



IP Literature Watch

CRA Charles River
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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

Biologics as the new antitrust frontier: Reflections, riposte, and recommendations

Daryl Lim (The John Marshall Law School)

2018 *University of Illinois Law Review Online* 209

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183829

History reminds us that without regulation, the strong do what they will and the weak suffer what they must. Self-interest drives incumbents to entrench their dominance and thwart challenge. Congress enacts laws to protect the process of competition in the marketplace from the tyranny of corporate might. In turn, courts attempt to give effect to those policies while safeguarding the incentive of incumbents and entrants to invest and innovate. The challenge of walking that tightrope at each technological frontier remains the same — whether dealing with sewing machines, computer operating systems, small-molecule (SM) drugs, or biologics. In each case, courts must operationalize antitrust precedent by adapting them to the technology before them and providing meaningful public guidance.

Michael Carrier and Carl Minniti offer a commanding survey of how antitrust policy and precedent interface with the competitive dynamics of biologics. With patent settlements, as the Authors note, the Actavis framework will continue to be applicable in situations where reference biologics (RBs) pay “follow-on biologics” (FOBs) to stay out of their markets. The Authors’ optimism that reverse payments will be less likely, however, should be tempered. Factors including the ability for FOBs to offer interchangeable therapies over time, the likelihood that FOBs must disclose manufacturing trade secrets during Biologics Price Competition and Innovation Act (BPCIA) litigation, and the real and present threat of patent revocation in post-grant proceedings both individually and may cumulatively result in a higher incidence of reverse payments than the Authors predict. At the same time, the lack of automatic reporting obligations will make anticompetitive biologic settlements more difficult to detect than those in the SM space.

With product hopping, the Authors are similarly optimistic. RBs are less likely to reformulate biologics; FOBs must price their biologics higher, making it less attractive for RBs to engineer “hard switches”; state substitution laws do not apply to biosimilars; and the BPCIA does not provide additional exclusivity for minor reformulations. As with the reverse-payments scenario, however, interchangeable FOB therapies will become the norm over time. The primacy of process innovation in biologics will make reformulation easier than in the SM space. Actavis also cautions against the Authors’ suggestion that RBs who enter with a reformulated biologic after a FOB should qualify for a safe harbor. Rather, the rule of reason should still be applied, though that analysis may be concluded in a “twinkling of an eye.”

Finally, as the Authors note, regulatory abuse (including (Risk Evaluation and Mitigation Strategy) REMS) will continue to raise antitrust concerns. In this regard, the Response amplifies the Authors’ analysis of refusals to deal in biologic samples for REMS purposes, as well as their analogies to patent assertion entities and standard essential patents, explain how each of these can inform the antitrust analysis in the biologics space. The Response also discusses why and how patent misuse can be used as a policy lever to address regulatory abuses, and why the cumulative nature of innovation in the biologics space makes patent misuse a particularly apt response.

Despite the BPCIA’s thoughtful construction, antitrust law has a gap-filling role. No solution is watertight and each piece is a compromised fit at best. RBs are not malefactors any more than FOBs are angels. Like a referee calling out strikes, antitrust law simply provides a marker to identify and penalize behaviors that run contrary to expectations of good gamesmanship when competing. The enterprise of developing a coherent understanding of biologics and its antitrust implications has only begun, but in all our endeavors, we can be grateful to the Authors for helping point the way.

IP & Licensing

The sound and fury of patent activity

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

Mark A. Lemley (Stanford Law School)

Stanford Law and Economics Olin Working Paper No. 521

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3195988##

Patent reform is a hotly contested issue, occupying the attention of Congress, the Supreme Court, and many of the most innovative companies in the world. Most of that dispute centers on patent enforcement, and in particular on the role of non-practicing entities (NPEs) or “patent trolls” – companies that don’t themselves make products but sue those that do. To technology companies, NPEs are a drag on innovation, taxing them tens of billions of dollars every year while achieving no social purpose. To NPEs and their supporters, they are enabling the first inventor to get paid and creating a working market for the transfer of technology.

