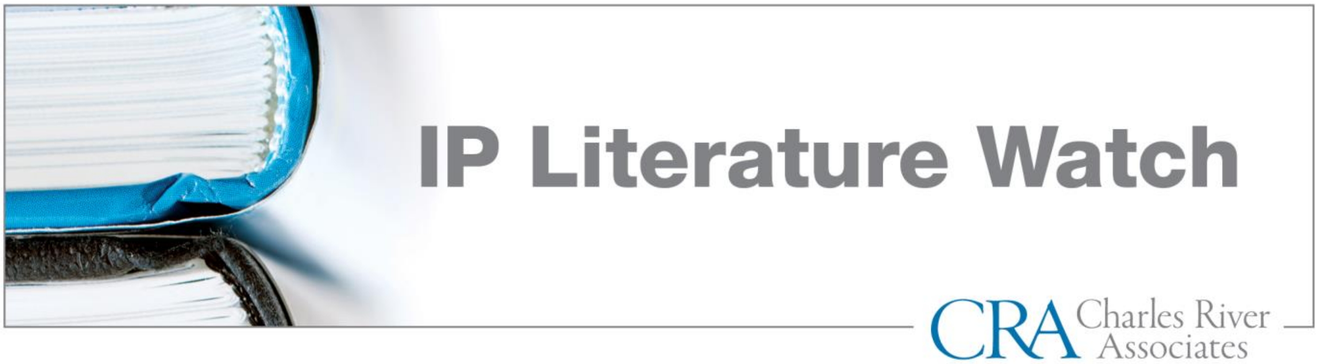

July 2019

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

Plugging the two-claim double-patenting loophole

Mark R. Carter (Journal of the Patent & Trademark Office Society)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415676

Much of the antitrust critique of patents rests on “double-patenting.” “Evergreening” is the extension of a patenting past its normal term, twenty years from filing, by patenting a quite similar invention. This paper shows there is no justification for the U.S. Patent and Trademark Office’s practice of forcing patent examiners to search for extra references before issuing obviousness double-patenting rejections by examining the history of 35 U.S.C. 101 and double-patenting doctrine.

FRAND and antitrust

Herbert Hovenkamp (University of Pennsylvania Law School; University of Pennsylvania – The Wharton School; University College London)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420925

This paper considers when a patentee’s violation of a FRAND commitment also violates the antitrust laws. It warns against two extremes. First, is thinking that any violation of a FRAND obligation is an antitrust violation as well. FRAND obligations are contractual, and most breaches of contract do not violate antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation.

Every antitrust case must consider the market environment in which conduct is to be evaluated. SSOs operated by multiple firms are joint ventures. Antitrust’s role is to evaluate how challenged restraints operate within the venture and condemn unreasonably anticompetitive practices. In her Qualcomm decision Judge Koh devoted considerable space to standard essential patents and FRAND commitments, but she addressed the antitrust refusal to deal and exclusion claims with little reference to standard setting or FRAND.

Breach of a FRAND commitment violates the antitrust laws when it causes competitive harm. For §1 of the Sherman Act, this requires an agreement that threatens to reduce market output. If the conduct is reasonably ancillary to other procompetitive activity, this requires an assessment of market power and anticompetitive effects. For §2 of the Sherman Act or §3 of the Clayton Act, it will require a showing of unreasonably exclusionary conduct by an actor with market power.

The antitrust issue of unilateral refusals to deal is too often confused with the essential facility doctrine. The essential facility doctrine is based on the idea that some assets are so essential to commerce that the owner has a duty to share them. By contrast, the refusal to deal rule is rooted in conduct – namely, a specific prior contractual obligation, reliance and path dependence, and subsequent repudiation. Many joint ventures involve a significant sunk investment in assets that are dedicated to the venture. If one firm can later extract itself and commandeer the relevant technology, it can leave the remaining firms at a significant competitive disadvantage, with the effect of transferring market share, reducing output, raising prices, and ultimately undermining the competitive promise of such ventures. This makes antitrust refusal to deal rules particularly important for collaborative networked industries.

While the essential facility doctrine is conducive to competitor passivity, the Aspen rule facilitates competitor investment. The idea that a facility is "essential" indicates that rivals need not bother to develop their own alternatives. Instead, they should seek a right to connect into the dominant firm's facility. By contrast, the Aspen rule is based on a premise of voluntary commitment to invest jointly. If one firm later reneges on that commitment in a way that threatens to undermine it, those investment backed expectations are lost. The Aspen rule thus serves to protect the integrity of investment when noncompetitive outcomes are threatened.

