



IP Literature Watch

CRA Charles River
Associates

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This newsletter contains an overview of recent publications concerning intellectual property issues. The abstracts included below are as written by the author(s) and are unedited.

IP & Antitrust

Through the anti-monopoly lens: What constitutes 'unfairly high patent pricing' in China?

Yuan Hao (Tsinghua University School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3442961

China is facing a pressing need to build its innovation-driven economy. With this backdrop, recent cases and controversies in judicial/administrative practice call our attention to the need of a more systematic understanding of the intersection between antitrust and IP. A critical thread in this intersection tapestry is the concept of "unfairly high patent pricing (专利高价)". Different than its US counterpart, Chinese Anti-Monopoly Law pays substantial attention to a dominant market player's unilateral "exploitative" conducts. Specifically, section 17(1) of the AML forbids a dominant undertaking from "abusing its market position" by selling at "unfairly high prices". However, neither the Law nor later enacted Judicial Interpretation provides an administrable definition of what constitutes "unfairly high price" in an anti-monopoly sense. Correspondingly, courts and enforcement agencies have significant discretion in characterizing a patent pricing as "unfairly high", thereby imposing penalty in practice. Despite a good intention, this ex post legal risk would seriously curtail business entities' ex ante incentive to invest in innovation, which is often entailed with high risks. Lacking adequate legal and economic guidance, this discretion would also result in significant institutional positive error. Such error would be particularly severe in the context of patent-intensive industries. Section 55 of the AML provides an IP "safety harbor", providing that a proper exercise of IPR shall be immune from the scrutiny by Anti-monopoly Law, while an abuse of IPR shall not. However, as recent cases/controversies indicated, this provision has been seldom followed by authorities in practice, probably due to the lack of an administrable test to differentiate "proper exercise" of IPRs from "abuse". This article tries to inform the anti-monopoly differentiation between "proper use" and "misuse" of patent, by probing into the very mechanism patent regime has been utilizing to promote innovation, which constitutes a mutual goal with Chinese Anti-monopoly Law. Economic insight into patent jurisprudence prevalent in various jurisdictions including China and the US revealed that the patent regime promotes innovation essentially through the instigation of dynamic competition. More specifically, it (i) directly bridges an innovator's R&D to market demands by granting the innovator a property right to exclude imitating competitors, thus restricting the competition by imitation ("CBI"); (ii) By restricting the competition by

imitation, patent regime achieves dual goals - it not only enables an incumbent patentee's access to ex post supra-competitive profits as ex ante incentive to invest, but also induces scarce social resources into other innovators' channels for "inventing around", i.e. to provide better/cheaper non-infringing technologies. This "inventing around", i.e. subsequent innovators' competition by substitution ("CBS"), constitutes a critical link in the virtuous circle of dynamic competition; (iii) Feeling competition pressure by existing or potential peer innovators, the original innovator would be incentivized to further investing in her own CBS, in order to stay a winner in the marketplace. In this way, a virtuous circle of dynamic competition would be instigated. As the conventional vehicle to protect a healthy market competition ecosystem, antitrust/anti-monopoly law should adopt a more dynamic perspective and respect the patent regime's key mechanism in its own facilitation of innovation. Importantly, antitrust law should not lightly disturb a well-functioning circle of dynamic competition, simply because under its lens CBI or static efficiency seems restricted and local optimum seems not achieved - as a result, a supra-competitive or even monopoly profit enjoyed by a patentee, should be presumed legal per se if static efficiency loss is the only proved harm. On the other hand, arguably in exceptional circumstances certain patent pricing may indeed be so excessively structured to amount to a constructive refusal to deal with follow-on innovators or at least serious "margin squeeze" for these innovators, and such refusal or squeeze in theory may lead to foreclosure of the CBS itself, thus frustrating the circle of dynamic competition. As an illustration, the conventional hypothesis of patent "anti-commons" or over-broad patents' suppressing effect on follow-on innovation can be well considered as embodiments of such theoretical worries of foreclosure on CBS. Nevertheless, decades of empirical research in various industries, including recent findings in SEP intensive areas, have showed little success in proving this theoretical worry in practice. There might be different explanations to this empirical failure. This article comments that perhaps precisely because the very patent mechanism of promoting innovation has been all along to instigate CBS through a restriction of CBI, throughout the years our patent regime has developed an implicit yet critical awareness to safeguard CBS from being foreclosed. This built-in awareness is reflected in a wide variety of rules and principles of patent jurisprudence prevalent in many jurisdictions, including the eligibility, inventiveness/non-obviousness and disclosure/enableness requirements in the grant of a patent, reverse doctrine of equivalents in patent infringement findings, as well as a few fundamental principles such as the proportionality principle as identified by Merges in Justifying IP. Surely these built-in mechanisms are not ironclad, but they may have worked in a more successful way than we gave faith to, and antitrust law shall not overlook this.

