

“Is Information Patentable?”

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Abstract

This Article explores the question of whether information can and should be patentable. Patent law has seemed traditionally to limit protection to four basic areas of subject matter: processes, machines, articles of manufacture, and composition of matter, all of which are limited to tangible products and processes. Although many cases have used the word “tangible” in defining the boundaries of patentable subject matter, neither the language of the statute nor judicial decisions have explicitly excluded “information” from patent protection. Arguably, such a limitation is implicit both in prior judicial decisions and certain patentability requirements. Advances in information technologies have thus challenged the traditional rules, especially with regard to protection of processes. Indeed, many recently filed patent applications and recently issued patents appear to protect information per se in many areas. This Article therefore attempts to address the question whether information can and should be protected under patent law. This Article suggests that the patent law has consistently excluded information from patent protection. It shows how courts developed over the years different information gatekeepers that aimed to keep information outside the patent system and in the public domain. However, because most of these gatekeepers were ill defined courts eventually sounded their death knell. The introduction of information technologies was, however, the turning point in the treatment of information. The Article closely tracks the courts’ and USPTO’s struggles with such technologies, pointing to early as well as ongoing efforts to keep information outside the system, a process in which all eventually gave up the fight. The Article next turns to consider whether information should be patentable and suggests that the balance tilts in favor of keeping information outside the patent system.