PATENT LAW TAILORING

Clark D. Asay

A significant amount of scholarship suggests that innovation—or the process of taking an invention from concept to a commercial product—differs dramatically by industry. That is, in some industries, it appears that competition may be the primary driver of innovation, whereas in others, the lure of exclusive rights—or patent rights—appears to play a more important role in promoting innovation. On this basis, some have argued that patent law should be tailored by industry to better promote innovation in each. Whether it be done legislatively or judicially remains a point of argument. But, many conclude, it should be done.

This Article, while acknowledging that some industry tailoring may prove beneficial, argues that solutions that tailor patent law according to who owns the patent and against whom it is being enforced (i.e., the probable effects on innovation), are more likely to prove effective at promoting innovation.

This is so for a number of reasons, as more fully discussed in the Article. First, innovation within industries is not monolithic. Different actors within a given industry face different costs and obstacles, both formal and informal, in attempting to innovate. And those differences have an impact on what role patents may or should play for different actors within the same industry.

Second, and related, actors within a given industry are also not monolithic in terms of their approaches to patents. Different actors within an industry have varying reasons for pursuing or not pursuing patents, and patents will therefore affect each and their innovative activities differently. Taking these differences into account and tailoring patent law accordingly would thus help better promote innovation.

And finally, from a normative standpoint, tailoring patent law according to the probable effects on innovation better satisfies the Constitutional basis for patent law in the first place. While advocates of industry tailoring often have the goal of promoting innovation with such efforts, a more straightforward way of promoting innovation is to expressly take into account the probable effects on innovation when adjudicating patent rights among parties.

This Article then explores the possible advantages and disadvantages of different proposals for tailoring patent law more explicitly based on the probable effects on innovation, including an analysis of efforts by federal district courts to do so following the U.S. Supreme Court's *eBay v. MercExchange* decision and legislative proposals to address the "patent troll" problem.