Based on this insight, this article proposes that a patentee's pricing act of her patented technologies should be presumed legal per se under section 55 of the AML, unless an administrative agency or anti-monopoly plaintiff can prove with actual evidence that the pricing at issue constitutes an "abuse" of the patent(s), in that it would likely foreclose the very type of competition mechanism the patent regime aims to promote, i.e. competition by substitution. In addition to the economic insight, this proposal is also supported by the antitrust/competition law practices in sister jurisdictions, and the cost-error framework pioneered by antitrust scholars such as Judge Easterbrook. Despite the existence of different official empowerments, almost all economically developed jurisdictions have exercised a very cautious practical attitude in condemning a market price as "unfairly high", particularly when it comes to patent-intensive industries. Our unfairly high pricing provision does not have a counterpart in traditional US antitrust jurisprudence, and despite the existence of a theoretical counterpart in EU, it has been rarely invoked in practice for good reasons. Based on the above discussions of the critical mechanisms of patent regime to promote dynamic competition, the empirical scarcity of real foreclosure of competition by substitution, as well as the cautious attitude in sister jurisdictions, the cost-error framework pioneered by Judge Easterbrook further teaches us that as our knowledge of dynamic efficiency is still insufficient and precision is very often unreachable, in choosing a good antimonopoly policy we should prefer the side with less error costs. This preference is particularly necessary in China when it is still experiencing a strenuous transition from planned economy to a full-fledged market economy today.

SEP holders' injunctive relief under antimonopoly law

Yaojia Tang (Zhejiang University of Finance and Economics (ZUFE))

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443556

In this paper, we analyze the effects of injunction by a SEPs holder, and the availability and antitrust policy for injunction. We show that FRAND commitment does not include a waiver of SEP holder's right to seek injunction. However, the granting of injunction to SEPs holder should be limited balancing the interests of patent holders and implementers. Seeking injunction by SEP holder against a willing licensee may not necessarily constitute an abuse of dominant, antitrust scrutiny shall pay much attention to anticompetitive effects. The granting rule of injunction is vague in China's Civil Procedure Law and relevant judicial Interpretation by the Supreme People's Court. The decision of InterDigital and the draft of Antimonopoly Guidelines (2017) in China demonstrate there are some issues needed to be resolved for Antimonopoly Law and its enforcement.

IP & Licensing

SEP royalties: what theory of value and distribution should courts apply

Alexander Galetovic (Universidad Adolfo Ibáñez; Stanford University – The Hoover Institution on War, Revolution and Peace; University of Padua – CRIEP)

Stephen Haber (Stanford University – Hoover Institution and Political Science)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3447641

Courts are often required to determine the royalty to which the owner of a FRAND-encumbered standard essential patent (SEP) is entitled. We argue that in adjudicating the value of SEPs, courts should do what they do in pricing other assets or the flows of income they produce: rely on information from the market about the value of comparable assets or their rental rates. In short, they should inquire about the observed royalty base and rate charged in the market by a SEP licensor to a different licensee, and make adjustments to account for differences in circumstance, such as the timing of the license.

The practical logic for doing so is straightforward: a royalty is simply the rental price of an asset created by investments in R&D. It is no different from other assets that courts value by inquiring about their market price, such as real estate, inventories, art collections, music catalogs, or personal business assets. The conceptual logic is also straightforward: the comparable method is based on price theory, the basic building block of microeconomics, which explains where value comes from and how it is distributed among factors of production, including intellectual property.

