



# IP Literature Watch

**CRA** Charles River  
Associates

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This newsletter contains an overview of recent publications concerning intellectual property issues. The abstracts included below are as written by the author(s) and are unedited.

## IP & Antitrust

### **Brief amici curiae of 82 law, economics, business, and medical professors in support of respondent**

Michael A. Carrier (Rutgers Law School)

*US Court of Appeals for the Fifth Circuit, 2019*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3504773](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504773)

In *FTC v. Actavis*, the Supreme Court issued one of the most important antitrust rulings in the past generation, finding that settlements by which brand firms pay generics to delay entering the market could violate antitrust law. In March, the FTC applied *Actavis* for the first time, issuing a comprehensive ruling that offered a ringing bipartisan (5-0) condemnation of this behavior.

Impax has appealed to the Fifth Circuit, seeking to overturn this ruling. This brief, filed on behalf of 82 professors of law, economics, business, and medicine, highlights Impax's four erroneous foundations, which seek to (1) overturn *Actavis*; (2) downplay Impax's concession that Endo made a reverse payment to delay entry; (3) ignore its role in delayed competition; and (4) remake antitrust law to immunize blatantly anticompetitive behavior.

### **Why property law does not support the antitrust abandonment of standards**

Michael A. Carrier (Rutgers Law School)

*57 Houston Law Review 265 (2019)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3504789](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504789)

Property is being hijacked. In property law itself, it is well-recognized that owners' rights are accompanied by robust limits. No one familiar with property law could reasonably claim that property owners have absolute rights to exclude.

But when the concept of property is exported elsewhere, those limits are sometimes forgotten. Such a version of property is viewed as absolute, not restricted by any limits. In the copyright realm, for example, we have seen it with owners claiming that infringement is "theft" or "piracy."

And now we are seeing it in the antitrust arena. Assistant Attorney General (AAG) Makan Delrahim has advocated an absolutist conception of property for patents, asserting that they provide an unqualified right to exclude followed by an injunction. That position is accompanied by the claim that antitrust has no role to play in addressing patent holdup, which occurs when a patent owner seeks an injunction or excessive royalties after an industry has adopted a patented technology that cannot be avoided.

This article (written for a symposium on IP and property) demonstrates how absolutist conceptions of limitless rights are not consistent with property law and do not justify abandoning antitrust scrutiny of patent holdup. If AAG Delrahim is going to launch an assault on antitrust's vital role in policing standard-setting abuses, he will need support from somewhere other than property law.

## IP & Litigation

### [USPTO patent number and case code file dataset documentation](#)

David L. Schwartz (Northwestern University – Pritzker School of Law)

Ted M. Sichelman (University of San Diego School of Law)

Richard Miller (United States Patent and Trademark Office)

*USPTO Economic Working Paper No. 2019-05*

*Northwestern Law & Econ Research Paper No. 19-12*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507607](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507607)

Researchers studying the U.S. patent litigation system have typically had to rely on proprietary, commercial databases to retrieve comprehensive lists of litigated patents and associated case information, precluding publication of underlying data and the verification of study results. In other situations, researchers have used incomplete datasets, potentially resulting in biased results. In order to overcome these limitations, the authors and their research teams reviewed every available initial complaint and related documents in roughly 99 percent of all patent cases filed in U.S. district courts between 2003 and 2016 in order to generate a comprehensive list of litigated patents in those cases. In addition, the authors and their teams coded the case “type” for all of these actions, such as infringement, declaratory judgment, false marking, ownership dispute, malpractice, among others. The resulting dataset can be downloaded in bulk and be used and reproduced with no licensing restrictions. These data have been married to USPTO’s Patent Litigation Docket Reports Dataset, which provides full case and docket information for every one of these cases. Thus, for the first time, researchers can now use a single, comprehensive dataset of patents, case types, and related case information to conduct empirical studies of patent litigation in the U.S. district courts.

