



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

Antitrust and intellectual property in the United States and the European Union

Douglas H. Ginsburg (U.S. Court of Appeals for the District of Columbia Circuit; George Mason University - Antonin Scalia Law School, Faculty)

Damien Geradin (Tilburg Law & Economics Center (TILEC); University College London - Faculty of Laws) Keith Klovers (FTC)

The Interplay Between Competition Law and Intellectual Property - An International Perspective, Gabriella Muscolo and Marina Tavassi eds., *Kluwer Law International*, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237788

The United States and the European Union each have a strong legal regime designed both to protect competition and to foster innovation. Because the competition and intellectual property (IP) laws are occasionally in some tension, each jurisdiction has developed detailed legal rules that govern when and how competition law restrictions apply to IP rights. Recognizing that innovation benefits consumers, each regime presumes a patentee may lawfully use, license, and sell its IP rights freely unless that activity would impair competition on the merits by (i) coordinating with other entities to restrain trade unreasonably; (ii) unilaterally acquiring (in the U.S.) or exercising (in the EU) market power; or (iii) transferring IP through an anticompetitive merger or acquisition. This chapter summarizes and briefly compares the applicable law in the U.S. and the EU, and then identifies the most prominent differences between the two regimes. Note that, because most of the applications discussed herein concern patents, the term patents is used throughout to refer to all kinds of IP unless the difference matters.

Why patent hold-up does not violate antitrust law

Gregory J. Werden (U.S. Department of Justice - Antitrust Division)
Luke M. Froeb (Vanderbilt University - Owen Graduate School of Management)
Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244425

Owners of standard essential patents (SEPs) are cast as villains for engaging in “patent hold-up,” i.e., taking advantage of the fact that they negotiate royalties with implementer-licensees that already have made sunk investments in the standard. In contrast to “patent ambush,” patent hold-up involves no standard-setting misconduct or harm to any competitive process, and thus cannot violate antitrust law. Commentators taking a contrary positions confuse the ends of antitrust law with its means. Antitrust law promotes consumer welfare only by protecting competition. Casting aside this core principle would expose business decisions, including ordinary price setting, to judicial oversight. Commitments made by SEP owners in the standard-setting process, however, should be enforced, and they are enforced. Without an antitrust cause of action, implementers invoke the powers of the courts to resolve royalty disputes over SEPs.

IP and competition: Context, test, and balance

Michael A. Carrier (Rutgers Law School)
Comment for FTC Hearings on Competition and Consumer Protection in the 21st Century

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232455

This comment highlights the importance of context, the appropriate test, and balance for the IP/competition intersection. First, it emphasizes the importance of context, in particular the regulatory regime in the pharmaceutical industry, highlighting the role the FTC can play through litigation, hearings, and 6(b) studies. Second, it underscores the importance of the “consumer welfare” standard. And third, it explains the balance critical to the intersection, which includes consideration of both IP and competition.

IP & Licensing

The effect of FRAND commitments on patent remedies

Jorge L. Contreras (University of Utah - S.J. Quinney College of Law)
Thomas F. Cotter (University of Minnesota Law School)
Sang Jo Jong (Seoul National University - College of Law)
Brian J. Love (Santa Clara University School of Law)
Nicolas Petit (University of Liege - School of Law; Hoover Institution; University of South Australia - School of Law)
Peter Georg Picht (University of Zurich - Institute of Law; Max Planck Institute for Innovation and Competition)
Norman Siebrasse (University of New Brunswick - Fredericton - Faculty of Law)
Rafał Sikorski (Adam Mickiewicz University)
Masabumi Suzuki (Graduate School, Nagoya University)
Jacques de Werra (University of Geneva)
Patent Remedies and Complex Products: Toward a Global Consensus, Ch. 5 (Brad Biddle, Jorge L. Contreras, Brian J. Love, and Norman V. Siebrasse, eds., Cambridge University Press, Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248726

This chapter addresses a special category of cases in which an asserted patent is, or has been declared to be, essential to the implementation of a collaboratively-developed voluntary consensus standard, and the holder of that patent has agreed to license it to implementers of the standard on

terms that are fair, reasonable and non-discriminatory (FRAND). In this chapter, we explore how the existence of such a FRAND commitment may affect a patent holder's entitlement to monetary damages and injunctive relief. In addition to issues of patent law, remedies law and contract law, we consider the effect of competition law on this issue.