The debate over "holdup" or "holdout" in the FRAND setting has occasional antitrust relevance. While holdout is a real problem, there is little empirical evidence that it occurs frequently in FRAND settings. Holdout occurs when implementers conspire to exclude patentees or suppress royalties. But standard essential patents are largely self-declared and, as it appears, significantly over declared. Further, "holdout" hypothesizes agreements to force patentees to accept infra-market royalties, but FRAND royalties are determined post-commitment by independent tribunals, and there is no evidence of systematic undercompensation.

One objection to finding antitrust liability when the defendant's conduct has also violated its FRAND obligation is the threat of double liability. There is little basis in fact or law for this concern. Many federal antitrust violations violate various common law and statutory rules. The remedy in these cases is not to dismiss one or the other claim at the onset, but rather to avoid double counting of damages for the same harm.

Finally, while some object to using antitrust law to discipline firms for seeking injunctions on FRAND-encumbered patents, existing antitrust doctrine on the point is clear and sufficient: a firm has the right to seek relief in court unless its prospects are so poor that the lawsuit must be regarded as a "sham." The antitrust question of injunctions on FRAND patents is thus quite fact-specific and depends on the extent to which the law is settled.

IP & Innovation

Patent policy, imitation incentives, and the rate of cumulative innovation

Silvana Krasteva (Texas A&M University)
Priyanka Sharma (Illinois Institute of Technology)
Chu Wang (East China Normal University)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3411158

We study an infinite horizon cumulative innovation model, in which strengthening patent protection has a negative litigation effect on innovation incentives by increasing litigation threat for future innovators and a positive competition effect by limiting profit eroding imitation by competitive firms without innovation

capacity. Patents are characterized by their strength and length and the optimal innovation-maximizing patent policy balances these two opposing effects. The short-run innovation incentives are a function of the remaining life of the outstanding patent. For moderate patent strength, longer remaining lifetime increases innovation incentives due to the competition effect. The opposite is true for strong patents, for which the litigation effect dominates. The long-run policy that maximizes the rate of innovation calls for moderate-strength and infinite patent length when innovators discount future profits significantly and for strong and finite length when innovators care more about their future profits.

Patents, litigation strategy and antitrust in innovative industries

Steffen Juranek (Norwegian School of Economics)
Thomas Quan (University of Georgia)
John L. Turner (University of Georgia)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3409987

In a patent infringement suit, the alleged infringer wins with a ruling of either patent invalidity or non-infringement. It is ambiguous which of these outcomes is preferred by the alleged infringer. Invalidity may increase current-period competition, but simultaneously removes constraints to successful future innovation. The choice of whether to vigorously pursue patent invalidation may also affect incentives to innovate. We adapt the "innovative industries" model of Segal and Whinston (2007) to study patent litigation strategy and rates of innovation. We show that a legal regime where infringement is considered first (and validity second) maximizes incentives to innovate. But if the future blocking effect of patent validity is strong, the alleged infringer may prefer to litigate validity first to maximize the likelihood of invalidity. This litigation strategy effect may reduce levels of innovation. Antitrust policy should seek to attenuate this effect, and may do so by reducing the advantage to incumbency.

Comparing historical patent datasets

Michael Andrews (National Bureau of Economic Research)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415318

I compare the strengths and weaknesses of five historical patent datasets and compare the suitability of each for use in innovation research. I first show that a number of historical sources exist that are nearly as complete as data on contemporary patenting. Second, I describe in detail differences across the datasets in terms of patent and inventor information included, reliability of provided information, and potential sample selection issues. Third, I show that while the datasets paint a remarkably consistent picture of aggregate invention through U.S. history, they contain important differences. In particular, differences in how patents are assigned to a location can produce statistically significant differences in estimates of the importance of agglomeration for invention. I discuss ways in which the different datasets can be used in conjunction with one another to improve inference.

