ABSTRACT: The effectiveness and efficiency of any legal system depend in large part on the accuracy and certainty with which that system can distinguish harmful from beneficial acts. Accuracy and certainty affect the value of various rights and entitlements and investments therein. Accuracy and certainty in the law also increases the deterrence of harmful acts while allowing non-harmful acts or even encouraging socially beneficial acts. Accordingly, accuracy and certainty in the law can have a profound effect on parties’ incentives ex ante.

Incentives are particularly important under patent law, which is designed specifically to encourage social beneficial invention. Accuracy and certainty in patent boundaries – the claims of a patent – are therefore believed to be pivotal to efficient patent incentives. The interpretation of patent claims therefore takes on singular importance under U.S. patent law, for patent claim construction determines patent scope and thus patent value. Patent claims are hardly self-defining, however. Indeed, some level of inaccuracy and uncertainty in patent claim construction may be inevitable. It is not surprising, then, that the courts often have difficulty interpreting patent claims. This Article therefore looks more closely at the effects of this inaccuracy and uncertainty on the fundamental purposes of the patent system.

In particular, the Article takes a look at the differences between rules and standards, the optimal complexity of the law, and how both bear on accuracy and certainty in patent claims. Patent claims can be seen as complex rules, and by modeling these rules when accuracy and certainty are both lacking – that is, when patent claim construction is inaccurate, uncertain, or both – we can see accuracy and certainty in patent claim construction may not be quite as important as we first thought in most industries.

First, because of the complexity of the underlying policy issues and the essentially ex parte manner in which patent claims are drafted, an “accurate” claim construction may not even exist at the margin. Second, uncertainty at the margins of claim construction may have little or no deleterious effect on the fundamental
purposes of the patent system. Uncertainty in claim construction is unlikely to weaken incentives to invent for either patentees or their competitors. Uncertainty in claim construction is also unlikely to have much impact on incentives to innovate. Accordingly, we may wish to revisit patent law’s current emphasis on accuracy and certainty in patent claim construction, especially in relation to the high cost of achieving accuracy and certainty and the diminishing returns on such investments.