

Draft date: 07/22/08

Who Changes the Rules? Paying Attention to the Process of Patent Reform

Liza Vertinsky
Emory University School of Law

Abstract

Change in the law does not happen instantaneously or in a vacuum. The process of legal change is fraught with uncertainty, complexity and cost, and the path selected for legal reform can have a significant impact on the outcome. But despite vigorous and prolonged debate over the content of patent reform, Congress and commentators alike have failed to consider the impact of legislating change rather than relying on judicial or agency law making. I ask the question of how alternative processes for patent law change impact the cost and outcome of patent reform. Filling a gap in the literature on legal change (particularly that relating to patent reform), I provide a framework for comparing legislation, judicial decisions and agency rule making as alternative mechanisms for changing patent law. The process of legal change is described in terms of four dimensions - variance, specificity, speed, and participation. Alternative processes for changing patent law are characterized along these four dimensions and then compared in terms of their impact on transition costs. The analysis shows that for many of the proposed reforms, judicial decision making may be the most efficient (i.e. least costly) mechanism for law change. Courts have the ability to introduce targeted, incremental change, they can accommodate changing market circumstances, and they are limited in their ability to deviate too quickly or unpredictably from existing norms. Courts cannot substitute for Congress and agencies when significant shifts in underlying policies or institutional structure are needed, however, and the analysis therefore also identifies when legislation or expanded agency rule making may be the best, or the only, mechanism for accomplishing certain types of law change. The analysis is a normative one, leaving any divergence in the behavior of Congress, the Federal Circuit and U.S. Patent and Trademark Office from institutional norms for future research. I conclude that by neglecting the impact of process on outcome when considering the scope and content of patent reform, Congress may lose opportunities to improve the performance of patent law.