



# 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

### **Is there a patent troll problem in the UK?**

Christian Helmers (Universidad Carlos III de Madrid)

Luke McDonagh (Cardiff University)

Brian J. Love (Santa Clara University School of Law)

*Fordham Intellectual Property, Media & Entertainment Law Journal*, Vol. 24, 2014, Forthcoming

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2331543](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331543)

This paper reports the findings of an empirical study of patent suits involving non-practicing entities (NPEs) in the U.K. between 2000 and 2010. Overall, we find that NPEs are responsible for 11% of all patent suits filed in the U.K. during this period. Though this is a small percentage by U.S. standards, our study suggests that patent trolling might not be as uniquely American as conventional wisdom suggests. We also find little support for many common explanations for Europe's relative scarcity of NPE activity. For example, we find that NPEs litigating in the U.K. overwhelmingly assert high-tech patents – even more so, in fact, than their U.S. counterparts – despite higher barriers to software patentability in Europe. Our study does, however, tend to support fee-shifting as a key reason for the U.K.'s immunity to NPEs. We see evidence that the U.K.'s loser-pays legal regime deters NPEs from filing suit, while at the same time encouraging accused infringers to defend claims filed against them. U.K. NPE suits are initiated by potential infringers more often than by NPEs; rarely end in settlement; very rarely end in victory for NPEs; and, thus, result in an attorney's fee award to the potential infringer more often than a damages award or settlement payment to the patentee. Together, these findings tend to support patent reform bills pending in the U.S. that would implement a fee-shifting regime for patent suits, and may also serve to quell concerns that Europe's forthcoming Unified Patent Court will draw NPEs to Europe.

### **Developing a framework for arbitrating standards-essential patent (SEP) disputes**

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David L. Newman (Arnstein & Lehr, LLP)

*Journal of Dispute Resolution*, Forthcoming

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335732](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335732)

A growing chorus of voices is calling for the use of arbitration to resolve disputes concerning standards-essential patents (SEPs). Those advocating the arbitration of SEP-related disputes include academic

commentators, government officials and members of the professional bar. Most cite the potential savings of cost and time that arbitration could achieve over the multi-year, resource-intensive lawsuits that currently characterize these disputes. But despite these ringing endorsements, there is surprisingly little guidance available for parties, standards-development organizations (SDOs), and tribunals that wish to implement effective arbitration procedures for these complex disputes.

In this article, we lay the groundwork for the development of such procedures and identify several key areas in which further study and deliberation will be required. We pay particular attention to fundamental questions such as whether SEP arbitration should be mandated by SDOs, which issues should be arbitrated, whether arbitral decisions should be confidential, and what form arbitration proceedings should take. While, at this early stage, we do not purport to answer these difficult questions in a definitive manner, we offer a framework for further discussion that we hope will be useful for policy makers, industry participants and commentators considering these important issues.

## FRAND in China

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Wentong Zheng (University of Florida - Levin College of Law)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335664](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335664)

This Essay discusses antitrust-related FRAND issues in China. In Part I, the Essay provides an overview of China's antitrust regime and its interaction with intellectual property rights. In doing so, the Essay offers an explanation of the nature of the Chinese antitrust regime that builds upon both the industrial organization and the political economy literatures. In Part II, this Essay discusses standard setting in China, and how FRAND-related issues are handled under Chinese standard-setting laws and regulations. In Part III, the Essay explores recent developments in Chinese courts that impact FRAND. In particular, it discusses the Huawei v. InterDigital case and its implications for global FRAND licensing. In Part IV, the Essay offers thoughts on the lack of transparency in China's antitrust regime as well as the use of industry policy in the FRAND setting and how these issues may negatively impact consumer welfare.

## IP & Innovation

### Patents, meet Napster: 3D printing and the digitization of things

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*Georgetown Law Journal, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2338067](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338067)

Digitization has reached things. This shift promises to alter the business and legal landscape for a range of industries. Digitization has already disrupted copyright-based industries and laws. As cost barriers dropped, individuals engaged with copyrighted work as never before. The business-to-business models of industrial copyright faltered and in some cases failed. Industries had to reorganize, and claimed foundations for copyright had to be re-examined. This Article examines a prime example the next phase of digitization: 3D printing and its implications on intellectual property law and practice.

