teach two versions of § 102, and that § 102(d) is in the older version of the statute, *Kathawala* does not seem worthy of much classroom time.

Another change to account for the AIA is that Chapter 5 is now devoted entirely to the AIA first-to-file system. For several reasons, we think teaching the AIA law first is best. The AIA is dramatically easier to teach because it has a very logical organization, and once students know the AIA's version of § 102, it is relatively easy to make the adjustment to pre-AIA § 102 (or at least easier than any other approach). Furthermore, students are going to be increasingly impatient with very lengthy expositions of pre-AIA law. For many students using this book, the AIA will have been enacted by Congress when they were in high school, and by the time they leave law school, the AIA will have been fully operational for five years or more. We are confident that students will be legitimately more interested in learning the new rather than the old.

The third and final important development is the continued expansion of recent Supreme Court case law on patent issues generally. In the past three years, the Court has decided ten patent cases from the Federal Circuit and reversed in eight of the ten. The Seventh Edition includes major new Supreme Court decisions on claim definiteness, claim construction, indirect infringement, remedies and the standards of review for the new AIA post-issuance review procedures. Even with these new cases, we fully expect that additional Supreme Court cases will soon be decided that will have to be added via our yearly summer supplements. In other words, stay tuned . . . we are living in exciting times for patent law!

As with prior editions, we have strived to make patent law accessible to a wide audience of students and teachers. We have continued to include many diagrams and figures from the patent cases and, where possible, have selected cases involving relatively simple technologies. We have also provided concise explanations of the relevant legal principles and policies animating the various doctrines. Our philosophy has always been to be as helpful as possible. In this regard we owe a great debt to many people, particularly adopters of the book and student research assistants. In the former category there are many, but Mark Lemley, Rochelle Dreyfuss and Josh Sarnoff deserve



special mention. In the latter, we owe much to literally generations of students. But most recently, Professor Duffy thanks his current students J. Kain Day, Taorui Guan, and Yujie Zhou, and Professor Merges thanks Jingyuan Luo, Berkeley Law class of 2016, for her heroic and cheerful work on this edition.

We also continue the tradition from prior editions of focusing attention on the underlying policies of patent doctrines. Patents have long been a subject of study among both legal scholars and economists. While this book is directed primarily toward a legal audience, it also covers the economic and other policy considerations that frequently control the direction of the law in the area. These policy discussions are intended both to serve a broader audience and to provide the book's core legal audience with a deeper understanding of forces shaping the law.

Finally, we continue to hope that, as with previous editions, this edition will 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 with 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 this edition communicates some of the intricacy—and even beauty—of this fascinating and developing field.

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