Rules for Patents

There is widespread agreement that the patent system in the United States is in need of reform, and over the past several years there has been a flood of reform proposals. These proposals, while varied, usually share two common assumptions. First, they assume that patent policy is best made through case-by-case adjudication, whether in litigation or administrative practice, of the validity of individual patents. Second, they assume that the existing allocation of authority over the standards for determining patent validity – in which the courts are primarily responsible for interpreting the broad language of the Patent Act – ought not to be disturbed. This paper challenges both assumptions.

I approach the problem of patent reform primarily as a problem of administration. The administrative structure of the patent system has remained largely unchanged since 1836. That structure may have been suitable for a time when the predominant tasks of the system were to grant or deny individual patent applications. The increasing diversity of technological innovation and the sharp increase in volume of patent applications, however, have made it so that the patent system must now function not only to grant or deny patents, but also self-consciously to make patent policy – that is, to interpret the broad language of the Patent Act and adjust the standards of patentability to changing technologies.

I argue that agency-based rulemaking is superior to case-by-case adjudication for making patent policy. Neither the courts nor the Patent Office as it is currently structured has the time, resources, or incentives to make forward-looking decisions concerning the standards of patentability as applied to rapidly changing technologies. The result is significant uncertainty over some of the basic requirements of patentability. By contrast, notice-and-comment rulemaking would allow an expert agency informed by the relevant actors to make considered judgments about the appropriate scope of innovation policy.

Finally, I consider the impact that administrative rulemaking would have on various elements of the current patent system, including the Patent Office, the Federal Circuit and the structure of judicial review, and validity litigation.