3D printing is a general-purpose technology that will do for physical objects what MP3 files did for music. The core patent bargain — sharing the plans on how to make something in exchange for exclusivity — may be meaningless in a world of digitized things. While these devices will unleash the creativity of producers and reduce costs for consumers, they will also make it far easier to infringe patents, copyrights, and trade dress. This will force firms to rethink their business practices and courts to reexamine not only patent doctrine but also long established doctrine in areas ranging from copyright

merger to trademark post-sale confusion. Moreover, Congress will need to consider establishing some sort of infringement exemption for 3D printing in the home and expanding the notice-and takedown provisions of the Digital Millennium Copyright Act to websites that host software enabling the 3D printing of patented items and distinctive trade dress. While a 3D printer is not yet a common household item, the time to start thinking about that future is now.

### **Intellectual property versus prizes: reframing the debate**

Benjamin N. Roin (Harvard Law School)

*University of Chicago Law Review, Vol. 81, 2014*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337825](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337825)

The academic literature on the prize system describes prizes as a radical alternative to intellectual property. The debate over which system is preferable has existed for centuries, and usually boils down to a single question: can the government determine the appropriate reward for innovations without relying on intellectual property rights to reveal their value to consumers? If yes, scholars assume prizes are superior because they avoid deadweight loss and provide equal or better incentives for innovation. This reflects a fundamental misunderstanding of the nature of intellectual property rights. It equates intellectual property with uniform monopoly pricing and monopoly profits, while depicting the prize system as the only effective strategy to achieve efficient consumer pricing and government control over rewards. In reality, intellectual property merely provides a right to exclude others from the market. Governments can and often do institute policies alongside intellectual property that closely resemble prize systems in their structure and objectives. They use subsidies (and sometimes price controls) to push consumer prices closer to marginal cost and adjust the incentives for innovation. Given these other policy levers available within an intellectual property regime, the existing prize literature has exaggerated and misconceived the differences between the two systems. Under many circumstances, the prize system has no advantage over intellectual property in avoiding deadweight loss. Moreover, intellectual property will frequently offer superior incentives to prizes, irrespective of whether used to measure an invention's value to consumers, because it provides an ongoing check against expropriation, thereby permitting renegotiation of rewards over time to reflect changing estimations of an invention's social value. Contrary to the longstanding framework used to compare the two systems, intellectual property may be superior to prizes even when the government can determine the appropriate reward for innovations.

### **Cumulative innovation, growth and welfare-improving patent policy**

Davin Chor (Singapore Management University - School of Economics & Social Sciences)

Edwin L.-C. Lai (Hong Kong University of Science & Technology)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2334680](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334680)

We construct a tractable general equilibrium model of cumulative innovation and growth, in which new ideas strictly improve upon frontier technologies, and productivity improvements are drawn in a stochastic manner. The presence of positive knowledge spillovers implies that the decentralized equilibrium features an allocation of labor to R&D activity that is strictly lower than the social planner's benchmark, which suggests a role for patent policy. We focus on a "non-infringing inventive step" requirement, which stipulates the minimum improvement to the best patented technology that a new idea needs to make for it to be patentable and non-infringing. We establish that there exists a finite required inventive step that maximizes the rate of innovation, as well as a separate optimal required inventive step that maximizes welfare, with the former being strictly greater than the latter. These conclusions are robust to allowing for the availability of an additional instrument in the form of patent length policy.

# IP & Litigation

## **A theory of patent portfolios**

Jay Pil Choi (Michigan State University)

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*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2334673](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334673)

This paper develops a theory of patent portfolios in which firms accumulate an enormous amount of related patents in diverse technology fields such that it becomes impractical to develop a new product that with certainty does not inadvertently infringe on other firms' patent portfolios. We investigate how litigation incentives for the holders of patent portfolios impact the incentives to introduce new products and draw welfare implications. We also consider a patent portfolio acquisition game in which a third party's patent portfolio is up for sale.