Which is it?

In this paper, we present the first full empirical of the effect of patent licensing demands on the economy. With the help of a National Science Foundation grant and experts in survey design, we sent our survey out to every US-based business with at least one employee and revenue of \$1 million or more – over 45,000 companies. Our results provide important insights into the nature and limits of patent licensing demands and their role (or lack thereof) in driving innovation.

We find that NPE licensing demands almost never lead to innovation by the target firm. None of the indicia we would expect of real technology transfer were common in patent licensing demands. Moreover, NPE demands were particularly unlikely to be accompanied by the sharing of know-how or employees, the creation of joint ventures, or the development of new products. NPEs do not seem to be a monolithic group. The results for certain types of NPEs were more promising. Federal labs that assert patents are the group most likely to transfer knowledge or drive new products when they license patents. University patent demands are more likely to drive innovation than demands by other sorts of NPEs, but most of them still don't involve any indicia of technology transfer. We also find that the patent system works differently in different industries. Patent licensing demands almost never result in technology transfer or new innovation in the computer industry, particularly when NPEs are doing the asserting. They are somewhat more likely to be productive in the life sciences, but it is areas like energy that see the most new products resulting from patent assertions.

Finally, and perhaps most important in the long run, a significant majority of respondents simply didn't face patent licensing demands at all. It is true that those companies may be smaller and less innovative than the ones that do face licensing demands. But given the raging debates over the patent system and its role in driving the economy, it is important to recognize that there are large swaths of American business that simply don't deal with patent licensing demands at all.

IP licence as an investment: Insights from *Bridgestone v. Panama*

Pratyush Nath Upreti (Sciences Po Law School)

Stockholm Intellectual Property Law Review (2018)1 (1) 16-27

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188731

The relationship between intellectual property (IP) and investment is old, but the debates are new. Recent high profile cases in which intellectual property rights (IPRs) are being sought to be protected by means of international investment law and treaties have generated visible debate and discussion. In the light of the recent decision on expedited objections in *Bridgestone Licensing v. Republic of Panama*, this article will explore arguments put forwarded by both parties regarding the interaction between IP Licence Agreements and the definition of investment, as well as the Tribunal's finding on the question whether an IP Licence with a revenue sharing model qualifies as an investment.

IP & Innovation

Patents v. innovation: Evidence from public firms

Sridhar Srinivasan (Northwestern University - Kellogg School of Management)

Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3185148

Can weakening patent protection enhance innovation? I investigate the effects of weakened patent protection on innovation at public firms by exploiting differential exposure to the Supreme Court decision *Alice vs CLS bank*. I provide causal evidence that innovation, proxied by R&D scaled by Assets, responds positively to exposure to weakened patent protection. I identify the "litigation channel" by contrasting the impact of the decision on R&D investment and patent application behavior on differentially affected firms. My estimates suggest that broad intellectual property rights play a significant role in deterring innovation by enabling the use of patents as weapons in legal arms races.

Do tax policies drive innovation by SMEs in China?

Runhua Wang (University of Illinois College of Law)

Jay P. Kesan (University of Illinois College of Law)

Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198864

There is little empirical evidence showing how innovation by small and medium enterprises (SMEs) is impacted by tax policies, especially SMEs from developing countries. We explore how targeted policies of corporate tax (firm-specific) and value-added tax (product-specific) in China impact their domestic SMEs' R&D investment and R&D output. We find that a stringent corporate tax policy with specified R&D thresholds for qualifying for tax credits is narrowly tailored to positively incentivize R&D and patent applications by firms, including SMEs. We also find that a value-added tax (VAT) policy without any R&D thresholds is over-inclusive in terms of its impact on the subsidized SMEs' innovation because SMEs can produce software products to qualify for the subsidies, regardless of whether their software products are innovative or not, though it does create a spillover effect on R&D by SMEs in other technology sectors who may choose to qualify for these VAT credits by incorporating software or ICs into their products.