Out of sight: Patents that have never been cited

Neil Gandal (Berglas School of Economics, Tel Aviv University; Centre for Economic Policy Research)
Michal Shur-Ofry (Hebrew University of Jerusalem, Faculty of Law)
Michael Crystal (Tel Aviv University)
Royee Shilony (Hebrew University of Jerusalem, School of Law, Students)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420061

Scientific understanding of innovation processes and of the patent system increasingly relies on big data analyses of patent citations. Much of that research focuses on highly cited patents. This study, conversely, offers the first systematic exploration of uncited patents — patents that receive no citations. Analyzing data

on all US patents issued between 1976 and 2008, we focus on the ratio of uncited patents out of all patents granted each year. We track the changes in the percentage of uncited patents during that period, and across technological fields, controlling for patents' age. We also investigate traits of uncited patents by examining the association between lack of citations and various factors including the number of inventors, number of technological subclasses, number of backward citations, and number of claims in the patent.

We find a robust pattern whereby the percentage of uncited patents declined between 1976 and the mid-1990s, but has been significantly increasing since then. These findings are consistent across technological fields and hold after controlling for patent characteristics. We discuss these and additional findings, and propose possible explanations. We suggest that the trend of increase in uncited patents raises, and reinforces, concerns regarding patent quality and "patent explosion". More broadly, our focus on "negative information" embedded in patent data opens up a new avenue for further research that can deepen our understanding of the patent system.

IP & Litigation

Generic entry before the agreed-upon date in pharmaceutical patent settlements

Keith Drake (Greylock McKinnon Associates)
Thomas G. McGuire (Harvard University – Department of Health Care Policy)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3416632

Drug patent litigation settlements specify a date for generic entry and typically include so-called "acceleration clauses" allowing the settling generic to enter earlier in certain circumstances, such as a third party winning the patent litigation. Agreed-upon dates in settlements between a brand and a generic with "first-filer" status affect the entire market because this date affects the date other generics may enter as well. This paper documents the entry outcome after a first filer-brand settlement by tracking how often the "acceleration clauses" in these settlements in fact accelerate entry. In total, the first filer entered prior to the original settlement date ten times in the 99 settlements included in our data. In four of these ten, the first filer failed to retain its 180-day exclusivity period — awarded by the FDA to the first generic to challenge the brand's patents — which allowed other later filing generics to enter and trigger the acceleration clause. In two cases, the first filer's entry was accelerated by another first-filer generic with shared rights to the 180-day exclusivity period. In the other four cases, the first filer's earlier entry was due to some special clause in the settlement (e.g., because of a shrinking brand market). In no case was a first filer's intact 180-day exclusivity period accelerated because of a later filing generic winning the patent litigation or settling for an earlier entry date.

On the economics of injunctions in patent cases

Thomas F. Cotter (University of Minnesota Law School)
Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (2019 Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413225

Courts in many countries continue to follow the traditional practice of awarding the prevailing patent owner a permanent injunction, absent exceptional circumstances. First-generation law-and-economics scholarship, building on Calabresi and Melamed's work on property and liability rules, largely supported this practice, based upon the perceived advantages of injunctions (as opposed to damages awards) in inducing bargaining and reducing valuation errors. More recent scholarship, however, has questioned the wisdom of automatic injunctions, particularly in cases in which the conditions conducive to patent holdup are present — among them, cases involving standard essential patents, patents incorporated into complex, multipatent devices, and actions brought by patent assertion entities.

Building upon this more recent work, I argue that the social benefits and costs of injunctions vary depending on the circumstances. To assist policymakers in rendering decisions in the real world, I propose two simplifying assumptions that would enable courts to compare the expected cost of holdup with the expected cost of valuation error. A simple set of recommendations follows, namely that courts generally should (1) grant injunctions when the probability of holdup is low, and (2) deny them when the probability of holdup is great and the expected harm from valuation error low to moderate. For indeterminate cases — for example, when the probability of holdup and the expected harm from valuation error are both high — courts can mitigate both risks to some degree by granting injunctions subject to stays pending design-around.

IP Law & Policy

Fictitious commodities: a theory of intellectual property inspired by Karl Polanyi's 'Great Transformation'

Alexander Peukert (Goethe University Frankfurt – Faculty of Law)
29 Fordham Intell. Prop. Media & Ent. L.J. 1151 (2019)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413500