## **'Reverse' patent declaratory judgment actions: a proposed solution for Medtronic**

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*University of Pennsylvania Law Review Online, 2013, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2334476](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334476)

The United States Supreme Court is scheduled to hear arguments in *Medtronic, Inc. v. Boston Scientific Corp.* – the first patent case of the term – on November 5, 2013. The issue in *Medtronic* is whether the burden of proof in patent declaratory judgment actions should be on the patent owner to prove infringement or on the accused infringer to prove non-infringement. Ordinarily, the patent owner bears the burden of proving infringement and the declaratory posture of a suit does not shift that burden. In *Medtronic*, however, the Federal Circuit created an exception for “MedImmune-type” suits, meaning declaratory judgment actions where the plaintiff is a licensee in good standing. In those cases, the Federal Circuit reasoned, the burden should lie with the accused infringer because the patent owner is precluded from counterclaiming for infringement.

This essay advances two arguments. First, the Federal Circuit and the parties claim that this exception is limited to MedImmune-type suits, but *Medtronic's* reasoning sweeps more broadly. There are other types of declaratory judgment actions where the patent owner cannot assert an infringement counterclaim, for instance because the declaratory judgment plaintiff has not yet infringed, and under *Medtronic* the burden would shift in those cases too. Second, the Federal Circuit wrongly concluded that the patent owner in *Medtronic* could not file a counterclaim. While it's true that the license precluded an infringement counterclaim, the Federal Circuit's own precedent makes clear that the patent owner could have filed a “reverse” declaratory judgment action seeking a declaration of future infringement. Thus, the Federal Circuit's rationalization for this exception was unjustified, and *Medtronic* should be reversed.

## **The impact of patent wars on firm strategy: evidence from the global smartphone market**

Yongwook Paik (University of Southern California - Marshall School of Business)

Feng Zhu (Harvard University - Harvard Business School)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340899](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340899)

We examine how patent wars affect firm strategy. We hypothesize that, as patent wars intensify, firms shift their business foci to markets with weak intellectual property (IP) protection due to increased litigation risks. This shift is attenuated for firms with stronger technological capabilities, and is more pronounced for firms whose home markets have weak IP systems. Using data from the global smartphone market, we find support for these hypotheses. Interestingly, we also find that the patent war intended to hamper the growth

of the Android platform may have merely shifted the sales to weak IP countries. This study sheds light on the emerging patent enforcement strategy literature by highlighting the heterogeneity in the efficacy of national patent systems in explaining firm strategy in platform-based markets.

## Analysis of Recent Court IP Decisions

### **A case study in patent litigation transparency**

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*Journal of Dispute Resolution, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2334417](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2334417)

The courts have long recognized a general right to inspect and copy judicial documents. Yet, large swaths of filings in patent litigations are often inaccessible. This article takes a closer look at this phenomenon by examining a single case. The Monsanto v. DuPont dispute over genetically modified Roundup resistant crops was chosen because of the impact it has on both agribusiness and patent law. The \$1 billion award against DuPont will undoubtedly shape the future of the market for genetically modified crops. Moreover, because the award was issued before a single infringing seed was sold, the case raises novel patent remedy issues.

This article assesses how transparent this landmark case was from two perspectives. Initially, it measures the nature and quantity of documents filed under seal. Next, this article selectively drills down on three different phases of the litigation, the pleadings, summary judgment and trial, to provide a more nuanced understanding of what the public cannot see. The results show a case that was fought largely in secret except for trial which was mostly open. Approximately 34% of the 1,697 of the filings listed in the PACER docket were filed under seal. This includes many of the key filings and court decisions. Moreover, the large majority of these secrets filings were made without any judicial oversight. It may be that the court simply did not have the resources to review all the applications to seal in this massive case. But regardless of the cause, this case highlights a recurring problem in patent litigation; the rampant sealing of documents of significant importance to the public.

### **Judging monopolistic pricing: F/RAND and antitrust injury**

William H. Page (University of Florida - Fredric G. Levin College of Law)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337691](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337691)

In a 2013 opinion in *Microsoft v. Motorola*, Judge James Robart calculated “reasonable and nondiscriminatory” or RAND royalties that Motorola could lawfully charge Microsoft for licenses to use Motorola patents that were essential to two industry standards. Although the case involved only a claim for breach of contract, Judge Robart’s opinion regulated monopoly pricing, a task courts try to avoid in other contexts, claiming institutional incapacity. In this instance, however, Judge Robart identified standards that he believed adequately guided him in the task. He recognized that the economic purposes of the RAND commitment were to prevent owners of standards-essential patents from, first, holding up licensees by exploiting the additional monopoly power that the standard conferred and, second, inefficiently stacking royalties with other essential patents. In estimating rates consistent with these purposes, he used as starting points the rates charged by two patent pools associated with the standards.