IP & Litigation

Patent trolls: Evidence from targeted firms

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Umit G. Gurun (University of Texas at Dallas)

Scott Duke Kominers (Harvard University)

Harvard Business School Finance Working Paper No. 15-002

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464303

We develop a theoretical model of, and provide the first large-sample evidence on, the behavior and impact of non-practicing entities (NPEs) in the intellectual property space. Our model shows that NPE litigation can reduce infringement and support small inventors. However, the model also shows that as NPEs become effective at bringing frivolous lawsuits, the resulting defense costs inefficiently crowd out firms that, absent NPEs, would produce welfare-enhancing innovations without engaging in infringement. Our empirical analysis shows that on average, NPEs behave as opportunistic patent trolls. NPEs sue cash-rich firms — a one standard deviation increase in cash holdings roughly doubles a firm's chance of being targeted by NPE litigation. We find moreover that NPEs target cash unrelated to the alleged infringement at essentially the same frequency as they target cash related to the alleged infringement. By contrast, cash is neither a key driver of intellectual property lawsuits by practicing entities (e.g., IBM and Intel), nor of any other type of litigation against firms. We find further suggestive evidence of NPE opportunism, such as forum shopping and targeting of firms that have reduced ability to defend themselves against litigation. We find that NPE litigation has a real negative impact on innovation at targeted firms: firms substantially reduce their innovative activity after settling with NPEs (or losing to them in court). Moreover, we neither find any markers of significant NPE pass-through to end innovators, nor of a positive impact of NPEs on innovation in the industries in which they are most prevalent.

Taking intellectual property into their own hands

Amy Adler (New York University School of Law)

Jeanne C. Fromer (New York University School of Law)

California Law Review, Vol. 107, 2019 Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183294

When we think about people seeking relief for infringement of their intellectual property rights pursuant to copyright and trademark laws, we typically assume they will operate within an overtly legal scheme of cease-and-desist letters, notice-and-takedown requests, litigation, or settlement. Quite by contrast are those who assert extralegal norms within a tight-knit community to remediate copying of creative works like tattoos, recipes, jokes, roller derby pseudonyms, and magic, which lie outside the subject matter—or at least the heartland—of these intellectual property laws. In recent years, however, there has been a growing third category of relief-seekers: those taking intellectual property into their own hands as a way to seek relief outside the legal system for copying of works well within the heartland of copyright or trademark laws, such as visual art, music, and fashion. Moreover, they can do so successfully across different artistic communities or in the absence altogether of any discrete community—that is, without the backdrop of a single close-knit community, which legal scholars tend to see as a prerequisite to enforcing extralegal norms. They exercise intellectual property self-help in a constellation of related ways. Most frequently, they use shaming, principally through social media or a similar platform to call out perceived misappropriations. Other times, they reappropriate perceived misappropriations, therein generating yet new creative works. This Essay identifies, illustrates, and analyzes this phenomenon using a diverse array of recent examples, including the Suicide Girls' retaking of Richard Prince's copies of their Instagram photos, Gucci's hiring of street artist GucciGhost for a recent fashion collaboration, a number of intellectual property diss songs at the center of hip hop, James Turrell's calling out of Drake for using artwork reminiscent of Turrell's in a popular music video, and Instagram phenomenon Diet Prada, which devotes itself to shaming copycats in fashion. Aggrieved creators can use self-help of the sorts we describe to accomplish much of what they could hope to derive from successful infringement litigation: collect monetary damages, insist on attribution to them of their work, and correct potential misattributions to them of a misappropriation. We evaluate how to assess the benefits and demerits of intellectual property self-help, as compared with more traditional intellectual property enforcement. We hold out more hope for the promise of self-help through retaking of copies than through social media shaming. Reappropriations, at their core, provide society with new artistic creations. Reappropriators turn the intellectual property paradigm on its head, by seeing infringement as a moment for creativity, rather than as a block to creativity. Social media shaming gives far less to the public, at least artistically.

Are patent assertion entities (PAEs) a threat to Europe?