Patent term under review, *Kimble v. Marvel Entertainment LLC*: Patent term and innovation

Esther Valerie Mongare (Moi University - School of Law; Catholic University Eastern Africa)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237529

If two parties entered into an agreement today for issuance of a Patent License whose term runs for more than the statutory duration of twenty (20) years, what backs a claim against the non-compliant licensee? Is it legal to run such a contract beyond its term? Has jurisprudence indicated otherwise with regard to the duration of patents? Do the rules of contracting have any bearing on this? It may be about time to consider a patent term capable of review beyond the normative.

IP & Europe

The impact of Brexit on unitary patent protection and its court

Matthias Lamping (Max Planck Institute for Innovation and Competition)

Hanns Ullrich (Max Planck Institute for Innovation and Competition)

Max Planck Institute for Innovation & Competition Research Paper No. 18-20

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232627

Among the many problems Brexit raises in the field of European intellectual property those relating to the system of unitary patent protection stand out for their complex and controversial nature. The reason is that this system rests on two legally different but interconnected pillars: EU Reg. 1257/2012 on the implementation of enhanced cooperation by the creation of unitary patent protection on the one hand, and, on the other, the Agreement between the Member States of the EU on the establishment of a Unified Patent Court (UPC) that will have exclusive jurisdiction over invalidation and infringement actions concerning the European patent with unitary effect and/or the classic European (bundle) patent. However, the link between unitary protection of European patents and the UPC Agreement is not only one of jurisdiction, but also one of substantive law. Thus, as regards the rules on infringement of the unitary patent, Reg. 1257/2012 refers to those contained in the UPC Agreement in respect of the European (bundle) patent.

Many in the patent law community hope to overcome the disruptive effects the withdrawal of the UK from the EU will produce on both the territorial scope of unitary patent protection and on the UPC as a court common to EU Member States. However, unitary patent protection cannot be dissociated from the general legal order of the EU's Internal Market and extended to the UK once it has left the Union. Any such extension is incompatible with the autonomous character of EU law and its institutions, will result in a legally split unity for separate and separately regulated markets, and conflict with both the UK's and the EU's public interests in defining and implementing a patent policy of their own. Since the core objective of the UPC Agreement is to establish for the adjudication of unitary patent protection a common court of EU Member States that, as such, forms part of the judicial system of the EU, continued participation in the UPC Agreement of the UK post Brexit will not be possible. It would be incompatible with the EU's foundational principle, which is integration by virtue of the operation of an autonomous legal order based on a complete system of legal protection by national courts acting as ordinary courts of the Union and in cooperation with the Court of Justice of the EU.

Common principles of secondary liability?

Matthias Leistner (Ludwig Maximilian University of Munich)

Common Principles of European Intellectual Property Law, 2012, 117-146

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247132

The quest for common principles of secondary liability for the infringement of Intellectual Property Rights (IPRs) in Europe faces a double challenge. First, the question that has to be answered is whether there are common principles of secondary liability with regard to different kinds of IPRs. As a matter of course, the answer to this question as well as the availability and conditions of actions concerning joint and contributory liability, may differ in the laws of the different Member States. Therefore, secondly, the question has to be answered whether identifiable common principles of secondary liability exist in the different Member States' laws. The answer to this second question is obviously influenced by the framework of secondary Community law in the field of intellectual property which, therefore, must also be taken into account.