We argue that courts should not employ the “bottom up” and the “top down” techniques of royalty apportionment. Both are based on the theory of patent holdup and royalty stacking, which assumes that any observed royalty is the result of “excessive royalties” wrought by the additional monopoly power conferred by standardization through patent holdup and royalty stacking. This theory has been shown to be logically inconsistent and logically incomplete, and its predictions have been rejected by systematic empirical tests. Bottom up techniques cannot actually be operationalized. Top down techniques were invented in order to address this limitation, but employing them requires a court to reject the implications of price theory.

Patents for sharing

Toshiko Takenaka (University of Washington – School of Law)

Michigan Technology Law Review, Vol. 26 (December 2019, Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453360

Spurred by the Internet, emerging technologies have changed the way commercial firms innovate and have made it possible for individuals to play an important role in that innovation. Producers in the Information Communication Technologies (ICT), and other sectors dealing with complex technologies with many separately patentable components, find it increasingly difficult to make products without infringing on patents held by others. Numerous overlapping patents often cover such products. Producers have developed a new way to use patents: as inclusive rights for sharing their technologies with others through cross-licensing and other private ordering arrangements in order to ensure the freedom to operate and innovate. Individual innovators, and open source software (OSS) programmers in particular, have also developed a new use of copyrights: using them to share their technologies through OSS licenses. Producers of complex technologies use patents for sharing their technologies with OSS programmers and for protecting themselves from patent assertion. In light of these recent uses, this article proposes a new utilitarian theory for patents: patent as the incentive to share, with the reward of increasing the freedom to operate and innovate. It argues that both the ex ante and ex post incentive to invent theories are outdated because they fail to take into account the patent owners' lack of control over their products in complex technology sectors. This article urges Congress to reevaluate U.S. patent rights in light of the new patent use. It reviews U.S. patents as property rights from the comparative law perspective and proposes the revitalization of the inclusive side of U.S. patents by introducing a compulsory license for blocking patents. It also proposes that the exclusive side of patent rights should be limited to private and experimental use exceptions to ensure the freedom to operate and innovate by sharing.

IP & Innovation

Decentralising the patent system

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Kyle Higham (Ecole Polytechnique Fédérale de Lausanne)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446337

This paper proposes a substantive re-think of the modern patent system. The patent system has come under intensive criticism in the past, and many scholars have proposed ways to improve it. Ideas for improvement include, e.g., prior-art bounties, contracting out examination and dynamic fee setting. However, many of these ideas have gone unheeded due to the cost of administering them and the rigidity of the patent system. We explore how distributed ledger technologies enable these major changes.

The Medicare innovation subsidy

Mark A. Lemley (Stanford Law School)

Lisa Larrimore Ouellette (Stanford Law School)

Rachel Sachs (Washington University in Saint Louis – School of Law)

New York University Law Review, Forthcoming

Stanford Law and Economics Olin Working Paper No. 536

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441247

Policymakers on both ends of the political spectrum have been looking for ways to reduce prescription drug prices. Democrats have also been working on expanding health care coverage, including different versions of Medicare for All. All these proposals have been framed as issues of access and spending. If innovation

incentives come up at all, it has primarily been because pharmaceutical companies claim that reducing drug prices will threaten innovation by undermining the value of their patents.

In fact, however, pharmaceutical access and innovation incentives are intimately related. Health insurance can change the structure of market demand. And Medicare in particular does so in a way that gives a very large subsidy to patented drugs, such that current U.S. pharmaceutical profits are often higher than they would be in an unsubsidized market. Medicare reimbursement rules thus can lead to greater-than-monopoly pricing of patented drugs, dramatically expanding the incentive U.S. policy provides to pharmaceutical companies. By not recognizing the Medicare innovation subsidy, policymakers have ignored one of the largest sources of innovation incentives. That extra incentive might be a good thing or a bad thing, depending on how much incentive pharmaceutical developers need. It may well be good for some classes of drugs and bad for others. But it is important for policymakers to understand how access policies like Medicare also serve as innovation incentives. This extra innovation subsidy may open the policy space for hybrid proposals that combine expanded government insurance like Medicare for All with lower drug prices while preserving or even increasing current returns to innovation.

