

Rethinking the Patent System's Early Filing Doctrine

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Abstract

The United States patent system is structured to encourage patent filing early in an invention's development and pending first to file legislative will only magnify this incentive. The current thinking is that an early filing system is beneficial. Early filing is seen as facilitating commercial development, eliminating wasteful patent races, and causing quicker dedication of the invention to the public.

Missing from the discussion is that early filing forces inventors to make filing decisions and draft applications with little technical or market information about the invention. This lack of information creates great uncertainty as to the invention's worth, causing most inventors to err on the side of filing early. As a result, inventors file first and ask questions later. Then, as more information surfaces, continuations, continuations-in-part, and new applications are filed to cover variations of the invention that are now better defined and/or shown to be of more commercial worth. The early filing nature of the patent system creates "a file early, file often" attitude.

Filing early and often exacerbates many of the patent system's most recognized problems. Filing early and often contributes significantly to the ever-rising number of applications, contributing to the backlog and burden on the Patent Office that reduces the quality of examination and issued applications. More applications means more issued patents, which cause problems of their own, particularly if they are "bad" patents. The earlier the patents are filed, the more likely they go underdeveloped because of the great uncertainty and the minimal investment at the time of filing. Asserting the early-filed patents in court is a cheaper option, creating patent trolls who use patents solely to extract rents from those already engaged in commercial development. The dearth of information and high level of uncertainty at the time of filing also contributes to the lack of clarity in the patent's specification and claims, causing patent boundaries to be unclear—a situation that some see as the root of the patent system's problems.

To minimize these problems, an actual reduction to practice requirement should be used to optimize filing time. The requirement would ensure that actual implementation information is available prior to filing, while stopping short of requiring full-blown commercialization. The additional, development-specific information generated reduces uncertainty at the time of filing, lowers the number of applications and issued patents, and increases the likelihood of commercialization.

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