**WORKING TITLE:** Fixing the Right Patents: Tailoring the Exercise of Declaratory Judgment Jurisdiction in Patent Cases.

**ABSTRACT:** Our patent prosecution process produces unjust patents. Patents are written and prosecuted ex parte; thus, so long as applicants stay within their duty of candor to the USPTO, they have every incentive to write overly broad claims and highlight material that supports patentability while downplaying any damaging information. This partial, one-sided process results in patents that obfuscate rather than illuminate, essentially allowing patent-holders to tell the public: “I won’t (or can’t) tell you where the boundary is, but put one foot over where I think it is and I’ll sue you for patent infringement.” Such patents are, by definition, unjust because they fail to clearly and objectively disclose the invention and do not establish a fair boundary of the patent right, leaving the public unable to discern if their own commercial and inventive activities conform with the law. But correcting every unjust patent may not be worthwhile. Instead, the Declaratory Judgment Act provides judges with a useful tool to correct patents that matter to the relevant public: the Act grants courts “unique and substantial discretion” to decide whether to take a declaratory judgment action even when the court has subject matter jurisdiction over it. Since unjust patents affect different industries in different ways, courts should use this discretion to tailor their exercise of declaratory judgment jurisdiction to different industries in order to correct those patents that are most likely to be impeding innovation. Certain industries are more likely to produce, and be adversely affected by unjust patents; for these industries, courts should broadly exercise their declaratory judgment jurisdiction so that more of these patents can be thoroughly vetted through an impartial decision-maker. In industries where unjust patents are less problematic, courts should limit their exercise of declaratory judgment jurisdiction to encourage private dispute resolution. By using this policy lever in an industry-specific manner, courts can correct unjust patents that unfairly block innovation, thereby furthering the goals of both the patent system and the Declaratory Judgment Act.

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