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Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189824

Patent Assertion Entities, companies that monetise patents but do not practice them, have been over the years negatively portrayed as harmful “patent trolls” that engage in speculative and abusive patent litigation against manufacturing companies, threatening them with injunctions in order to extract settlements unrelated to the value of their technology. Although mass PAE litigation has mainly been US phenomenon, recent study indicated that PAEs are on the rise in Europe and a number of changes the European patent and litigation system have been recommended, in particular the denial of injunctive relief in case of finding of infringement of a valid patent.

This article provides a different perspective on PAEs. It will first show that it is incorrect to label all PAEs as “bad” actors. Generally, PAEs are in the business of patent licensing and serve a useful intermediary function in the market, facilitating licensing and technology transfer, while some may be engaging in aggressive monetisation practices. Whether there is abuse of litigation system would depend on the facts of the case, and not a priori whether plaintiff is PAE or not. Second, PAEs have mainly been US phenomenon and the incentives for abuse of European patent and litigation system are not present, or are not present to the same extent as in the US. A combination of factors, such as patent cases being decided by experienced judges, higher costs of patent enforcement, lower costs of defence, loser pays principle and generally higher quality of patents all disincentivise the emergence of opportunistic litigation practices. Finally, the available evidence shows that PAEs are actually responsible for very small number of patent litigation in the EU. The vast majority of litigation is between practicing entities and in majority of cases PAEs are actually defendants in invalidity suits initiated by practicing entities. The evidence therefore suggests that European patent and litigation system is functioning well and that the fear about massive PAE litigation abuses is unfounded. European judges should continue in applying the relevant legal framework for granting legal remedies for infringement of IP rights, which already gives them the tools to guard against litigation abuses by any type of entity.

IP Law & Policy

Patent policy and American innovation after eBay: An empirical examination

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Timothy Simcoe (Boston University - Questrom School of Business; NBER)

Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183402

The 2006 Supreme Court ruling in *eBay vs. MercExchange* marked a sea change in U.S. patent policy. The *eBay* decision removed the presumption of injunctive relief. Subsequent legal and policy changes reduced the costs of challenging patent validity and narrowed the scope of patentable subject matter. Proponents of these changes argue that they have made the U.S. patent system more equitable, particularly for sectors such as information technology, where patent ownership is fragmented and innovation highly cumulative. Opponents suggest the same reforms have weakened intellectual property rights and curtailed innovation. After reviewing the legal background and relevant economic theory, we examine patenting, R&D spending, venture capital investment and productivity growth in the wake of the *eBay* decision. Overall, we find no evidence that changes in patent policy have harmed the American innovation system.

From revolving doors to regulatory capture? Evidence from patent examiners

Haris Tabakovic (Harvard Business School)

Thomas Wollmann (University of Chicago)

NBER Working Paper No. w24638

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3185893

Many regulatory agency employees are hired by the firms they regulate, creating a “revolving door” between government and the private sector. We study these transitions using detailed data from the US Patent and Trademark Office. We find that patent examiners grant significantly more patents to the firms that later hire them and that much of this leniency extends to prospective employers. These effects are strongest in years when firms are actively hiring, and these relationships hold for the intensive margin of

intellectual property protection. Ultimately, this leads the agency to issue lower quality patents, which we measure in citations. Together with other supporting evidence, we argue these results are suggestive of regulatory capture.

Copyright Law

What we don't see when we see copyright as property

Jessica Litman (University of Michigan Law School)

