

## INCOMPREHENSIBLE PATENTS

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This Article tackles the question of comprehension of patent claims. It is no secret that claims are difficult to understand. And there are a number of theories about why it is so hard to construe claims. But no one has actually taken a look at the structure of the patent claim. Are claim construction difficulties caused, or at least related, to the form of the claims themselves? In this Article, I suggest that the ability to understand patent claims is inversely related to the complexity of patent claims. I also assert that the complexity of patent claims is affected by an unexpected norm in patent drafting and propose that this norm must be changed to improve comprehension of patent claims.

There is, unfortunately, no direct measure of comprehension of patent claims, nor is complexity suitable for quantification. Instead, I use word count of patent claims as a measure of complexity and the inverse of comprehension. The idea is that, as technology becomes more complex and patent law becomes increasingly confusing, it would make sense that a greater number of words would be required to describe the new technology to the disclosure level required by law. The average number of words per patent claim would thus be expected to increase over time, implying that complexity too is increasing. If it is true that complexity of patent claims is increasing over time, it would make sense that the ability of courts to construe and comprehend patents should be decreasing. Perhaps a lack of comprehension of patent claims is a necessary by-product of the evolution of technology and law.

A finding that the word count of patent claims, and thus complexity, is not changing over time may be more troubling. While it could signal that technology or the law is not becoming more complicated, it could also indicate something much more disconcerting – a norm in drafting patent claims that obscures patent meaning and is incommensurate with the invention. The upside of this, however, is that an identified norm can be changed. Patent law is currently ripe for reform, but claim drafting has not been on the table. I propose modified guidelines for patent claims that would decrease unnecessary complexity and, hopefully, improve comprehension.