Artificial creativity: Emergent works and the void in current IP doctrine

Tim Dornis (Leuphana University of Lüneburg)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451480

Artificial intelligence (AI) is on everyone's lips and is in everyday use. Yet discussion on what this means for our present and future—particularly in terms of the revolutions that AI might bring to the legal sphere—has only just begun. One topic that warrants, but has yet to receive, in-depth attention is the relevance of AI for innovative and creative activity and production. Legal analyses thus far have focused on humans and their role as innovators, authors, or creators. Left in the dark, however, is the question of how to regulate AI when it “innovates” or “creates” autonomously—without human direction or intervention. Examples of such artificial creativity abound. Robots and computers have recently come to paint works of art, compose symphonies, and write news articles, poetry, and novels. All of these “works” would doubtlessly be protected by copyright if created by a human being. But we are hopelessly naïve when confronted with whether and how copyright law and neighboring areas of intellectual property protection should respond to the rise of AI. Indeed, current law is devoid of rules and doctrines for artificial creativity—with the result that AI-generated works are left unprotected. The consequences of such neglect are yet to be discussed. This article provides an overview of the status quo of artificial creativity—i.e., creative production by AI—and its regulation (or, rather, non-regulation) in different jurisdictions, as well as an analysis of relevant doctrinal debate and economic foundations. It then offers suggestions for a reconceptualization of current doctrine, outlining a road map and overarching framework for legislative action and practical adjudication.

IP & Litigation

Patent accidents: Questioning strict liability in patent law

Patrick Russell Goold (City University London, The City Law School)

Indiana Law Journal, 2019, *Forthcoming*

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450484

Accidental infringement of patent rights is a pervasive and growing problem in the Information Age. As IP rights proliferate and expand in scope, it is becoming increasingly easy for companies and individuals to inadvertently infringe patents. When such accidental infringement occurs, patent law holds the infringer strictly liable. This contrasts with many areas of tort law where defendants are only liable if they act negligently.

This article questions the normative desirability of strict liability in patent infringement cases. Assuming the primary value of patent law is utilitarian, the Article poses the research question: What liability rule will maximize social welfare? The Article answers the question theoretically by applying economic models of accidents developed in tort law literature. The research finds that a negligence rule is preferable. Unlike strict liability, negligence liability will encourage both patentees and technology users to take reasonable measures to prevent accidental infringement, and thus minimize the social cost of patent accidents. Therefore, the Article recommends reforms to the liability rule in direct patent infringement cases. Defendants should be liable for accidental patent infringement only when they fail to adopt reasonable care to avoid the infringement.

IP Law & Policy

Research handbook on patent law and practice (table of contents and preface)

UW Law Submitter (University of Washington – School of Law)

Toshiko Takenaka (University of Washington – School of Law)

Research Handbook on Patent Law and Theory (Edward Elgar Publishing, 2019)

University of Washington School of Law Research Paper Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457388

This significantly updated second edition of the Research Handbook on Patent Law and Practice provides comprehensive coverage of new research for patent protection in three major jurisdictions: the United States, Europe and Japan.

Leading patent scholars and practitioners provide an innovative comparative analysis of fundamental issues such as patentability, examination procedure and the scope of patent protection, with current issues such as patent protection for industry standards, computer software and business methods. Updates to this second edition reflect on the dramatic changes that have taken place in the US Patent System since the first edition, including the America Invents Act that has introduced the first-inventor-to-file policy and post issuance proceedings to challenge validity. Current topics, such as the Unified Patent Court, patent litigation updates reform in the US, design patents and patent inventions in medical science, are also addressed.

Is privacy and personal data set to become the new intellectual property?