U of Michigan Law & Econ Research Paper No. 18-014

U of Michigan Public Law Research Paper No. 602

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3183265

It is becoming increasingly clear that the supposed copyright wars that copyright scholars believed we were fighting – nominally pitting the interests of authors and creators against the interests of readers and other members of the audience – were never really about that at all. Instead the real conflict has been between the publishers, record labels, movie studios, and other intermediaries who rose to market dominance in the 20th century, and the digital services and platforms that have become increasingly powerful copyright players in the 21st. In this essay, adapted from the 13th annual University of Cambridge Center for Intellectual Property and Information Law International Intellectual Property Lecture, I argue that it would make good sense for at least some of us to leave the fight between 20th century publishers and 21st century platforms to the many lawyers that represent both sides, and to focus on some of the issues that aren't as likely to attract their attention. While copyright scholars have been writing about whether authors' interests or readers' interests should be paramount, we've missed the opportunity to look more closely at the issues that the copyright wars obscured. Here is one: For all of the rhetoric about the central place of authors in the copyright scheme, our copyright laws in fact give them little power and less money. Intermediaries own the copyrights, and are able to structure licenses so as to maximize their own revenue while shrinking their payouts to authors. Copyright scholars have tended to treat this point superficially, because – as lawyers – we take for granted that copyrights are property; property rights are freely alienable; and the grantee of a property right stands in the shoes of the original holder. I compare the 1710 Statute of Anne, which created statutory copyrights and consolidated them in the hands of publishers and printers, with the 1887 Dawes Act, which served a crucial function in the American divestment of Indian land. I draw from the stories of the two laws the same moral: Constituting something as a freely alienable property right will almost always lead to results mirroring or exacerbating disparities in wealth and bargaining power. The legal dogma surrounding property rights makes it easy for us not to notice.

Who's afraid of Swiss cheese? Resolving the copyright claims of non-coauthors

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Seattle University Law Review, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191622

Driven by a fear of making “Swiss cheese” out of movie copyrights, courts have consistently rejected any possibility that an actor or director may hold an independent copyright interest in his or her movie performance or direction. To justify the exclusion of such contributions from the canon of copyright, courts have resorted to redefining the constitutional and statutory limits on copyrightable subject matter. While their efforts succeed in squeezing out the authorship claims of actors and directors, the collateral

damage wrought by their new restrictions on what constitutes a “work of authorship” has not previously been evaluated.

In this Comment, I suggest these new doctrines, which are inconsistent with foundational principles of copyright law and established case law, ought to be rejected as there is no need to fear the authorship claims of actors and directors. The 1976 Copyright Act envisions nine circumstances under which one may contribute to a larger work; all contribution claims can be resolved within that framework. Furthermore, courts have existing gatekeeping doctrines to mitigate their policy fears without altering existing copyright law. Copyright claims from those making creative contributions should not drive courts to implement ill-conceived novel solutions, thereby distorting collaborative forms of authorship, such as movies. Instead, by enforcing traditional copyright doctrines, courts can provide the stable framework necessary to facilitate bargaining among the multiple authors involved in these complex creative works.

More unfair claims about fair use in Australia

George Robert Barker (Australian National University; London School of Economics; Law and Economics Consulting Associates Ltd)

Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3184614

This paper extends an earlier review of five studies that have been used by a number of large companies and private advocacy groups to promote major copyright policy changes in Asia Pacific. The earlier paper identified how some of the key arguments used by the proponents of these changes were based on faulty or misleading interpretations of data.

This paper reviews a new report that has been recently released, written for Google, and authored by Deloitte: Access Economics (2018). This review again isolates a number of false claims being made, this time about the economic effects of fair use in Australia, including four key flawed assertions in the paper.

Assertion 1: that substantial downstream value is lost as a result of current copyright law in Australia. The downstream uses of copyright works involved include: text and data mining, digital analytics, cloud computing, transformative, educational and informational uses involving existing copyright works.

Assertion 2: that this downstream value is lost due to current copyright law in Australia reducing cumulative innovation, and that Fair Use can remedy that.

Assertion 3: that creativity is booming in the digital world and that introducing Fair Use in Australia will benefit creative output.

Assertion 4: that transaction costs would be lower under a Fair Use system.

As we shall discuss this presents an unbalanced picture of the likely impacts of adopting Fair Use in Australia, the nature and extent of the real current market problems, the scope for market solutions to the alleged problems, the nature and role of copyright and of transaction costs.

The paper is indeed based on a fundamental misinterpretation of copyright. It fails to adequately acknowledge that copyright merely requires the creator’s consent, and provides the basis for a market in creative works and does not prevent use. The paper then does not adequately explain why any copyright

market might be expected to fail in the manner alleged, nor why the proposed legal intervention (fair use) might be expected to improve outcomes.