Throughout, Judge Robart presented the process of estimation in terms of a hypothetical negotiation between a prospective licensee and the owner of the standard-essential patent. In this paper, however, I argue that Judge Robart’s approach, and the process of calculating RAND or FRAND royalties generally, can be better understood as comparable to the calculation of the overcharge caused by a monopolistic

exclusionary practices — a form of antitrust injury. In both contexts, courts compare actual prices with those in counterfactual, but-for world free from improper exploitation of monopoly power.

### **Ending patent exceptionalism & structuring the rule of reason: The Supreme Court opens the door for both**

Robin Feldman (University of California Hastings College of the Law)

*Minnesota Journal of Law, Science & Technology, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333291](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333291)

A patent gives one an opportunity to exploit an idea. It is not intended as a universal pass for exploiting the legal system. Nevertheless, a notion I would call patent exceptionalism has been allowing patent holders to exercise free rein. It is a dangerous approach that fails to distinguish between deploying the right and deploying the system. This article describes patent exceptionalism and explains how the Supreme Court decision in *FTC v. Actavis* moves away from it.

The article also explains how the appeal of patent exceptionalism intertwines with antitrust. To put it bluntly, patent exceptionalism is alluring because it makes life so simple. Moving away from patent exceptionalism means worrying about the messy question of what is acceptable patent behavior for antitrust purposes, a question generally analyzed under the burdensome rule of reason. Once again, the Supreme Court in *Actavis* opens a door, although one could argue that the door was opened merely a crack. By suggesting that the lower courts “structure” antitrust litigation, the Court provides an opportunity to give form to the amorphous rule of reason, an apparition that has repelled the hardiest of antitrust warriors. This article discusses how a structured rule of reason can be developed.

The patent system is not a deity to which we must respectfully defer. It is a living, breathing part of the organism that is our legal system. If we continue to treat patents with exceptionalism, we have only ourselves to blame as we walk willingly into the volcano.

### **Hatch-Waxman patent case settlements – The Supreme Court churns the swamp**

Kent Bernard (Fordham University School of Law)

*Minnesota Journal of Law, Science & Technology, Vol. 15, 2013, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335615](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335615)

The Supreme Court in *FTC v. Actavis, Inc.* rejected both (a) the settling parties’ view that any settlement within the scope of the patent at issue and not the result of sham litigation was legal; and (b) the FTC’s view that any settlement which involved a transfer of any money or asset from the patent owner to the challenger was presumptively illegal. The Court chose to open up door (c), and require that there be a full “rule of reason” inquiry into the settlement.

This article explores what that means in terms of settlements going forward, and suggests reforms that might make the whole system work better.

## **IP & Copyright**

### **Tollbooths and newsstands on the information superhighway**

Brad A. Greenberg (Columbia Law School)

*Michigan Telecommunications and Technology Law Review, Vol. 20 (Dec. 2013 Forthcoming)*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340334](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340334)

The Internet has made it easier than ever before to stay informed on current events — and without ever needing to pick up, let alone pay for, a newspaper. But recent litigation and legislation in the United



States and Europe have challenged the cost-free flow of such information. The opposition to these recent legal developments is rooted in a belief that stronger intellectual property protections result in higher tolls, which, in turn, price many consumers out of accessing and using the information.

But overlooked has been an existential consideration: information-gathering is expensive, and absent efficient tolls there will be far less information to access at all, regardless of cost. The United States Supreme Court recognized this principle in *Harper & Row Publishers, Inc. v. Nation Enterprises* as it applies more narrowly to whether copyright law inhibits free expression. Identifying the particular importance of incentives for newsgatherers, this Essay extends the Harper & Row rationale beyond its copyright mooring.

In light of the continued withering corps of professional newsgatherers, these legal developments actually could enhance the exchange of information and ideas to the extent they preserve incentives for news publishers. This Essay proffers that copyright expansions actually can increase access and thereby serve important copyright and First Amendment values.