Leon Trakman (University of New South Wales (UNSW) – Faculty of Law)

Robert Walters (Victoria University)

Bruno Zeller (University of Western Australia – Faculty of Law)

(2019) International Review of Intellectual Property and Competition Law

UNSW Law Research Paper No. 19-70

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448959

A pressing concern today is whether the rationale underlying the protection of personal data is itself a meaningful foundation for according intellectual property (IP) rights in personal data to data subjects. In particular, are there particular technological attributes about the collection, use and processing of personal data on the Internet, and global access to that data, that provide a strong justification to extend IP rights to data subjects? A central issue in so determining is whether data subjects need the protection of such rights in a technological revolution in which they are increasingly exposed to the use and abuse of their personal data. A further question is how IP law can provide them with the requisite protection of their private space, or whether other means of protecting personal data, such as through general contract rights, render IP protections redundant, or at least, less necessary. This paper maintains that lawmakers often fail to distinguish between general property and IP protection of personal data; that IP protection encompasses important attributes of both property and contract law;

and that laws that implement IP protection in light of its sui generis attributes are more fitting means of protecting personal data than the alternatives. The paper demonstrates that one of the benefits of providing IP rights in personal data goes some way to strengthening data subjects' control and protection over their personal data and strengthening data protection law more generally. It also argues for greater harmonization of IP law across jurisdictions to ensure that the protection of personal data becomes more coherent and internationally sustainable.

Intellectual property in the Information Age: American & Chinese perspectives

Kal Raustiala (University of California, Los Angeles (UCLA) – School of Law)

Prepared for Penn Volume on the US, China & International Law

UCLA School of Law, Public Law Research Paper No. 19-30

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451389

Innovation is widely seen as a key driver of economic success in the 21st century — and therefore a key driver of national power. And while the secret sauce that yields a highly innovative economy is difficult to identify, let alone replicate, robust and broad intellectual property (IP) protection is widely believed to be an essential component. This paper compares the international IP policy of the two largest powers in the world: the U.S. and China. The U.S. is the world's leading proponent of strict IP regulation. China, by contrast, has long been seen, by the West at least, as the world's leading IP scofflaw. Yet Chinese observers — indeed, many observers around the world — believe the US is an IP bully that pushes inappropriate legal standards on other nations in an effort to serve the narrow interests of a few key domestic constituencies. There is substantial (though shrinking) divergence in how the US and China approach IP today, and this contrast reflects major differences in national interest and economic conditions. At the same time, American history itself suggests that convergence in IP law and policy will continue to occur, and may well accelerate, as the Chinese economy expands and matures. National power is a function of economic size but also innovation. Unlike the Cold War, when the US and Soviet economic spheres had little economic contact, the US and China are deeply economically intertwined. Those pervasive economic ties define the relationship. Yet the two states remain politically and militarily competitive — increasingly so under the Xi and Trump administrations — and while true conflict is not on the immediate horizon, its prospect drives substantial concern in the US over China's acquisition of American IP and innovations, the expansion of Chinese tech firms such as ZTE and Huawei, and its overall approach to IP protection.

TRIPS and its contents

Peter K. Yu (Texas A&M University School of Law)

IDEA: The IP Law Review, Vol. 60, 2019

Texas A&M University School of Law Legal Studies Research Paper No. 19-36

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3448332

In 2006, I published TRIPS and Its Discontents as part of a symposium commemorating the tenth anniversary of the TRIPS Agreement. At that time, developing countries were deeply discontent with the Agreement and the new and higher intellectual property standards that the WTO had imposed upon them. By contrast, when the TRIPS Agreement was about to celebrate its twenty-fifth anniversary earlier this year, the developing countries' trenchant critiques of the Agreement were mostly gone. Also disappearing were their usual accusations of coercion and neo-imperialism.

What has happened? Have developing countries successfully adjusted, or become sensitized, to the high intellectual property standards in the TRIPS Agreement? Have these countries and their supportive commentators and nongovernmental organizations become tired of criticizing the Agreement? Have developing countries and their supporters moved on to other more pressing issues in the areas of intellectual property and international trade? Have these countries been initially mistaken about the negative ramifications of the TRIPS Agreement and eventually found out that the Agreement was beneficial after all?

Written for the Second Annual Intellectual Property Redux Conference, this article seeks to answer these questions by revisiting the TRIPS developments in the past twenty-five years. It begins by offering five

reasons to explain why developing countries have gradually shifted their views from being discontent with the TRIPS Agreement to being content with it. The article then turns to four observations that will inform the Agreement's past as well as the ongoing and future development of the international intellectual property regime. The article concludes by identifying three active roles that the TRIPS Agreement will continue to play in the near future, viewing from the developing countries' perspective.