The paper also doesn't present any real new evidence, particularly drawing on the so-called "big data" that must now be available on digital copyright market transactions. A more useful contribution would further have examined the practical limitations of licensing markets, and the extent to which these might be addressed by new digital technologies, such as artificial intelligence and distributed ledger technology in order to enhance creative market growth, investment and innovation.

Design Patent Issues

Claiming design

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Mark P. McKenna (Notre Dame Law School)

University of Pennsylvania Law Review, Vol. 167, 2018, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186762

Design stands out among intellectual property subject matter in terms of the extent of overlapping protection available. Unlike other subject matter, for which different forms of intellectual property are available for different aspects of the product, design patent, trademark, and copyright protection are often available, and claimed, for precisely the same features of a design. Yet as we show, the claiming regimes of these three forms of design protection differ in significant ways: as to the timing of claims; their format, and particularly whether they are visual or verbal; their multiplicity (whether one can make multiple claims to the same design); and in terms of the level of abstraction at which the claims are made. Taken together, these choices with respect to claiming methodology have significant effects on the operation of each individual regime. All of the claiming regimes have significant shortcomings, particularly in terms of the quality of notice the claims provide to third parties about claim scope. That notice problem is worsened, as we argue, by the frequent cumulation of rights in the same design. Claim ambiguity and parties' ability to switch back and forth between different design claims—both within and across legal regimes—make it difficult for courts or third parties to evaluate the validity and scope of rights. There is significant irony here, because intellectual property claims exist almost entirely to provide notice. Cumulation also enables design rightsholders to assert rights in one or more regimes using the claiming rules that benefit them most at a particular moment, without any risk that those claiming choices will bind them in later rights assertions.

We suggest a number of improvements to each claiming regime for the purpose of restoring internal order. We also analyze various approaches to ameliorating the amplified costs of overlapping regimes for claiming design. In particular, we focus on doctrines of election and channeling rules as alternative methods of directing designs to one regime or another. We also introduce the possibility of transsubstantive intellectual property claiming rules as a way to smooth out important inconsistencies across these regimes while also allowing protection under multiple regimes. Each of these solutions would alleviate at least some of the concerns we identify, though one's preference among them will likely depend on her level of concern about overlapping rights.

Greeted with a shrug: The impact of the community design system on United States law

Stacey L. Dogan (Boston University - School of Law)

Kur, M. Levin and J. Schovsbo, The EU Design Approach – A Global Appraisal (Edward Elgar (Forthcoming))

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190550

In an era of increased harmonization of intellectual property laws worldwide, the United States' treatment of product design looks like an anomaly. Since the European Community Design System went into effect in 2002, advocates in the US have urged Congress to follow suit and adopt sui generis design protection, particularly for fashion. The US Congress, however, has resisted the call and left design protection to the existing standards of trademark, copyright and design patent law.

This Chapter explores some of the reasons that the Community Design System has had so little purchase in US debates over design. The rejection of design rights has resulted from both substantive and pragmatic concerns. The substantive concerns include the utilitarian tradition of US intellectual property law, with its ostensible preference for competition over exclusivity; as a practical matter, definitional problems, enforcement concerns, and political economy considerations have also played a role.

The absence of sui generis design protection does not, however, mean an absence of legal protection for design. Despite its practical and theoretical hurdles, there is broad intuitive appeal to the notion that creative designers deserve some form of protection against copying. At times, this has led courts to find outlets for design protection under copyright and trademark/unfair competition law. Design patent law, moreover, which saw little action through the twentieth century, has recently emerged as a popular form of protection for certain types of design. These developments have reduced the perceived urgency of the call for sui generis rights; together with the philosophical and practical concerns discussed above, they help to explain why the calls for a US version of the Community Design System have gone unanswered.