### **Copyright termination and technical standards**

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Andrew Hernacki (Venable, LLP)

*University of Baltimore Law Review, Vol. 43, 2014, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2335010](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335010)

Section 203 of the Copyright Act permits authors to terminate any grant of rights in a copyright between 35 and 40 years after the initial grant was made. In this article we analyze the application of Section 203 termination to technical standards documents, focusing in particular on the exclusion of works-made-for-hire, the treatment of joint works and derivative works. We conclude that, although Section 203 is theoretically applicable to technical standards, several statutory obstacles would impede the wholesale termination of standards-related license grants. Nevertheless, in order to avoid costly and time-consuming litigation, we recommend that Congress or the courts explicitly acknowledge the inapplicability of Section 203 to technical standards.

## **IP & Biotechnology**

### **Solving the problem of new uses**

Benjamin N. Roin (Harvard Law School)

*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337821)

One of the most dramatic public-policy failures in biomedical research is the lack of incentives for industry to develop new therapeutic uses (“indications”) for existing drugs once generics are available. Policymakers and commentators are well aware of this “problem of new uses,” but fail to appreciate its magnitude. Over the past decade, this gap in the incentives for pharmaceutical R&D has become one of the greatest barriers to medical progress. Recent technological advances have allowed researchers to identify hundreds of potential new indications for older drugs that could address critical unmet medical needs. And researchers are poised to discover hundreds more. Developing new indications for existing drugs is much faster, cheaper, and less risky than developing new drugs, and therefore offers the single most promising avenue for delivering new medical treatments to the public. However, pharmaceutical companies invariably lose interest in developing new uses for existing drugs when patients have access to low-cost generics. This article explores the nature and source of this gap in the incentives for developing new medical treatments, showing that it ultimately stems from a simple information problem. At present, the government encourages drug development by granting firms temporary monopoly rights

that block generic manufacturers from making or selling imitations of their drugs. The government also makes available an alternative type of monopoly protection for new indications that applies to the act of taking or administering a drug for a new therapeutic use. The latter monopoly rights could provide the appropriate incentives for developing new uses of existing drugs. However, pharmaceutical companies cannot enforce these rights without knowing when physicians prescribe the drug for the patented indication as opposed to some other use. If the government established an infrastructure for pharmaceutical companies to monitor the prescribed indications when pharmacists fill a prescription, those firms would possess the information necessary to enforce patents on new indications, thereby solving the problem of new uses. This article argues that the government could easily create such an infrastructure through the expanding use of e-prescribing software and electronic medical records.

## IP & Development

### TRIPS and developing countries introduction

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*Working Paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333811](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333811)

Since its inception in 1994, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) has embodied the orthodox view that enforcing strong intellectual property rights (IPRs) is necessary to solve problems of trade and development. The Doha Declaration of 2001 offered short periods of special dispensation, especially to least developed countries, and proclaimed one goal to be the promotion of “access to medicines for all.” Nonetheless, it is important to recognize that the Declaration did not disturb the orthodox view of strong IPRs reflected in TRIPS. The editors of this collection reject this view and the traditional development theory that underlies it, particularly the theory’s binary model of the world as comprising developed countries and all the rest who must follow the IPR-laden path to development. The editors share the conviction that the TRIPS regime of strong IP rights is increasingly out of phase with the shifting geopolitical dynamics of multilateralism in international relations, a multilateralism in which human rights has become a progressively more influential factor in shaping trade and development policy.

The editors of this collection ask, How can TRIPS mature further into an institution that supports a view of economic development which incorporates the ensemble of human rights now seen as encompassing a more comprehensive set of collective interests that includes public health, environment, and nutrition? In particular how can this 21st century congregation of human rights provide a pragmatic ethic for accomplishing a rapport with IPRs in the new landscape of development policy?

Addressing such questions, the chapters in the first part of the collection shed new light on recent deployments of human rights ethics, international treaty obligations, and domestic law that have had success in reshaping IPRs, deployments made in developing countries and the BRIC group. The chapters in the second part make new proposals and recommendations for the further use of human rights and related ethics to resolve conflict over IPRs in ways that can benefit less developed countries.

