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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

'Excessive royalty' prohibitions and the dangers of punishing vigorous competition and harming incentives to innovate

Douglas H. Ginsburg (US Court of Appeals for the District of Columbia Circuit; George Mason University School of Law)
Bruce H. Kobayashi (George Mason University School of Law)
Koren W. Wong-Ervin (George Mason University School of Law – Global Antitrust Institute)
Joshua D. Wright (George Mason University School of Law)
CPI Antitrust Chronicle, Vol. 4, No. 3, 2016
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748252

This article discusses the dangers of regulating royalties, including the difficult — if not impossible — task of determining whether a particular royalty is “excessive,” and suggest that agencies not apply to IPRs, including SEPs, their laws prohibiting excessive pricing. Should an agency be required by law to apply the prohibition to IPRs, then at the very least it should focus primarily upon the prices of comparable licenses, which are the best available evidence of the market value of a patent.

The IEEE-SA revised patent policy and its definition of 'reasonable' rates: a transatlantic antitrust divide?

Nicolas Petit (University of Liege – School of Law)
Working Paper
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742492

The IEEE-SA updated patent policy and the Business Review Letter issued by the US DoJ have caused much discussion in the US (Sidak, 2015). The purpose of this paper is to assess whether a similarly lenient antitrust approach to Standard Setting Organizations’ (“SSOs”) rate setting policies would prevail under the European Union (“EU”) competition rules. Recent EU competition case-law has promoted a very hard line in the area of coordinated conduct. Cases such as Dole Food Company, T-Mobile or Expedia have expanded the scope of the per se prohibition rule found in Article 101 TFEU to forms of

horizontal coordination with less than obvious anticompetitive potential, such as “cheap-talk” pre-pricing communication (Dole Food Company), episodic collusion (T-Mobile) and horizontal agreements with limited market coverage (Expedia). Those judgments, and others, share a common rationale: that of deterring any coordinated interference with the price system. In the EU courts’ view, joint interference by competitors with the price system seems to be a sin in itself, regardless of actual or potential market effects. Horizontal coordination is thus increasingly prohibited on its face, and punished as a means to set an example. From an enforcement standpoint, this trend in the case-law trend has pros (lower enforcement costs) and cons (deters pro-competitive coordination). But perhaps more importantly, it has a major normative implication, which is that it raises the antitrust risk for all forms of coordination, including arrangements of the type found in the IEEE-SA updated patent policy. This paper explains that the antitrust risk generated by SSOs rate setting policies is presumably higher in the EU than in the US, where the case-law on horizontal coordination is less stringent. From a methodological standpoint, the paper choses to discuss this issue on the sole basis of the case-law of the EU courts, instead of focusing on Commission Guidelines and other soft law instruments, whose binding value on parties other than the Commission itself has been considerably degraded in recent judgments.

IP & Innovation

Perverse innovation

Dan L. Burk (University of California, Irvine School of Law)
William & Mary Law Review, Vol. 58, 2016
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2746318

An inescapable feature of regulation is the existence of loopholes: activities that formally comply with the text of regulation, but which in practice avoid the desired outcome of the regulation. Considerable ingenuity may be devoted to exploiting regulatory loopholes. Where technological regulation is at issue, such ingenuity may often be devoted to developing new technology that avoids the regulation; such innovation may be termed “perverse” because it is directed to avoiding the regulation that prompted it. Nonetheless, in this essay I argue that such regulatory circumvention may result in socially beneficial innovation. Drawing on insights from innovation policy in the law of intellectual property, I suggest several principles that should be adopted to channel such perverse innovation toward constructive activity.

Innovation prizes in practice and theory

Michael J. Burstein (Benjamin N. Cardozo School of Law)
Fiona Murray (Massachusetts Institute of Technology – Entrepreneurship Center)
Harvard Journal of Law and Technology, Vol. 29, 2016 Forthcoming
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741827