'Ask me no questions,' the struggle for disclosure of cultural and genetic resource utilization in design law

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Vanderbilt Journal of Entertainment & Technology Law, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188591

New issues relating to the intersection of design protection and cultural and genetic resource utilization are arising from the confluence of an increased interest in design protection, the sustained allure of exotic cultural expressions, and novel uses of biological and genetic resources in crafting the appearance of articles protected by industrial design rights. As awareness of the many ways in which cultural and genetic resource use and misappropriation can occur is evolving, some developing countries have begun exploring the appropriateness of—and in some cases even instituting—a requirement that a designer disclose the origin of traditional cultural expressions, traditional knowledge, and biological or genetic resources used in creating a design in an industrial design application.

This development has become a focal point in the negotiation of a draft Design Law Treaty (DLT) in the World Intellectual Property Organization Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications. The DLT is expected to make it easier to obtain design protection globally by limiting domestic design registration requirements. Currently, a controversy exists over an African Group proposal to allow policy space in the draft DLT for countries to be able to require design

applicants to disclose the origin of traditional cultural expressions, traditional knowledge, and biological or genetic resources used in creating protectable designs.

The African Group proposal is optional—not mandatory—for countries to adopt. At a minimum, parties to the African Regional Intellectual Property Organization’s Swakopmund Protocol will need such policy space to comply with obligations embedded in that agreement. The need for domestic and international policy coherence and mutual supportiveness in relation to cultural and genetic resource protection issues is also likely to lead additional countries to desire such flexibility in the future as technology expands the ways these resources can be used and monetized in industrial design regimes.

This Article focuses on that controversy. It highlights possible justifications countries may have for desiring the flexibility to impose disclosure requirements on design protection applicants and explores broader ramifications of the dispute for policy coherence and mutual supportiveness goals in relation to protecting cultural and genetic resources.

Other IP Topics

Investment treaties and intellectual property: *Eli Lilly v. Canada* and *Phillip Morris v. Uruguay*

Daniel J. Gervais (Vanderbilt University - Law School)

Jared Doster (Vanderbilt Law School)

Working paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188745

Phillip Morris v. Uruguay and Eli Lilly v. Canada are two international investor-state cases that may reveal an emerging trend in international investment law: if a State creates laws that reduce the financial value of an investor’s domestic IP rights, then the investor might use the State’s international IP obligations against it in order to obtain compensation for the lost value of the IP or even force the State to consider reversing course.

Against the dehumanisation of decision-making – algorithmic decisions at the crossroads of intellectual property, data protection, and freedom of information

Guido Noto La Diega (Northumbria University)

9 (2018) JIPITEC 3 para 1

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188080

Nowadays algorithms can decide if one can get a loan, is allowed to cross a border, or must go to prison. Artificial intelligence techniques (natural language processing and machine learning in the first place) enable private and public decision-makers to analyse big data in order to build profiles, which are used to make decisions in an automated way.

This work presents ten arguments against algorithmic decision-making. These revolve around the concepts of ubiquitous discretionary interpretation, holistic intuition, algorithmic bias, the three black boxes, psychology of conformity, power of sanctions, civilising force of hypocrisy, pluralism, empathy, and technocracy.

The lack of transparency of the algorithmic decision-making process does not stem merely from the characteristics of the relevant techniques used, which can make it impossible to access the rationale of the decision. It depends also on the abuse of and overlap between intellectual property rights (the “legal black box”). In the US, nearly half a million patented inventions concern algorithms; more than 67% of the algorithm-related patents were issued over the last ten years and the trend is increasing.

To counter the increased monopolisation of algorithms by means of intellectual property rights (with trade secrets leading the way), this paper presents three legal routes that enable citizens to ‘open’ the algorithms.

First, copyright and patent exceptions, as well as trade secrets are discussed.

Second, the GDPR is critically assessed. In principle, data controllers are not allowed to use algorithms to take decisions that have legal effects on the data subject’s life or similarly significantly affect them. However, when they are allowed to do so, the data subject still has the right to obtain human intervention, to express their point of view, as well as to contest the decision. Additionally, the data controller shall provide meaningful information about the logic involved in the algorithmic decision.