IP & Litigation

Lost profits and disgorgement

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Thomas F. Cotter (University of Minnesota Law School)

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Norman Siebrasse (University of New Brunswick - Fredericton - Faculty of Law)

Masabumi Suzuki (Graduate School, Nagoya University)

Forthcoming in Patent Remedies and Complex Products: Toward a Global Consensus, Ch. 2 (Brad Biddle, Jorge L. Contreras, Brian J. Love, and Norman V. Siebrasse, eds., Cambridge University Press)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249528

This book chapter addresses two types of monetary remedies for patent infringement: (1) recovery of the patentee's lost profits and (2) disgorgement of the infringer's profits. Both remedies make a comparison between what actually happened and a hypothetical "but for" world in which no infringement occurred. But the two remedies have substantially different objectives: lost profits are intended to compensate the patentee by restoring it to the position it would have occupied absent infringement, while disgorgement may serve other purposes, including deterrence, recapturing wrongful gains, and encouraging ex ante licensing of patented technology.

Part II addresses several key issues regarding lost profits awards, including the availability and standard of proof, the role of non-infringing alternatives, potential recovery for the sale of related but unpatented goods, whether and how to apportion lost profits awards for complex products, and potential recovery for other infringement-related harms. Part III describes the justifications for, and availability of, the disgorgement (accounting) remedy in major patent systems and, additionally, analyzes a number of questions related to calculating such awards. In both sections, we make recommendations and identify areas for further research.

IP Law & Policy

Disguised patent policymaking

Saurabh Vishnubhakat (Texas A&M University School of Law; Duke University School of Law)
Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242146

Patent Office power has grown immensely in this decade, and the agency is wielding its power in predictably troubling ways. Like other agencies, it injects politics into its decisions while relying on technocratic justifications. It also reads grants of authority expansively to aggrandize its power, especially to the detriment of judicial checks on agency action. However, this story of Patent Office ascendancy differs from that of other agencies in two important respects. One is that the U.S. patent system still remains primarily a means for allocating property rights, not a comprehensive regime of industrial regulation. Thus, the Patent Office cannot yet claim broad autonomy to make substantive political judgments. Indeed, the agency until now has wielded its power mostly in disguise. The other difference is that the era of broad Patent Office power is still in relative infancy. Recent years have seen important analytical and empirical studies of the agency's dramatic changes, but its new and controversial practices are not yet entrenched. Meaningful reform is still possible, and it is desirable. Patent Office power has grown so much so quickly in part because the political valence of that power has been obscured by a blinkered focus on technological expertise. Understanding the agency's pernicious structural choices—such as commingling separately delegated powers in order to evade judicial review and stacking adjudicatory panels to reach desired outcomes—in terms of politicization reveals significant risks of injury upon the agency's ability to make credible commitments, and also illuminates potential solutions.

Renewed efficiency in administrative patent revocation

Saurabh Vishnubhakat (Texas A&M University School of Law; Duke University School of Law)
Iowa Law Review, Vol. 104, 2018-9

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3237841

Administrative patent revocation in the U.S. is poised to enter a new period of efficiency, though ironically it will be an efficiency that the America Invents Act originally put in place. The Court's recent approval of the constitutionality of Patent Trial and Appeal Board proceedings was blunted by the Court's accompanying rejection of partial institution. This Patent Office practice of accepting and denying validity review petitions piecemeal had been a key part of the agency's procedural structure from the start. As a result, the Court's decision in *SAS Institute v. Iancu* to require a binary choice—either fully accepting a PTAB petition or fully denying it—is already being criticized for sacrificing efficiency on the altar of wooden statutory interpretation, including two dissents from the decision itself. Starting from the premise that *SAS Institute* was rightly decided, however, this paper makes two contributions. The theoretical contribution is to contrast PTAB estoppel with ordinary principles of res judicata and collateral estoppel. This important context is lacking in the literature, and the profound effect of *SAS Institute* on PTAB estoppel makes this evaluation especially timely. The empirical contribution is to marshal new data and guide the difficult structural choices that the agency must now make in order to comply with *SAS Institute*. Notably, though Justice Ginsburg's dissent suggested that the agency could comply with the Court's decision through a few empty gestures, her mock proposal is actually a sound plan of action. By reinvigorating Congress's more systemic view of efficiency than minimizing short-term agency workload, the Court has enabled the Patent Office to resolve open questions about the maturing system for resolving patent validity through administrative, rather than judicial, process.