## IP & Licensing

### [How do patent incentives affect university researchers?](#)

Lisa Larrimore Ouellette (Stanford Law School)

Andrew Tutt (Independent)

*International Review of Law and Economics, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3505030](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3505030)

Universities and other beneficiaries of public funding for scientific research are encouraged to patent resulting inventions under the Bayh–Dole Act. This controversial framework gives academic grant recipients a direct financial stake in the success of their inventions by requiring universities to share the resulting patent royalties with inventors. This incentive for grant recipients might help justify Bayh–Dole patents when the conventional justification for exclusivity — that it is necessary for commercialization — fails to hold. But there is little evidence as to whether it works.

This article examines how one aspect of the patent incentive — the prospect of royalties — affects the behavior of university researchers. Fortunately, different schools offer inventors different shares of patent revenue. We have created a dataset of royalty-sharing policies from 152 universities, which shows substantial variation across universities and time. (For example, Caltech switched from sharing 15% to 25% of net income in 1994, the University of Washington switched from sharing 100% of initial revenues to a flat rate of 33% in 2004, and the University of Iowa switched from 25% to 100% of initial patent revenues in 2005.) Although prior work has reported that higher inventor royalties lead to more university licensing income, we show that this result was driven by coding errors. We also extend prior work by examining more years, doing a more convincing panel data analysis, using additional outcome variables, and looking at lateral moves by the most active patenters. In all of these analyses we find no compelling empirical evidence that increasing university inventors' royalty share has a significant effect on any of the outcomes one would expect to be most affected.

These results do not imply that patents provide no incentives to university researchers. They may provide reputational benefits or encourage faculty-run spin-offs, or even provide financial incentives that are not captured by our statistics. But the lack of a measurable impact of higher royalty shares on patenting activity suggests that, from a social welfare perspective, it may be preferable for a larger share of royalties to be retained by universities, which are then required by Bayh–Dole to reinvest this money in science research and education. In any event, our analysis raises promising questions for future research and calls into question the existing view that increasing the inventor's share in university patent policies encourages researchers to develop and commercialize more remunerative patents.

### **Patent aggregation: More than patent trolls**

Dominique Christ (N/A)

Niccolò Galli (Max-Planck Institute for Innovation and Competition)

Cornelia Peuser (N/A)

*les Nouvelles - Journal of the Licensing Executives Society, Volume LIV No. 4, December 2019*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3470170](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470170)

Patent trolls are just a small piece of the patent aggregation puzzle. A myriad of electronics companies, with and without production capabilities, pursues patent aggregation by building patent portfolios and monetizing them beyond manufacturing. So far, it is unclear whether such patent aggregation activities have adverse effects on innovation. This article replaces the myopic discussion about patent trolls with a wider picture — that of patent aggregation. It analyses the rationales and evolution of this phenomenon, orders the domain of patent aggregators, and presents the effects patent aggregation activities can have on technological development. Only the interplay of patent and competition laws is considered apt to reconcile patent aggregation with innovation.

### **The Fountainhead and de standard essential patents. Trading and rating systems**

Enrique Sanjuan (University of Malaga – Facultad de Derecho)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3503577](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503577)

Through the present work it is tried to demonstrate that within the system of negotiation proposed by the best doctrine and assumed by the Communication from the Commission (Setting out the EU approach to Standard Essential Patents. Brussels, 29.11.2017 COM (2017) 712 final), the evaluation of the Standard Essential Patents (SEP) must necessarily distinguish three essential elements: (1) The minimum and maximum in said valuation. (2) The negotiation markup. And (3) The peculiarities of the market and of those who intervene in it. And therefore, the valuation cannot be, in any case, the framework of a negotiation that may be anticompetitive for the inventor, for the implementer or for both. It is therefore proposed to establish the valuation systems (methods) and establish minimums and maximums based on criteria such as the market where the action is taken, the marginal costs and revenues of those involved in the negotiation and the incentive yields.

After a brief introduction to situate ourselves in the subject (Chapter 1), in Chapter 2 we analyze the problem of negotiation from positions that pretend to take advantage of the system (hold-up and hold-out) to obtain competitive advantages in relation to patents essentials in Chapter 3; the negotiation systems are contrasted with the systems of valuation of these patents, introducing an analysis of the methods used by the Courts and considered by the doctrine in Chapter 4. Chapter 5 necessarily concludes with the establishment of rules for the setting of the limits (above and below) that will have to be considered in any negotiation or valuation of these patents.