Third, this paper critically analyses the first known case of a court using the access right under the freedom of information regime to grant an injunction to release the source code of the computer program that implements an algorithm.

Only an integrated approach – which takes into account intellectual property, data protection, and freedom of information – may provide the citizen affected by an algorithmic decision of an effective remedy as required by the Charter of Fundamental Rights of the EU and the European Convention on Human Rights.

Intellectual contract

Daniel F. Spulber (Northwestern University - Kellogg School of Management)

Northwestern Public Law Research Paper No. 18-16

Northwestern Law & Econ Research Paper No. 1813

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192578

The article introduces the concept of Intellectual Contract (IC) to characterize agreements for invention, innovation, and technology adoption. The article also introduces the term Intellectual Tort (IT) to describe liability for misappropriation of trade secrets and infringement of patents, trademarks, and copyrights. The article observes that legal protections for inventors are based on a flawed combination of IT and Intellectual Property (IP). The article argues that greater emphasis on IC would improve both IT and IP. Because IC protects expectation interests it is essential for creating, developing, sharing, and applying intangible assets. IC generates gains from trade that enhance the benefits of inventors, innovators and adopters. IC has become crucial for technological change and economic growth.

Agribiotech patents in the food supply chain: A US perspective

Daryl Lim (The John Marshall Law School)

Ioannis Lianos, Alexey Ivanov & Dennis Davis (eds.) Global Food Value Chains and Competition Law, (Cambridge University Press, Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3188403

This chapter highlights U.S. agribiotech patent issues as they relate to the food supply chain. Agribiotech patents challenge how we think about fundamental issues of seed ownership, innovation, and when downstream uses are or should be permissible. Part II of this chapter sketches the arc of agribiotech developments in the U.S. from its colonial past to the current day and observes the evolution of protection over seed traits transition from an open socialist-style franchise to a tightly controlled oligarchy subsisting on patent rights. Part III assesses patent exhaustion through the lens of Bowman and the Court's more recent decision in *Impression Prod., Inc. v. Lexmark Int'l, Inc.* Part IV offers observations on three issues: (1) patentees and generic seed companies will remain invested in maintaining compliance for transgenic seed exports; (2) the recent spate of mega-mergers continue the transformation set in motion by the privatization of agriculture more than a century ago, with these mergers benefiting agribiotech companies and farmers abroad, unfortunately, at the expense of U.S. farmers at home; and (3) developments such as retaliatory tariffs on transgenic seed exports will affect agribiotech innovation as surely as developments in patent law, and should be part of any comprehensive analysis of dynamic trends in the food value chain. Part V highlights key areas for future study and concludes.

Innovation and tradition: A survey of intellectual property and technology legal clinics

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For artists, nonprofits, community organizations and small-business clients of limited means, securing intellectual property rights and getting counseling involving patent, copyright and trademark law are critical to their success and growth. These clients need expert IP and technology legal assistance, but very often cannot afford services in the legal marketplace. In addition, legal services and state bar pro bono programs have generally been ill-equipped to assist in these more specialized areas. An expanding community of IP and Technology clinics has emerged across the country to meet these needs. But while law review articles have described and examined other sectors of clinical legal education, there has not been an article to date that examines the rise and the role of such clinics. This is an important need to fill. With student and client and law firm demand for IP and Technology clinics, law schools want information about existing programs, and existing programs want information about the innovations of other clinics and collaboration opportunities. In addition, the traditional clinical community wants to ensure that these new programs build on the strengths of the original founding clinics. This survey data and article fills that need.

This article distills the results of a comprehensive survey of 70 directors of IP and Technology Clinics into themes that analyze the focus and aspirations of this new clinical community. It takes stock of what IP and Technology clinics were founded to accomplish, how and what they are teaching students, and what clients and missions drive them. It highlights some individual innovations to inspire the community to continue to grow and change. It concludes by assessing what these clinics accomplish, how they are faring on these goals and the role they may play in the future of clinical legal education and experiential learning more generally.

About the editor

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