Innovation prizes in reality are significantly different from innovation prizes in theory. The former are familiar from popular accounts of historical prizes like the Longitude Prize: the government offers a set amount for a solution to a known problem, like £20,000 for a method of calculating longitude at sea. The latter are modeled as compensation to inventors in return for donating their inventions to the public domain. Neither the economic literature nor the policy literature that led to the 2010 America COMPETES Reauthorization Act — which made prizes a prominent tool of government innovation policy — provides a satisfying justification for the use of prizes, nor does either literature address their operation. In this article, we address both of these problems. We use a case study of one canonical, high profile innovation prize — the Progressive Insurance Automotive X Prize — to explain how prizes function as institutional means to achieve exogenously defined innovation policy goals in the face of significant uncertainty and information asymmetries. Focusing on the structure and function of actual

innovation prizes as an empirical matter enables us to make three theoretical contributions to the current understanding of prizes. First, we offer a stronger normative justification for prizes grounded in their status as a key institutional arrangement for solving a specified innovation problem. Second, we develop a model of innovation prize governance and then situate that model in the administrative state, as a species of "new governance" or "experimental" regulation. Third, we derive from those analyses a novel framework for choosing among prizes, patents, and grants, one in which the ultimate choice depends on a tradeoff between the efficacy and scalability of the institutional solution.

Risky IP

Andres Sawicki (University of Miami – School of Law)
University of Miami Legal Studies Research Paper No. 16-18
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748356

Intellectual property scholars assume that artists and inventors are risk averse. These creators are thought to prefer a known outcome to an unknown one of equivalent expected value. IP scholars therefore frequently argue that legal uncertainty will lead to suboptimal levels of artistic and inventive work.

This Article challenges IP's fundamental risk-aversion assumption. Theory and evidence from the interdisciplinary field of creativity research indicates that a willingness to take risks is an essential part of the creative personality. As a result, IP scholars should not generally assume that creators are risk averse; instead, the most plausible starting point is that creators are risk seeking, either in absolute terms or at least compared to the general population. The creativity literature also suggests that risk might be an environmental factor facilitating creativity, whether or not creators themselves prefer it. This possibility demands that IP scholars take a more nuanced approach to the impact of IP risk than the simplified risk preference approach they have pursued thus far.

The analysis here has significant implications for many persistent questions in IP law and policy. It indicates, for example, that uncertain doctrines like the fair use defense in copyright law are not nearly so problematic as ordinarily assumed. And efforts to make IP more predictable, like the Supreme Court's recent opinion in Nautilus v. Biosig, may have hidden costs. Most fundamentally, the analysis suggests that patents and copyrights — rewards of uncertain value — are better able to stimulate creativity than more predictable mechanisms like grants or subsidies.

IP & Litigation

How often do non-practicing entities win patent suits?

John R. Allison (University of Texas – McCombs School of Business)
Mark A. Lemley (Stanford Law School)
David L. Schwartz (Northwestern Law School)
Berkeley Technology Law Journal, Forthcoming
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2750128

Much of the policy debate over the patent system has focused on the perceived problems with non-practicing entities (NPEs), also called patent trolls. Drawing on a comprehensive data set we built of every patent lawsuit filed in 2008 and 2009 that resulted in a ruling on the merits, we find that the situation is rather more complicated than simply operating companies vs. NPEs. While operating companies fare better in litigation than NPEs overall, breaking NPEs into different categories reveals more complexity. Patent Assertion Entities (PAEs) in particular win very few cases. Further, once we

remove certain pharmaceutical cases from the mix, no patent plaintiff fares very well. That is particularly true of software, computer, and electronics patents.

Trans-Pacific Partnership provisions in intellectual property, transparency, and investment chapters threaten access to medicines in the US and elsewhere

Brook K. Baker (Northeastern University – School of Law)
PLoS Med Vol. 13, No. 3, e1001970 (2016)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747412

The recently negotiated Trans Pacific Partnership Agreement (TPP) contains provisions that would dramatically and negatively impact access to affordable medicines in the United States and elsewhere if it is ratified. Provisions in the Intellectual Property (IP) Chapter of TPP lengthen, broaden, and strengthen patent-related monopolies on medicine and erect new monopoly protections on regulatory data as well. IP Chapter enforcement provisions also mandate injunctions preventing medicines sales, increase damage awards, and expand confiscation of medicines at the border. IP rightholders gain new powers in the Investment Chapter to bring private, IP-related investor-state-dispute-settlement (ISDS) damage claims directly against foreign governments before unreviewable, three-person arbitration panels. Unrestricted IP-investor damage claims deter countries' willingness to render adverse IP decisions and to adopt IP policy flexibilities designed to increase access to affordable medicines. The Transparency Chapter contains provisions that allow pharmaceutical companies more access to government decisions listing medicines and medical devices for reimbursement. At the very least, these multiple TPP provisions that extend pharmaceutical powers should be scaled back to the minimum consensus standards reached in the 1994 World Trade Organization (WTO) Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Health advocates should convince the US Congress and opponents in other countries to reject an agreement that could so adversely impact access to medicines.