### **Licensing at the patent cliff and market entry**

Annabelle Marxen (Swiss Competition Commission)

João Montez (Centre for Economic Policy Research (CEPR))

*CEPR Discussion Paper No. DP14276*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3518617](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518617)

We study the incentives for a monopoly incumbent to reach an agreement allowing a generic to enter just before its patent expires, i.e., at the patent cliff, and its consumer and social welfare effects. In our model, entry by more than one entrant is unprofitable. Thus, in the absence of an agreement, the entry game has a "grab the dollar" structure, with each generic entering in each period with a low (high) probability if entry costs are high (low). In that case the incumbent can remain a monopolist for some time after patent expiry, until one or more generics finally enter. An early entry agreement guarantees a single generic enters the market immediately, and it allows the incumbent to extract the entrant's profit. It will be reached in equilibrium when entry costs are low or the entry process is short. In these instances, early entry agreements do however tend to hurt consumers. Yet, allowing for such agreements increases overall social welfare in a benchmark model of vertical differentiation, even if the expected competition on the market is reduced. The same holds in a benchmark model with captive consumers and shoppers, provided the share of captives is not too high.

### **Is the sword of Damocles still hanging over the SEP holder and the implementer?**

Aygun Zeynalova (Independent)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3502693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502693)

The recent case Huawei v. ZTE plays a crucial role especially with regard to the determination of final position of the Court of Justice of the European Union related to the situation started with Orange Book-Standard case. The judgment can be considered as shedding light to uncertainty related to the boundaries of Fair, Reasonable and Non-Discriminatory (FRAND) negotiations. As it has been for the first time that the Court set out a framework for evaluating whether by seeking an injunction, a Standard Essential Patent (SEP) holder can be considered abusing its dominant position, the judgment provides a road-map for clarification the issue by national courts.

The purpose of this paper is to clarify the pre-Huawei situation in order to be able to make a comparison between different approaches elaborated by EU Commission, national courts, as well as, analyzing the Huawei v. ZTE impact to further development in domestic courts.

The findings of this paper show that the European Court simplified of determination of balance between Competition law and Intellectual Property law by way of introduction of requirements from both SEP holders and implementers. Considering these requirements as "sword of Damocles", the paper intends to analyse the post-Huawei situation with very recent cases from national courts, e.g. Unwired Planet case from UK Courts, as well as emphasizing an outside approach from U.S. courts to the relevant situation.

# IP Law & Policy

## Defective patent deference

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*Washington Law Review, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3508880](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508880)

The Supreme Court's implicit deference to the Office of the Solicitor General in patent cases is well-documented: What the Solicitor General requests, the Solicitor General typically receives. But we know far less about how the Solicitor General arrives at these preferred policy positions, or why the Solicitor General comes to advocate for some outcomes over others. This is problematic. In practically every other corner of the administrative state, an agency engages in substantive rulemaking — and earns substantial deference to its views — only where robust procedural protections attend to the policymaking process, where the agency's outcome reflects its substantive expertise, and where the agency may, through presidential removal and election, be held politically accountable for its policy choices.

But this is not so in patent law. The Patent Office has never claimed to exercise any substantive rulemaking power. Meanwhile, the Solicitor General develops and advocates for patent policy outcomes, but behind closed doors, without deep internal expertise, and under the time constraints of appellate litigation. These shortcomings (among others) suggest that we should re-examine the Solicitor General's influence over patent policy in favor of alternate interpretive practices that improve Executive Branch decisionmaking. And they counsel in favor of several reforms — most importantly, to the policymaking power of the Patent Office.