The puzzle this Article addresses is this: how can it be explained that intellectual property (IP) laws and IP rights (IPRs) have continuously grown in number and expanded in scope, territorial reach, and duration, while at the same time have been contested, much more so than other branches of property law? This Article offers an explanation for this peculiar dynamic by applying insights and concepts of Karl Polanyi's book "The Great Transformation" to IP. It reconstructs and then applies core Polanyian concepts of commodification (infra, II), fictitious commodities (infra, III), and countermovements (infra, IV) to the three main areas of IP, namely copyrights, patents, and trademarks, as they have evolved and are currently regulated in international and selected national laws. The analysis reveals that the history of IP can be told in terms of Polanyi's famous "double movement": efforts to commodify virtually every reproducible input/output face equally persistent opposition, which points out the disruption that IPRs inflict upon communication and competition. Whereas IPRs dis-embed informational artifacts from the uninterrupted flow of societal exchange and subject them to prior authorization requirements, IP countermovements call for their re-embedding, i.e. their usability irrespective of authorization. From a normative perspective, a Polanyian perspective on IP suggests that IP law and policy should ensure that market-based transactions coexist with non-market modes of accessing and sharing information so that authors, inventors, and other entrepreneurs have as many options as possible.

Intellectual property in the New Technological Age: 2019 – Chapters 1 and 2

Peter S. Menell (University of California, Berkeley – School of Law)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415161

Rapid advances in digital and life sciences technology continue to spur the evolution of intellectual property law. As professors and practitioners in this field know all too well, Congress and the courts continue to develop intellectual property law and jurisprudence at a rapid pace. For that reason, we have significantly augmented and revised Intellectual Property in the New Technological Age.

The 2019 Edition reflects the following principal developments:
Trade Secrets: Congress passed the Defend Trade Secrets Act of 2016, one of the most momentous changes in the history of trade secret protection. The new law opens up the federal courts to trade secret cases, provides for ex parte seizures of misappropriated trade secrets in "extraordinary circumstances," and establishes immunity for whistleblowers. Other recent developments address nonsolicitation agreements, the inevitable disclosure doctrine, and the enforceability of noncompetition agreements.

Patents: The past several years have witnessed some of the most significant developments in U.S. patent history—from the establishment of the new administrative review proceedings at the Patent Office to important shifts in patent-eligibility, claim indefiniteness, enhanced damages, and equitable remedies at the Supreme Court and means-plus-function claim interpretation and infringement doctrine at the Federal Circuit. IPNTA significantly expands coverage of design patents in response to the growing importance of this form of protection.

Copyrights: The Supreme Court issued important decisions addressing the useful article doctrine, public performance right and the first sale doctrine. The past few years also witnessed important developments in the Online Service Provider safe harbor, fair use, and state protection for pre-1972 sound recordings. We have also integrated the digital copyright materials into a unified treatment of copyright law and substantially revamped the fair use section to reflect the broadening landscape of this important doctrine. IPNTA2019 integrates the complex provisions of the Music Modernization Act of 2018.

Trademarks: IPNTA2019 integrates important cases on federal registrability of disparaging marks, merchandising rights, likelihood of confusion on the Internet, and remedies.

Intermediary liability and fundamental rights

Christophe Geiger (Université de Strasbourg – CEIPI)
Giancarlo Frosio (Université de Strasbourg – CEIPI; Stanford University – Stanford Law School Center for Internet and Society)
Elena Izyumenko (Université de Strasbourg – CEIPI)
in: Giancarlo Frosio (ed.), The Oxford Handbook of Online Intermediary Liability (OUP, forthcoming 2019)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3411633

This chapter of the Oxford Handbook of Online Intermediary Liability sets the stage for considering the tension between intermediary liability and fundamental rights with special emphasis on the European legal framework. Competing fundamental rights, such as freedom of expression, privacy, freedom of business and the right to property are entangled into the intermediary liability conundrum. Policy makers are still in search of a balanced and proportional fine tuning of online intermediaries' regulation that might address the miscellaneous interests of all stakeholders involved, with special emphasis on users' rights. In this context, the increasing reliance on automated enforcement technologies, which will be the topic of further review in multiple chapters throughout the Handbook, might set in motion dystopian scenarios where users' fundamental rights are heavily undermined.