IP Law & Policy

Knowledge goods and nation-states

Daniel Jacob Hemel (University of Chicago Law School)
Lisa Larrimore Ouellette (Stanford University – Stanford Law School)
Minnesota Law Review, (2016), Vol. 101, Forthcoming
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2745632

The conventional economic justification for global IP treaties begins from the premise that if left to their own devices, nation-states will rationally underinvest in innovation incentives such as IP laws, grants, tax credits, and prizes (the "underinvestment hypothesis"). Under this account, nation-states will free-ride on each other's knowledge production unless they find some solution to their collective-action problem. The solution that nation-states have struck upon is international IP law: states use IP treaties to harmonize their domestic laws and thus to ensure a baseline level of investment in knowledge production (the "harmonization hypothesis"). And since states are obligated by treaty to adopt strong IP laws, they steer away from tools such as grants, credits, and prizes that are potentially more efficient mechanisms for encouraging innovation. Previous authors have adopted this logic while lamenting its implications: IP appears to be a necessary evil in an interconnected world — necessary to solve the free-rider problem; lamentable because it results in sizeable deadweight losses.

This account of IP treaties is informative but incomplete. The underinvestment hypothesis is robust only to the extent its assumptions about the nature of knowledge goods and the behavior of nation-states are accurate. But not all knowledge goods are global public goods, and nation-states have motivations to

invest in knowledge production that the conventional account fails to capture. More fundamentally, the harmonization hypothesis rests on a misapprehension of the link between global and domestic IP laws. States can comply with IP treaties while relying primarily on non-IP innovation incentives and non-price mechanisms for allocating knowledge goods within their own borders. In the extreme case, a government body subsidizes the production of a knowledge good through prizes or grants, takes title to the resulting IP rights, and then licenses the knowledge good to the government of another nation-state. The government in the consumer nation-state has the option of financing royalty payments to the producing country through taxation and then distributing the knowledge good to its own citizens at marginal cost. In this example, IP law operates only at the international — not the domestic — level. While in practice states generally choose to rely on IP at least to some extent, we show that many real-word arrangements resemble the extreme example in important respects.

Our more nuanced account does not imply that international IP laws are misguided; rather, our analysis highlights the specific function that IP treaties serve. Most significantly, international IP laws establish a framework for setting the size of payments from states that consume knowledge goods to states that produce those knowledge goods. At the same time, international IP laws allow each signatory state to choose its own mix of innovation incentives and its own method of allocating access to knowledge goods within its own borders. Put differently, the international IP regime does not relegate nation-states to a subordinate position in the production of knowledge goods; rather, it creates a framework in which nation-states still are dominant players in the innovation game.

The law of the platform

Orly Lobel (University of San Diego School of Law; Harvard Law School)
Minnesota Law Review, 2016
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742380

New digital platform companies are turning everything into an available resource: services, products, spaces, connections, and knowledge, all of which would otherwise be collecting dust. Unsurprisingly then, the platform economy defies conventional regulatory theory. Millions of people are becoming part-time entrepreneurs, disrupting established business models and entrenched market interests, challenging regulated industries, and turning ideas about consumption, work, risk, and ownership on their head. Paradoxically, as the digital platform economy becomes more established, we are also at an all-time high in regulatory permitting, licensing, and protection. The battle over law in the platform is therefore both conceptual and highly practical. New business models such as Uber, Airbnb, and Aereo have received massive amounts of support from venture capitalists but have also received immense pushback from incumbent stakeholders, regulators, and courts. This article argues that the platform economy is presenting not only a paradigm shift for business but also for legal theory. The platform economy does not only disrupt regulated industries but also demands that we inquire into the logic of their correlated regulations. It requires that we go back to first principles about public intervention and market innovation. The article thus poses a foundational inquiry: Do the regulations we have carry over to the platform economy? By unpacking the economic and social drives for the rise of the platform economy, the article develops a new framework for asking whether digital disruptions comprise loopholes akin to regulatory arbitrage, most prominently studied in the tax field, circumvention akin to controversial copyright protection reforms, or innovation-ripe negative spaces akin to design-around competition in patent law. Bringing together these different bodies of law, the article offers a contemporary account of the relevance of regulation for new business models. The article concludes that, as a default, legal disruption by the platform economy should be viewed as a feature rather than a bug of regulatory limits.