Copyright Law

A natural right to copy

Glynn S. Lunney, Jr. (Texas A&M University School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438625

In this symposium, we gather to celebrate the work of Wendy Gordon. In this essay, I revisit her article, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*. In the article, Professor Gordon first used the "no-harm" principle of John Locke to justify copyright as natural right and then used his "enough-and-as-good" proviso to limit that right. Her second step turned natural rights approaches to copyright on its head. Through it, she showed that even if we accept copyright as natural right, that acceptance does not necessarily lead to a copyright of undue breadth or perpetual duration. Rather, even a natural rights framework leads to a copyright regime shorter and narrower than we presently have.

While I agree that copyright should be shorter and narrower, I worry that Professor Gordon conceded too much in her first step. Neither Locke's reasoning nor Professor Gordon's reading of it can justify a right to prohibit copying as a matter of natural law. It is not the right to prohibit copying to which we have a natural entitlement. It is the right to copy.

Rethinking the "consumer" label

Dustin Marlan (University of Massachusetts School of Law)

Gonzaga Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440251

Our trademark law uses the term "consumer" constantly, reflexively, and unconsciously to label the subject of its purpose. According to the U.S. Supreme Court, trademark law has "a specialized mission: to help consumers identify goods and services they wish to purchase, as well as those they want to avoid." As one leading commentator puts it, "trademarks are a property purely of consumers' minds," and "the consumer, we are led to believe, is the measure of all things in trademark law."

Much criticism has been rightly levied against trademark law's treatment of the consumer as passive, ignorant, and gullible. For instance, consumers are seen as requiring protection from any and all marketplace confusion and hold no cause of action or expressive use-rights under the Lanham Act. However, that a contributing factor to such treatment could be the linguistic bias stemming from the law's label of the buying public as mere consumers — rather than, for instance, 'customers,' 'buyers,' 'purchasers,' 'participants,' 'citizens,' 'persons,' 'individuals,' or 'human beings' — has not, until now, been seriously discussed.

This article urges trademark law to rethink its ubiquitous use of the consumer label. It explores consumer as an objectifying, anti-ecological, and nonsensical metaphor for "one that utilizes economic goods." It then examines social psychology experiments finding that use of consumer has potentially deleterious effects for society given the negative stereotypes which it engenders as a social categorization. It claims, by extension, that the implicit linguistic bias inherent in consumer rhetoric might contribute to trademark law defining the public in a manner that is patronizing, biased, insulting, and indulgent of likelihood of confusion claims. The

article thus suggests that we might either phase out the consumer label or at least pause to acknowledge its potentially biasing effects.

How Europe wants to redefine global online copyright enforcement

Martin Husovec (Tilburg Law and Economics Center (TILEC); Tilburg University – Tilburg Institute for Law, Technology, and Society (TILT); Stanford University – Stanford Law School Center for Internet and Society)
In: Tatiana Eleni Synodinou (ed.), Pluralism or Universalism in International Copyright Law (Kluwer law, Forthcoming)

TILEC Discussion Paper No. 2019-16

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372230

This book chapter discusses how since the early 2010s the European Union continuously deviated from the original notice and takedown safe harbour model championed by the United States thereby incrementally creating its own regulatory response to online copyright infringement. The article puts the Digital Single Market Directive, and its highly contentious Article 17 (formerly 13), in a broader context of new regulatory models that have been developed in the last decade. These models not only inspired the reform but will also continue to co-shape it and complement it in the years to come. The ultimate goal is to provide a reader with a high-level analysis of the current regulatory models, including of Article 17 DSMD, and to provide a concise overview of the developments which are likely to set the tone of the discussions also abroad. When this happens, it is always useful to understand the regulatory context in which the European reform took place.

Other IP Topics

An economic perspective to intellectual property

Ivin George (NMIMS School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3454409

Intellectual Property can be seen from different economic perspectives. On the one hand knowledge economy and the relation to IP provide the Macro-Economic-Perspective and on the other hand the Micro-Economic-Perspective analyses the IP-situation in a Knowledge Economy for a firm. Thus, this paper will try to elaborate on these two perspectives and study the importance of IP management for the effective realisations of these economic perspectives. This paper has been divided into two parts, the first part tries to elaborate on the concept of Knowledge economy and its characterisation, the second part tries to justify the economic rationale for IP protection and gives an overview of the micro and macro-economic utilization of IP protection.