## Rigorous policy pilots the USPTO could try

Colleen V. Chien (Santa Clara University – School of Law; Stanford University – Management Science & Engineering)

*Iowa Law Review Online, Vol. 104, No. 1, 2019*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3499202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3499202)

Academics and others may get greater uptake of their policy ideas if framed not only as policies to enact but experiments to try and to learn from. A companion article, Rigorous Policy Pilots, lays out a framework, "MATTER" for proposing policy experiments, shorthand for specifying questions that matter, relevant authority, the underlying theory of change, testing protocol, evidence and resources. Applying it to the US Patent and Trademark Office, which has shown a willingness to experiment with new approaches before adopting them, this essay proposes several rigorous pilots for addressing some the patent system's most enduring challenges: ensuring that the patents granted by the Office are of high quality, and ensuring the full participation of US innovators in inventing ("inclusive innovation"). To overcome challenges in measuring the effectiveness of agency action, the essay proposes taking advantage of natural experiments, natural yardsticks, and independent or synthetic assessments.

A "search first" pilot would give applicants the option of requesting that all of the relevant prior art in their case be provided "up front," through the examiner's initial searching of the entire specification rather than just the claims, following the approach of jurisdictions that bifurcate search and examination. The early certainty would help applicants make early determinations about whether or not the patent was worth pursuing. Quality pilots, in general, could also more explicitly measure the robustness of prior art vetting as a quality metric, given the "prior art gap" between US examiners and others reviewing a patent. Piloting development of "error detection technology" for vetting compliance with the Patent Act's Section 112 disclosure requirements, following previous examples of agencies adopting outside technology, could also help close the applicant readiness gap that this essay documents between smaller and larger inventors, enhancing both inclusion and patent quality. Finally, the essay

proposes a pilot for testing for the presence of implicit gender bias in the award of patents to help get at the root causes of the 7-21% difference in patent grant rate between male and female-led inventions.

### **Extraterritoriality and the active inducement of infringement**

Robert Stier (Pierce Atwood LLP)

*Forthcoming 19 UIC Rev. Intell. Prop. L. (2020)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3503034](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503034)

In *Merial Ltd. v. Cipla Ltd.*, the Federal Circuit held that actions taken outside the United States might make a foreign defendant liable for induced infringement of a US patent under § 271(b) of the Patent Act. This article questions whether Merial remains good law after the Supreme Court's 2018 decision in *WesternGECO LLC v. ION Geophysical Corp.* There, the Supreme Court held that lost profits from foreign sales were recoverable under § 284 of the Patent Act when they resulted from acts of domestic patent infringement. In reaching that decision, the Court applied the test from *RJR Nabisco, Inc. v. European Community* to evaluate the potential extraterritorial application of US patent laws. If the same test from *RJR Nabisco* is applied to § 271(b), an accused infringer who acts entirely outside the United States should not be liable for inducing infringement of a U.S. patent. In other words, this article concludes that *Merial* has been impliedly overruled. The article will be forthcoming in *19 UIC Rev. Intell. Prop. L. (2020)*.

## IP & Innovation

### **Incentivizing accessible design**

Christopher Buccafusco (Benjamin N. Cardozo School of Law)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3497902](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3497902)

When scholars contemplate the legal tools available to policymakers for encouraging innovation, they primarily think about patents. If they are keeping up with the most recent literature, they may also consider grants, prizes, and taxes as means to increase the supply of innovation. But the innovation policy toolkit is substantially deeper than that. To demonstrate its depth, this Article explores the evolution of designs that help people with disabilities access the world around them. From artificial limbs to the modern wheelchair and the reshaping of the built environment, a variety of legal doctrines have influenced, for better and for worse, the pace and direction of innovation for accessible design.

This Article argues that two of the most important drivers of innovation for accessible design have been social welfare laws and antidiscrimination laws. Both were responsible, in part, for the revolution in accessibility that occurred in the second half of the twentieth century. Unlike standard innovation incentives, however, these laws operate on the “demand side.” Social welfare laws and antidiscrimination laws increase the ability and willingness of parties to pay for accessible technology, ultimately leading to greater supply. But in doing so, these laws generate a different distribution of the costs and benefits of innovation. They also produce their own sets of innovation distortions by allowing third parties to make decisions about the designs that people with disabilities have to use.

The law can promote innovation, and it can hinder it. The law's relationship to the wheelchair, the most important accessibility innovation of the twentieth century, produced both results. Policymakers have choices about which legal incentives doctrines they can use and how they can use them. This Article evaluates those tools, and it provides guidelines for their use to encourage accessible technology in particular and innovation generally.