Copyright Law

Copyright accidents

Oren Bracha (University of Texas at Austin – School of Law)
Patrick Russell Goold (Illinois Institute of Technology – Chicago-Kent College of Law)
Boston University Law Review, Forthcoming
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748665

It is a deeply entrenched principle that copyright infringement does not require fault. The Article reexamines this principle in the context of "copyright accidents." Copyright accidents occur when ex ante it is not certain whether a proposed use will result in copyright infringement. In cases where the copyright status of a work is unclear, where the preferences of the copyright owner are reasonably in doubt, or where the copyist is unaware she is copying, there is merely a risk that a proposed use will infringe the right. And troublingly, the measures that any party could take to reduce that risk – for example searching for the copyright information – impose costs. Such copyright accidents are ubiquitous, but they are invisible to copyright law. The law has no doctrinal or conceptual mechanism for dealing with them. In such circumstances the question becomes, should liability require fault?

To answer this question we apply the well-developed theoretical framework of tort law to copyright accidents. Typically, tort law deals with the problem of accidental harm through the application of negligence rules. Such rules incentivize both potential injurers and victims to invest optimally in prevention. This Article argues that copyright accidents should likewise be governed by a negligence rule. Employing a negligence rule in copyright is justified by both efficiency and other consequence-oriented normative theories of copyright. Doing so would incentivize both the copyright owner and user to take optimal measures to avoid copyright accidents. We demonstrate how simple changes to the fair use doctrine could implement a negligence rule in copyright and thus solve the copyright accident problem. This in turn would positively affect numerous real world controversies, such as the problems of mass digitization, orphan works, and copyright triangles.

The copy process

Joseph Fishman (Vanderbilt University – Law School)
New York University Law Review, Forthcoming
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748145

There's more than one way to copy. The process of copying can be laborious or easy, expensive or cheap, educative or unenriching. But the two intellectual property regimes that make copying an element of liability, copyright and trade secrecy, approach these distinctions differently. Copyright conflates them. Infringement doctrine considers all copying processes equally suspect, asking only whether the resulting product is substantially similar to the protected work. By contrast, trade secrecy asks not only whether but also how the defendant copied. It limits liability to those who appropriate information through means that the law deems improper.

This Article argues that copyright doctrine should borrow a page from trade secrecy by factoring the defendant's copying process into the infringement analysis. To a wide range of actors within the copyright ecosystem, differences in process matter. Innovators face less risk from competitors if imitation is costly than if it is cheap. Consumers may value a work remade from scratch more than they do a digital reproduction. Beginners can learn more technical skills from deliberately tracing an expert's creative steps than from simply clicking cut and paste. The consequences of copying, in short, often depend on how the copies are made.

Fortunately, getting courts to consider process in copyright cases may not be as far-fetched as the doctrine suggests. Black-letter law notwithstanding, courts sometimes subtly invoke the defendant's process when ostensibly assessing the propriety of the defendant's product. While these decisions are on the right track, it's time to bring process out into the open. Copyright doctrine could be both more descriptively transparent and more normatively attractive by expressly looking beyond the face of a copy and asking how it got there.

IP & Asia

More than bric-à-brac: testing Chinese exceptionalism in patenting behavior using comparative empirical analysis

Jay P. Kesan (University of Illinois College of Law)
Alan C. Marco (United States Patent and Trademark Office)
Richard Miller (United States Patent and Trademark Office)
Michigan Telecommunications and Technology Law Review, Vol. 22, No. 53, 2015
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2744731

Although many developing economies are increasingly influencing the global economy, China's influence has been the greatest of these by far. Once hindered from competition by political and economic restrictions, China is now a major economic player. As China's economic might has grown, so too has the demand for intellectual property protection for technologies originating from China.