The current dilemma and future of software patenting

Yahong Li (The University of Hong Kong – Faculty of Law)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3423271

The unprecedented division over patent eligibility based on the ''abstract idea'' construct among the courts and judges in the Alice v. CLS case, the post-Alice contradictory decisions and the trend of rejecting or invalidating software patents, as well as the uncertainty about the concept of ''computer program as such'' (or ''per se'') in Europe and China, present a chaotic reality and serious dilemma as to the future direction of the software patenting regime around the world. The recent revisions to patent examination guidelines by the patent offices in the US, Europe and China, particularly the ''grouping'' of ''abstract ideas'' by the USPTO, providing examples of a ''further technical effect'' by the EPO, and distinguishing a ''computer program per se'' and ''computer-implemented inventions'' by the CNIPA, although helpful in patent examinations, cannot solve the root problem and fix the dilemma. A more general definition, or a ''safe harbour'', for the ''abstract idea'' or computer program ''as such'' is needed. In addition, to prevent patent

trolls and promote true software innovation, the scope and length of software patent protection should be limited, e.g. allowing only the means of implementation but not the function to be patented; and granting 10 years of utility-model-type or sui generis protection. All the above proposed reforms should be undertaken at the international level, e.g. by adopting a Software Treaty under the auspices of the WIPO, because the software patent dilemma is a global one that deserves an international solution, especially in the age of the internet where most of the soft-ware patents cover borderless internet technologies.

Copyright Law

An empirical study of 225 years of copyright registrations

Zvi S. Rosen (George Washington University – Law School)
Richard Schwinn (Office of Advocacy at the U.S. Small Business Administration)
Tulane Law Review, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2643075

This project provides the first comprehensive empirical study of copyright registrations and renewals over the entire scope of American History since the Constitution. Relying on our a newly developed dataset of copyright registration filings, including data for the years before 1870 that has never been seen before, as well as renewal filings from 1909–2005, we provide a history of copyright registration in America and make a number of new findings about the trajectory of copyright registrations over a 225 year period. In addition to these new findings, we engage longstanding questions about the effectiveness of copyright law and the effects of statutory, economic, and technological changes on the maintenance of federal copyrights. The project builds on existing research into the effectiveness of copyright law, including studies by William Landes and Richard Posner as well as more recent work by Raymond Ku. It also complements ongoing work by Robert Brauneis and Dotan Oliar on copyright registrations since 1978 and provides an increasingly holistic picture of the development of U.S. copyright in the modern age.

The law as uncopyrightable: Merging idea and expression within the eleventh circuit's analysis of 'law-like' writing

Christina Frohock (University of Miami – School of Law)
University of Miami Law Review, Vol. 73, 2019
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410664

The Eleventh Circuit recently issued an opinion in Code Revision Commission v. Public.Resource.Org, Inc. that meditates on the law as much as resolves a dispute. For that reason alone, attention should be paid. A commission acting on behalf of the Georgia General Assembly and the State of Georgia filed a copyright infringement action against a nonprofit organization that had disseminated annotated state statutes. The Eleventh Circuit took these modest facts and delivered a philosophical analysis of the nature of law, finding that statutory annotations are outside copyright protection because the true author of such “law-like” writing is “the People.” The court's opinion respects democracy by amplifying the voice of the People. Such amplification works best, however, on narrow facts. Applied broadly, in line with the scope of the court's philosophy, the opinion risks distorting the People's voice by muting intragovernmental disagreements. That voice is more often cacophony than clarion call, and the loudest strain comes from the least representative branch. Focusing on the exercise of sovereign authority, a different area of copyright law supports the same case outcome. The law, along with law-like annotations, is uncopyrightable because its idea and its official expression merge.

EU copyright reform: Grappling with the Google effect

Annemarie Bridy (University of Idaho; Stanford Law School Center for Internet and Society)
Vanderbilt Journal of Entertainment & Technology Law, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3412249

Sweeping changes are coming to copyright law in the European Union. Following four years of negotiations, the European Parliament in April 2019 approved the final text of the Digital Single Market Directive (DSMD). EU member states now have two years to transpose its provisions into domestic law. The new directive, which is the most substantial change to EU copyright law in a generation, contains provisions for enhancing cross-border access to content available through digital subscription services, enabling new uses of copyrighted works for education and research, and, most controversially, 'clarifying' the role of online services in the distribution of copyrighted works.

The provisions associated with the last of these goals — Article 15 (the 'link tax') and Article 17 ('upload filters') take aim directly at two services operated by Google: Google News and YouTube. Article 15 is intended to provide remuneration for press publishers when snippets of their articles are displayed by search engines and news aggregators. Article 17, which this article takes for its subject, is intended to address the so-called 'value gap' — the music industry's longstanding complaint that YouTube undercompensates music rightholders for streams of user videos containing claimed copyrighted content. The text of the DSMD nowhere mentions YouTube, but anyone versed in the political economy of digital copyright knows that Article 17 was purpose-built to make YouTube pay.