The fundamental right to property and the protection of investment: How difficult is it to repeal new intellectual property rights?

Martin Husovec (Tilburg Law and Economics Center (TILEC); Tilburg University – Tilburg Institute for Law, Technology, and Society (TILT); Stanford University – Stanford Law School Center for Internet and Society)
Forthcoming, in Christophe Geiger (eds), Research Handbook on Intellectual Property and Investment Law (Edward Elgar 2019)

TILEC Discussion Paper No. 2019-17

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391680

In the 2010s, we are witnessing a number of policy debates concerning proposals for new intellectual property rights. The high-profile examples include publishers' rights, data producers' rights, and sport events organizers' rights. The arguments behind these rights are purely utilitarian, unlike in the case of some traditional intellectual property rights, such as authors' or inventors' rights. These rights are clearly presented

as tools of the European Union (EU) innovation policy, incentivizing quality journalism, data creation and trading or investments in sports. However, how sticky are these tools?

A lot of attention in the literature rightly focuses on the first-order issue of their social costs and benefits. Little attention is paid to the problem of institutional inertia which keeps some of these solutions in circulation despite their proven ineffectiveness. While economic progress is unthinkable without stable property rights, it is equally unthinkable without their never-ending adjustment and continuous reflection of their effects. In this article, I pose the following question: how difficult is it to legislate away a new set of intellectual property rights once they are found to be incapable of delivering on their promises?

Essence of intellectual property rights under ART 17(2) of the EU Charter

Martin Husovec (Tilburg Law and Economics Center (TILEC); Tilburg University – Tilburg Institute for Law, Technology, and Society (TILT); Stanford University – Stanford Law School Center for Internet and Society) *forthcoming in German Law Journal (special edition on ‘Essence of Fundamental Rights’ edited by Mark Dawson, Orla Lynskey and Elise Muir)*
TILEC Discussion Paper No. 2019-18

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3391688

Smoking kills. It is also very costly, which is why many governments try to change the habits of their citizens, including by changing the packaging of the products they buy. Of course, tobacco firms are pushing against such laws. They see their rights, in particular, rights to intellectual property, violated. They argue that such legislative changes take away the essence of their hard-earned IP rights and should not be permissible. They point out that the CJEU is allegedly redefining the ‘essence’ of fundamental rights and its function in the system of limitations and developing a set of core inviolable rights.

How justified are these arguments? The absolute theory of essence says that the essence of rights cannot be interfered with or taken away, including by the legislator. The relative theory of essence, on the other hand, claims that interference with essence is just a more serious interference which is still subject to the typical proportionality analysis. Therefore, the adoption of either of these two theories has profound consequences. What might constitute the essence of intellectual property rights (IP rights)? When are legislators touching upon it? Is the CJEU really advancing a notion of essence that can prevent legislative changes, or at least make them very difficult? The answer to all these questions depends on our understanding of what constitutes the ‘essence’ of intellectual property rights, and what consequences this notion has under Article 17(2) of the EU Charter of Fundamental Rights.

Changing market dynamics in the pharmaceutical industry: Analysis using data from the last ten years

Atanu Saha (Econ One Research)
Heather Roberts (Econ One Research)
Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450773

Using a panel dataset of 82 drugs that lost patent exclusivity in 2009-2018, we examine: (a) how brand prices change pre and post generic entry; (b) the evolution of generic share and prices in response to generic entry and (c) the market impact of follow-on products and authorized generics. We find, contrary to many prior studies, the rate of change of brand prices do moderate after generic entry; and in some cases, brands lower their price just after the onset of generic competition. Evidence does not support the proposition that brands increase prices in the period just before generic entry. We find that follow-on drugs have considerably higher generic-to-brand price ratio, and the rate of brands’ share erosion is significantly lower in markets with authorized generics. Markets with a single generic manufacturer throughout the post-entry period are found to have shallower than average decrease in prices and slower uptake of generic share.

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