The New Model of Interest Group Representation in Patent Law

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Traditional public choice theory postulates that, generally speaking, interest group representation is primarily responsible for the passage of legislation in a wide variety of areas. Intellectual property scholars have largely embraced public choice theory as providing an accurate descriptive explanation for the Congressional enactment of laws in the intellectual property space, agreeing that the general assumptions of the public choice model are met in this context and that specific statutes bear the scars of the interest group negotiation process. This Article contends that the reality of legislative enactment in patent law diverges sharply from this conventional wisdom. Drawing on three case studies — the Federal Courts Improvement Act of 1982, the Bayh-Dole Act, and the Hatch-Waxman Act — this Article argues that, in actuality, legislative enactments in patent law take place on a spectrum of interest group representation. In this space, laws are often passed where the relevant interest groups are either wholly unorganized or even entirely nonexistent. This Article goes on to consider the one-way-ratchet nature of these statutes, a characteristic that is common to statutes in the copyright context, and then to ask why legislative enactments in patent law should be like those in copyright law in some respects but unlike those enactments from a public choice perspective. Ultimately, the Article puts forth several testable hypotheses about legislative action in the patent law space.