Before summarizing the chapters, the Introduction briefly discusses the conflict between intellectual property and human rights, a seemingly inevitable clash, especially between patent rights, given their continuing expansion in the pharmaceutical and biotechnology sectors, and human rights, which now comprise a wider array of collective interests. The conflict between patent rights and human rights is widely understood as expressing a particularly difficult form of the familiar tension between efficiency and dispersion, between encouraging innovation and promoting fair distribution. This dominant view of the conflict bears scrutiny. Why? Because the economic case for patent rights as the engine of economic growth is not well-supported. In consequence, it cannot be taken for granted that the moral virtue of wider distribution of patented goods, especially pharmacological products, exacts a high price on economic



growth and development. In this light, the Introduction concludes with some useful principles for human rights activists to counter what should be recognized as the uneasy case typically made for strong protection of patent and other IPRs.

## Other IP Topics

### Cultural cognition of patents

Lisa Larrimore Ouellette (Yale Law School - Information Society Project)

*IP Theory, Vol. 4, 2013, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2333216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333216)

Simply making empirical progress is not always enough to influence policy, as demonstrated by the polarized public discourse over issues ranging from climate change to gun control. The current discourse over patents appears to have a similar pathology, in which cultural values — such as respect for strong property rights or concern about limiting access to knowledge — shape priors and affect the weight given to new information, such that advocates and policymakers on both sides of the patent wars often fail to acknowledge the ambiguity of existing evidence. In this Essay, I suggest that the “cultural cognition” framework might help scholars to understand this value-based division and to study ways to design and communicate patent experiments so that the resulting knowledge has the impact it should.

### Defining patent quality

Christi J. Guerrini (Chicago-Kent College of Law)

*Fordham Law Review, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2337317](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337317)

Depending on whom you ask, the state of U.S. patent quality is either dismal or decent, in decline or on the upswing, in need of intervention or best left alone. Absent from the ongoing debate about the quality of U.S. patents, however, is much thoughtful discussion about what constitutes a patent’s “quality” in the first place. What features of a patent make it good in quality, what features make it bad in quality, and how are those features related? Surprisingly, scholars and policymakers have shown little interest in these questions. Yet their answers are critical to the direction of the patent agenda because they dictate how to measure patent quality and, consequently, how to evaluate the success or failure of quality reforms.

The broad aim of this Article is to draw attention to the definition of patent quality as an important subject of scholarly inquiry. Its more specific aim is to call for a return to first principles and begin the process of developing a meaning of patent quality. It does so by analyzing the concept using a methodology applied in the business literature of quality management. The implications of this work include a fundamentally different approach to patent quality’s meaning that is essentially the inverse of the conventional way of thinking about the concept. That is, instead of defining a good-quality patent as one that at a minimum satisfies the legal standards of patentability, the legal standards of patentability (among other things) should be adjusted and applied to reflect good patent quality. Following this new approach, I propose a formula for assessing patent quality and identify the most important variable in that formula: the quality “dimensions” along which patent quality rises and falls. Identifying these dimensions is the necessary first step in a process that ultimately aims to shift the focus of reform efforts from the limited goal of increasing the number of legally valid patents toward the broader goal of increasing the number of good-quality patents.

## Overview of the new patent law of the United States

Paul M. Janicke (University of Houston Law Center)

21 *Texas Intellectual Property Law Journal* 63 (2013)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340624](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340624)

The United States has passed a sweeping new patent law, affecting nearly every aspect of patent practice, including patentability conditions, novelty definitions, and litigation defenses. It also establishes four new post-grant procedures, three for challenging issued patents and one for curing inequitable conduct in the original grant. On the novelty front, the new law moves the United States closer to the first-to-file arrangement seen in European laws. However, it retains a one-year grace period for an inventor who publicly discloses the invention prior to anyone's filing.

### About the editor

**Dr. Anne Layne-Farrar** is a vice president in the Antitrust & Competition Economics Practice of CRA. She specializes in antitrust and intellectual property matters, especially where the two issues are combined. She advises clients on competition, intellectual property, regulation, and policy issues across a broad range of industries with a particular focus on high-tech and has worked with some of the largest information technology, communications, and pharmaceuticals companies in the world.

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