In this article, we present a detailed empirical study of Chinese patenting trends in the United States and the implications of these trends for the global economy. We compare these trends to patenting trends from earlier decades. Specifically, we compare Chinese patenting trends to Japan, South Korea, Brazil, Russia, and India. We study how patent allowance rates for Chinese patent applications at the United States Patent and Trademark Office have improved, and how these allowance rates compare to allowance rates in earlier "boom" periods from other East Asian countries.

While many believe that China is an exception in many respects, we find that patents for innovations originating from China seem to track a well-trodden path laid down by countries like South Korea in earlier decades. As a historical matter, we show empirically that China's patenting trend is not unique. It is instead strikingly similar to the patenting trends of other Far East Asian countries whose inventors have applied for patents in the United States. In other words, Chinese innovation is moving up the value chain in product development much like other Far East Asian countries have done in the past. We also find that China appears to be setting itself apart from other BRICS (Brazil, Russia, India, China, and South Africa) countries in successfully seeking patent protection for technological innovation and in producing products with higher levels of technological sophistication and innovation.

Our empirical results can be largely explained by four factors. First, our work underscores the role of foreign direct investments by multinational corporations in China; foreign direct investments are a major factor driving U.S. patent filings from China. Second, Chinese government policies have promoted patent protection and aligned Chinese patent office procedures with the procedures of the U.S. Patent and Trademark Office. Third, investment in research and development in China by both domestic and foreign entities has increased significantly. Fourth, the Chinese government has committed to moving up the value chain in products and services.

Law, innovation and intellectual property rights in India

Dr. Prakash Chandra Mishra (Shri Ram Swaroop Memorial University)
Working Paper
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742102

This paper provides an analytical overview of how technological development may be promoted or hindered by an effective system of intellectual property rights regime (IPRS). IPRS can play a positive role in encouraging new innovative development, rationalization of inefficient industry, and inducing technology acquisition and creation. They may harm development prospects by raising the costs of imitation and permitting monopolistic behavior by owners of IPRS. The potential gains and losses depend on the competitive structure of markets and the efficiency of related business regulation, including aspects of competition policy and technological development policy made by the central government of India. This paper reviews available case laws on these issues. The evidence supports the view that product innovation is sensitive to IPRS in developing nation like India. In several cases like Novartis case Indian court not allowed patent. Overall, there is a positive impact on growth, but this impact must depend on the price, nobility and uniqueness of product and nature of the economy. The research would conclude by putting forward suggestions for harmonizing the balance between policy decision taken by India and barriers imposed internationally.

Other IP Topics

Open access, open science, open society

Thomas Margoni (University of Stirling – School of Law)
Roberto Caso (University of Trento – Faculty of Law – LawTech Group)
Rossana Ducato (Università degli Studi di Trento – Faculty of Law)
Paolo Guarda (University of Trento – Faculty of Law)
Valentina Moscon (University of Trento – Faculty of Law)
Trento Law and Technology Research Group, Research Paper No. 27
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2751741

Open Access' main goal is not the subversion of publishers' role as driving actors in an oligopolistic market characterised by reduced competition and higher prices. OA's main function is to be found somewhere else, namely in the ability to subvert the power to control science's governance and its future directions (Open Science), a power that is more often found within the academic institutions rather than outside. By decentralising and opening-up not just the way in which scholarship is published but also the way in which it is assessed, OA removes the barriers that helped turn science into an intellectual oligopoly even before an economic one. The goal of this paper is to demonstrate that Open Access is a key enabler of Open Science, which in turn will lead to a more Open Society. Furthermore, the paper argues that while legislative interventions play an important role in the top-down regulation of Open Access, legislators currently lack an informed and systematic vision on the role of Open Access in science and society. In this historical phase, other complementary forms of intervention (bottom-up) appear much more "informed" and effective. This paper, which intends to set the stage for future research, identifies a few pieces of the puzzle: the relationship between formal and informal norms in the field of Open Science and how these impact on intellectual property rights, the protection of personal data, the assessment of science and the technology employed for the communication of science.

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.

Contact

For more information about this issue of *IP Literature Watch*, please contact the editor:

Anne Layne-Farrar
Vice President
Chicago
+1-312-377-9238
alayne-farrar@crai.com

www.crai.com/antitrust

www.crai.com/ip

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