

Oskar Liivak, The Unresolved Ambiguity of Patent Claims

*For well over a hundred years patent claims have been at the center of every patent related issue. Yet, what exactly does a patent claim claim? Exactly what type of thing is claim language intended to communicate? Despite their importance, patent law is confused about this central question. Some think of claims in the sense of “I claim to have invented the following things” while others think of them in the sense of “I claim exclusionary dominion over the following things.” These two views communicate quite different information and it impacts both substantive and procedural patent law. Generally, there is agreement about the legal effect of patent claims. Ultimately, in both views, patent claims determine a patent’s exclusion. But, how and why we move from claim text to exclusion differs considerably. The Federal Circuit, increasingly the Supreme Court, and patent scholars are all aiming to improve claim clarity yet all those efforts may prove fruitless unless this underlying ambiguity is first acknowledged and resolved. There cannot be clear and consistent patent discourse until the fundamental nature of patent claims is resolved. For example, In *The Interpretation-Construction Distinction in Patent Law*, Lawrence Solum and Tun-Jen Chiang take on some of the knotty linguistic problems associated with patent claims. Though I think the linguistic tools they develop are useful contributions, they failed to thoughtfully deploy them in patent law. Most importantly, they missed this unresolved, ongoing ambiguity in the linguistic meaning of claims. They simply presumed that the only way to understand claims is as direct delineations of patent exclusion. As a result their ultimate conclusions are premature if not mistaken. This response aims to first highlight this ambiguity and then it aims to resolve it. Once the confusion is understood, then it is clear that, though the legal effect of claims is to delineate exclusion, the only reasonable understanding of the linguistic meaning of claims is as “I claim to have invented the following things.”*