Do you want innovation and jobs? Repeal § 511

Steve Black (Texas Tech University School of Law)

Washburn Law Journal, Vol. 57, No. 3, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235428

Since 1950, Congress has limited the scope of the activities in which a nonprofit entity could participate, in part due to a controversy over a pasta company donated to the NYU School of Law by a couple of wealthy alumni. The pasta profits helped the school refurbish and expand, but competing noodle manufacturers complained that the law school was not paying taxes on what was a commercial venture. Today, as we face high unemployment and a struggling economy, innovation and job creation are matters of national and international concern. Our universities harbor large untapped reserves of intellectual capital - commercial projects that, in large measure, have been relatively ignored because of the controversy that arose in the 1950s. Is it time to repeal or grant a holiday from the tax laws that restrict nonprofits from entering the marketplace?

Copyright Law

Staking the boundaries of software copyrights in the shadow of patents

Pamela Samuelson (University of California, Berkeley - School of Law)

Florida Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250496

Ever since the venerable Supreme Court opinion in *Baker v. Selden*, courts and commentators have overwhelmingly endorsed the rule that copyright and utility patent protections for intellectual creations are mutually exclusive. That is, an intellectual creation may be eligible for copyright or utility patent protection, but not both. Original works of authorship are channeled to the copyright regime, while novel and non-obvious machines are channeled to the patent system.

The well-established mutual exclusivity rule for copyright and utility patent was recently renounced, as applied to computer program innovations, by the Court of Appeals for the Federal Circuit (CAFC) in *Oracle America, Inc. v. Google Inc.* One of Google's defenses against Oracle's charge of copyright infringement for its reuse of parts of the Java API was that the API's functionality made it more properly patent, than copyright, subject matter. The CAFC rejected the exclusivity argument and endorsed overlapping copyright/patent protection for APIs.

Part I begins with a review of the mutual exclusivity rule that grew out of *Baker* and explains that the nature of computer programs initially caused confusion about whether copyright or patent was an appropriate form of IP protection. After Congress decided copyright was appropriate, a few courts in the 1980s declared that copyright protection could extend to the "structure, sequence, and organization" (SSO) of programs. These decisions were widely criticized for giving patent-like protection to programs with deleterious effects on competition and innovation in this industry. Members of Congress were sufficiently concerned that they held hearings and commissioned studies to address the perceived copyright/patent overlap problem.

Part II shows that concerns about copyright and patent overlaps subsided in the 1990s as numerous appellate court decisions recognized that the essentially utilitarian nature of programs gave them a relatively thin scope of copyright protection. Courts adapted various limiting doctrines of copyright law to prevent copyright/patent overlap in software IP cases, leaving patent law to protect the utilitarian elements of programs. By interpreting the scope of copyright in the shadow of patents and filtering out functional design elements, courts in software copyright cases restored the balance that Congress intended.

Part III shows that the CAFC's Oracle decision is the sole unreversed opinion endorsing software copyright/patent overlaps. To support its view that copyright and patent could provide overlapping protections for software APIs, the CAFC inappropriately invoked dicta from the Supreme Court's *Mazer v. Stein* decision, failing to notice that *Mazer* explicitly recognized that utility patents and copyrights are "mutually exclusive." Part III also argues that courts should be more receptive to arguments that the existence of issued patents for software innovations is evidence that those innovations should not be protectable by copyright law.

Part IV discusses Oracle's destabilization of the copyright/patent balance in software cases and offers concrete suggestions about how courts should approach discerning the proper boundaries of copyright and patent in protecting particular aspects of software. More clarity to the software copyright caselaw can be attained if courts engage in rigorous filtration of unprotectable non-literal elements of software. When courts interpret software copyright in the shadow of patents, they are less likely to exceed the boundaries laid out by *Baker* and Congress.