The important questions to ask in the wake of Article 17 are who else will pay — and in what ways. This article offers a focused examination of Article 17 as public law created to settle a private score between the music industry and YouTube. In Part I, I explain and critique the 'value gap' as a policy rationale for altering the scope of generally applicable copyright safe harbors. Part II breaks down the terms of the European Commission's original proposal for Article 13 (which later became Article 17) in relation to existing provisions of the E-Commerce Directive (ECD) and the Information Society Directive (ISD). In Part III, I survey human rights and competition-related criticisms of Article 13's mass licensing and 'technical measures' mandates. Part IV analyzes the adopted text of Article 17 with attention to the nature and adequacy of revisions made to answer the criticisms outlined in Part III.

Incentivizing top musicians

Guy A. Rub (Ohio State University (OSU) – Michael E. Moritz College of Law)
Texas A&M Journal of Property Law (2019 Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424113

The high social costs of our copyright law system are traditionally justified as a necessary evil to incentivize the production of more and better information goods. One would, therefore, expect that as copyright becomes stronger, and as the industry revenues increases, productivity will improve. Glynn Lunney's recent book, Copyright's Excess: Money and Music in the US Recording Industry, however, shows that, at least when it comes to the recording music industry, such a correlation does not exist. This is especially the case with respect to leading musicians, who seem to have reduced their productivity in the industry's most profitable years.

The incentives of top and wealthy artists to continue to create receives relatively little attention in copyright law literature. Those incentives likely do not fit within the overall framework. The formula "money equals incentives" is quite crude with respect to most people, but it seems simply erroneous when it comes to those artists who are already very wealthy.

This essay explores the forces that drive superstars' creativity. It suggests that the main motivations for the creativity of the ultra-wealthy are likely to be rooted in their internal joy from creativity and, possibly even

more, in the social-psychological rewards that it entails. It concludes by considering some of the possible implications of this incentive structure and with a call for copyright law to focus on the monetary incentives of marginal artists and not those of the ultra-rich.

IP & Trade

Bilateral trade and investment agreements and the harmonisation of copyright law at international level: Lessons to be learned from the TTIP

Christophe Geiger (Université de Strasbourg – CEIPI)
*Tatiana-Eleni Synodinou (ed.), Pluralism or Universalism in International Copyright Law, Alpheen aan den Rijn (NL), Kluwer Law International, 2019 (Forthcoming)***https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3410946**

The Transatlantic Trade and Investment Partnership, better known under the name "TTIP", is a bilateral trade and investment agreement that has been negotiated between the European Union and the United States since 2013. The respective administrations on both sides of the Atlantic have several times indicated their desire to resume the negotiations that have been put on hold (but not officially abandoned) after the last US presidential elections. If it is currently uncertain what will be the fate of the TTIP, the topic could be revived as the EU Council in April gave a new mandate to the European Commission to negotiate a Bilateral Trade Agreement with the US, without it being entirely clear what will be the exact scope of the negotiations. More generally, the dynamics of signing bilateral trade and investment agreements with third countries is steadily going forward so that lessons can certainly be learned from the TTIP experience, no matter what happens in the future with its negotiations. The proposed TTIP agreement has given rise to a number of concerns within European public opinion, in particular because of the secret nature of the discussions, which raised questions about the potential contents of the texts and the commitments made on both sides. These concerns recall those expressed at the time of the negotiations on the Anti-Counterfeiting Trade Agreement (ACTA), which mobilised significant concern among public opinion in Europe and ultimately led to the rejection of the Agreement by a large majority in the European Parliament in July 2012. The TTIP, although it obviously has a much broader content than ACTA, likewise contains provisions dedicated to intellectual property rights and more particularly to copyright. Its principal characteristic, however, lies in the inclusion of intellectual property rights in the list of investments protected by a specific section of the agreement. If implemented, the enforcement of this protection would be entrusted to arbitration tribunals or to a special court for the protection of investments that is yet to be set up. Hence the question arises as to whether the regulation of intellectual property by the European Union or one of its Member States, in a way that would affect the scope of the intellectual property rights held by certain large private companies, could be considered as a potential threat to their investments. If this was the case, proceedings could be brought against the EU or one of its Member States, leading to the risk of considerable limitations being imposed on legislators in the necessary implementation of a balanced and effective copyright law in Europe.