Intellectual property regulation and software piracy: A dynamic approach

Michael D'Rosario (Deakin University - Deakin Business School)
Review of Economic Research on Copyright Issues, 2918, 15(1), 38-64
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243758

Promoting Intellectual Property Rights (IPRs) is of particular importance to nations engaging in significant innovation. The existing literature relating to software piracy research is typified by the use of qualitative methods to analyse the impact of IPRs on software piracy. Most concern themselves with a handful of important macroeconomic factors in an effort to identify whether they possess any explanatory power, employing qualitative frameworks for analysis. More contemporary research has given greater attention to the role of key regulatory variables on software piracy using econometric methods. In this paper, the relationship between foreign political pressure, IPR regulatory reforms and software piracy is considered. We estimate a model of software piracy as a function of bi-lateral pressure and investment (where US 301 reporting is the proxy for bilateral pressure, and capital investment the proxy for bi-lateral investment), Scientific investment, trade dependence and government effectiveness. The models are estimated using data from 80 countries over nine years. The study responds to the dearth of research employing dynamic panel estimations in estimating the impact of IPR reforms on software piracy. The findings suggest out of cycle review and US 301 reporting are pertinent factors potentially moderating software piracy.

Abstraction, filtration, and comparison in patent law

Michael Risch (Villanova University Charles Widger School of Law)
University of Pennsylvania Journal of Law and Innovation, Vol 1, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232508

This essay explores how copyright's doctrine of abstraction, filtration, and comparison is being used in patent law, and how that use could be improved. This test, which finds its roots in the 1930's but wasn't fully developed until the 1990's, is one that defines scope for determining infringement. The copyrighted work is abstracted into parts, from ideas at the highest level to literal expression at the lowest. Then, unprotected elements are filtered out. Finally what remains of the original work is compared to the accused work to determine if the copying was illicit.

This sounds far removed from patent law, but there is a kinship, though perhaps one that is not so historic and a bit hidden. The essence of the test is determining protectable subject matter. These same needs permeate patent law as well. This essay explores how the test is implicitly used and should be explicitly used.

With design patents, the test might apply as it does in copyright, with functional elements being filtered out during infringement. Current precedent allows for this filtering, but not clearly or consistently. With utility patents, the abstraction, filtration, and comparison happen earlier, during the test for patentable subject matter. Here, the comparison is with what is conventional or well known. The essay concludes by discussing why the application is different for design and utility patents.

Other IP Topics

Some facts of high-tech patenting

Michael Webb (Stanford University - Department of Economics)

Nick Short (Harvard University)

Nicholas Bloom (Stanford University - Department of Economics; National Bureau of Economic Research (NBER))

Josh Lerner (Harvard Business School - Finance Unit; Harvard University - Entrepreneurial Management Unit; National Bureau of Economic Research (NBER))

Harvard Business School Entrepreneurial Management Working Paper No. 19-014

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233722

Patenting in software, cloud computing, and artificial intelligence has grown rapidly in recent years. Such patents are acquired primarily by large US technology firms such as IBM, Microsoft, Google, and HP, as well as by Japanese multinationals such as Sony, Canon, and Fujitsu. Chinese patenting in the US is small but growing rapidly, and world-leading for drone technology. Patenting in machine learning has seen exponential growth since 2010, although patenting in neural networks saw a strong burst of activity in the 1990s that has only recently been surpassed. In all technological fields, the number of patents per inventor has declined near-monotonically, except for large increases in inventor productivity in software and semiconductors in the late 1990s. In most high-tech fields, Japan is the only country outside the US with significant US patenting activity; however, whereas Japan played an important role in the burst of neural network patenting in the 1990s, it has not been involved in the current acceleration. Comparing the periods 1970-89 and 2000-15, patenting in the current period has been primarily by entrant assignees, with the exception of neural networks.

The design patent bar: An occupational licensing failure

Christopher Buccafusco (Benjamin N. Cardozo School of Law)

Jeanne Curtis (Benjamin N. Cardozo School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245319

Although any attorney can represent clients with complex property, tax, or administrative issues, only a certain class of attorneys can assist with obtaining and challenging patents before the U.S. Patent & Trademark Office (PTO). Only those who are members of the PTO's patent bar can prosecute patents, and eligibility for the patent bar is only available to people with substantial scientific or engineering credentials. However much sense the eligibility rules make for utility patents—those based on novel scientific or technical inventions—they are completely irrational when applied to design patents—those based on ornamental or aesthetic industrial designs. Yet the PTO applies its eligibility rules to both kinds of patents. While chemical engineers can prosecute both utility patents and design patents (and in any field), industrial designers cannot even prosecute design patents. This Article applies contemporary research in the law and economics of occupational licensing to demonstrate how the PTO's application of eligibility rules to design patents harms the patent system by increasing the costs of obtaining and challenging design patents. Moreover, we argue that the PTO's rules produce a substantial disparate impact on women's access to a lucrative part of the legal profession. By limiting design patent prosecution jobs to those with science and engineering credentials, the majority of whom

are men, the PTO's rules disadvantage women attorneys. We conclude by offering two proposals for addressing the harms caused by the current system.

Intellectual property and international law

Henning Grosse Ruse-Khan (University of Cambridge - Faculty of Law; Max Planck Institute for Innovation and Competition)

University of Cambridge Faculty of Law Research Paper No. 56/2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3246900

Written for a Handbook on Intellectual Property Research, edited by Irene Caboli and Maria Lilla Montagnani, this paper offers some thoughts on legal research that concerns or applies 'international law' concepts, perspectives and methodologies to intellectual property (IP). The idea is to discuss how research questions related to IP can be framed from the standpoint of international law. This begs an initial question: what do we mean by 'international law' and how does this relate to IP? The first section tackles these questions by offering a range of possible views on the notion of international (IP) law. Section two then considers how a multi-dimensional conception of international law frames research questions on IP. It also gives some more concrete examples of an international law approach to IP.

Economic analysis of intellectual property notice and disclosure

Peter S. Menell (University of California, Berkeley - School of Law)

Ben Depoorter & Peter S. Menell (eds.), Research Handbook on the Economics of Intellectual Property Law: Vol I. Theory (2018)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242854

Notice of intellectual property content, ownership, boundaries, scope of rights (and limitations), enforcement institutions, and remedial consequences plays a central role in resource planning and other economic and social functions. This chapter examines the function, design, and economic effects of intellectual property notice and disclosure rules and institutions. Based on this analysis, the chapter offers a comprehensive set of policy, institutional, and litigation reforms.

Zombies, ghosts & Hollywood accounting: Intangibles and intellectual property strategies

Olufunmilayo Arewa (Temple University - James E. Beasley School of Law)

Intellectual Property Strategies in a Globalized World (Alexandre Quiquerez & José Augusto Fontoura Costa eds., 2018, Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3240792

Film and television projects are frequently not profitable, at least as defined contractually in characteristic industry contracts. The "Hollywood accounting" treatment that generates these outcomes is both curious and often complex. Even highly successful film and television projects, from the films *Star Wars: Return of the Jedi* and *Harry Potter and the Order of the Phoenix* to television programs such as *Who Wants To Be A Millionaire?*, *The Walking Dead*, and *Supernatural*, which have all grossed significant amounts of revenues, have all been characterized as generating no profits, at least as defined in industry contracts, which has significant consequences for those entitled to profit participations. Contractual entitlements to a percentage of profits of course depend on having profits to begin with. Firms in the film and television sector have significant flexibility in how they characterize both revenues and costs. This flexibility is in part a consequence of the high degree of intangibility in that pervades film and television businesses. Practices within the industry also typically involve significant business dealings within entertainment industry corporate umbrellas. How revenues and costs from such intra-group transactions are accounted for has been a key source of a number of disputes. Disputes surrounding profit definitions in film and television highlight both the impact of intangibility and contract interpretation within the creative industries more generally.

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