Regulatory and policy issues arising from intellectual property and investor-state dispute settlement in the EU: A closer look at the TTIP and CETA

Christophe Geiger (Université de Strasbourg – CEIPI)
*in: Christophe Geiger (ed.), "Research Handbook on Intellectual Property and Investment Law", Cheltenham (UK)/Northampton, MA (USA), Edward Elgar Publishing, 2019, Forthcoming.***https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420092**

For the European Union (EU), the dynamics of signing bilateral trade and investment agreements with third countries is steadily going forward. Good examples of such agreements are the controversial "Comprehensive Economic and Trade Agreement" ("CETA") between Canada and the EU and, the

Transatlantic Trade and Investment Partnership ("TTIP") that has been negotiated between the European Union and the United States since 2013. The CETA and TTIP agreements have given rise to concerns in European public opinion, particularly due to the secret nature of the discussions surrounding the negotiation process. Both agreements contain provisions dedicated to intellectual property rights but their principal characteristic lies in the inclusion of intellectual property rights in the list of investments protected by a specific section of the agreement. If implemented, the enforcement of this protection would be entrusted to arbitration tribunals or to a special court for the protection of investments that is yet to be set up. Hence the question arises whether the regulation of intellectual property by the European Union or one of its Member States, in a way that would affect the scope of the intellectual property rights held by certain large private companies, could be considered as a potential threat to their investments. If this was the case, proceedings could be brought against the EU or one of its Member States, leading to the risk of considerable limitations being imposed on legislators in the necessary implementation of a balanced and effective intellectual property law in Europe.

Other IP Topics

The paradox of source code secrecy

Sonia Katyal (University of California, Berkeley – School of Law)
Cornell Law Review, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3409578

Today, the government relies on machine learning and AI in predictive policing analysis, family court delinquency proceedings, parole decisions, and DNA and forensic science techniques, among other areas, producing a fundamental conflict between civil rights and automated decision-making. Ground zero for this conflict, I argue, has become the murky, messy intersection between software, trade secrecy, and public governance. In many cases of automated decision-making, algorithms – and the source code that informs them, are hidden from public view, even though they implicate core constitutional protections of due process, individualized justice and equal protection. However, because they are often protected as trade secrets, they can remain entirely free from public scrutiny.

This article argues that the constitutionally-inflected conflict that we now face is, in no small part, attributable to a core failure of our system of intellectual property to address, definitively, the boundaries of software protection and the implications for source code secrecy. In a world of privatized decision-making, the largely consistent move towards closed code in software sectors, has a number of deleterious results for the public, particularly in the age of algorithmic dominance. However, this Article argues that source code also carries a paradoxical character that is peculiar to software: the very substance of what is secluded often stems from the most public of origins, and often produces the most public of implications. And it is the failures of intellectual property law that has made this possible. First, as I show, courts have shifted the boundaries of protection for software under both copyright and patent law, further amplifying the attractiveness of trade secrecy. Second, the law has been willing to entertain a unique – and paradoxical-- overlap between copyright, patent, and trade secrecy, even though the three regimes have opposing public goals. Copyright and patent law are oriented towards disclosure, trade secrecy the opposite. While this overlap of protection in software seemed, at first glance, to be a good thing for innovation policy, it has proven deleterious for the larger public, particularly criminal defendants and lower income populations, who are now increasingly governed by an invisible hand that they can no longer investigate or question. But, as I argue, it may also be deleterious for other innovators, as well. The Article concludes with a brief discussion of ways to offer greater transparency through a "controlled disclosure regime," offering areas of reform in intellectual property, contract law, and discovery.

Blunting the late-mover advantage: intellectual property and knowledge transfer

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Mattias Ottervik (The Chinese University of Hong Kong (CUHK) – Department of Government & Public Administration)
Akron Law Review, Vol. 52, 2019
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420210

The United States followed a path of initially giving little protection to intellectual property (IP) so that the country could benefit from the IP of nations we term earlier-movers on the world stage of economic development. This symposium piece argues that Japan and China have been following a similar trajectory in their intellectual property laws while progressing on their own economic climb. Widespread international outsourcing of manufacturing has made intellectual property a key asset for private companies, which has strengthened the tendencies of earlier-movers to formulate and enforce strict intellectual property laws. This suggests that countries like China respond not only to pressure from earlier-movers like the United States to increase intellectual property protection, but are also driven by concerns against their own later-movers. Perhaps curiously, if the hierarchy of movers shifts and the relative interest in intellectual property enforcement does as well, China will someday seek to protect its goods against infringement by the likes of the United States and Japan.

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