### **Automating labor: Evidence from firm-level patent data**

Antoine Dechezleprêtre (London School of Economics & Political Science (LSE))

David Hémous (University of Zürich)

Morten Olsen (University of Copenhagen)

Carlo Zanella (University of Zurich – Department of Economics)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3508783](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3508783)

Do higher wages lead to more automation innovation? To answer this question, we first introduce a new measure of automation by using the frequency of certain keywords in patent text to identify automation innovations in machinery. We validate our measure by showing that it is correlated with a reduction in routine tasks in a cross-sectoral analysis in the US. Then we build a firm-level panel dataset on automation patents. We combine macroeconomic data from 41 countries and information on geographical patent history to build firm-specific measures of lowskill and high-skill wages. We find that an increase in low-skill wages leads to more automation innovation with an elasticity between 2 and 4. An increase in highskill wages tends to reduce automation innovation. Placebo regressions show that the effect is specific to automation innovations. Finally, we use the Hartz labor market reforms in Germany for an event study and find that they are associated with a relative reduction in automation innovations.

### **Government R&D and private innovation: Empirical evidence from the Bayh-Dole Act**

Yun Hou (National University of Singapore)

Ivan P. L. Png (National University of Singapore (NUS))

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3498899](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498899)

Performing government R&D can enhance and certify a firm's competencies, but impose resource costs. Here, we investigate the net effect of government R&D on private-sector innovation. From 1983, President Reagan allowed large businesses to patent inventions arising from government R&D. Empirically, large businesses increased government R&D, and this led to less R&D for internal use, but no significant change in R&D for external industry clients. We interpret these results as due to resource re-allocation to government R&D outweighing competency enhancement and certification for internal R&D, but not external R&D.

## Copyright Law

### **What is left of user rights? – Algorithmic copyright enforcement and free speech in the light of the Article 17 regime**

Sebastian Felix Schwemer (Centre for Information and Innovation Law (CIIR))

Jens Schovsbo (Centre for Information and Innovation Law (CIIR))

*Forthcoming in Paul Torremans (ed), Intellectual Property Law and Human Rights, 4th edition (Wolters Kluwer, 2020)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507542](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507542)

Article 17 of the Directive on copyright and related rights in the Digital Single Market (the DSM Directive) has strengthened the protection of copyright holders. Moving forward, online content-sharing providers will be responsible for copyright infringement unless the use of works on their platforms is authorized or if they have made 'best efforts' to obtain an authorization and prevent the availability of unlicensed works. At the same time, the Directive has made it clear that users of protected works shall be able to rely on the existing limitations and exceptions regarding quotation, criticism and review and caricature, parody or pastiche. The Directive even casts these limitations and exceptions as user rights. This paper points out that copyright's limitations and exceptions have traditionally constituted a corner

stone in the internal balancing of the interests of users against rights holders and with a clear view of safeguarding the interests of free expression and information protected by the Charter. Given the overall purpose of the DSM Directive in strengthening the position of rights holders, there is a dire risk that the benefits of the limitations and exceptions evaporate in the attempts of platform operators to escape liability by use of algorithmic enforcement. The article uses the recent decisions of the CJEU in *Pelham*, *Funke Medien* and *Spiegel Online* to draw attention to the central importance of the limitations and exception as the primary channel for fundamental rights analyses in copyright. It is finally pointed out how the DSM Directive –despite of its on-the-paper recognition of users’ rights– is most likely going to lead to a devaluation of those same rights.

### **Deciding fair use**

Amanda Reid (UNC at Chapel Hill)

*Michigan State Law Review*, Vol. 2019, No. 3, 2019

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3498352](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3498352)

An often-overlooked question is who should decide the important questions of the day. This Article takes up the inquiry as it relates to copyright fair use. Conceptually, fair use is a public policy question. The better policy view is that fair use is a statutory right, a speech-protective safeguard, and a defense — but not an affirmative defense. Operationally, who decides fair use is a judicial policy question. Who decides a particular question is informed by the nature of the question?

Courts are arbiters of law, and juries are arbiters of facts. For a mixed question of law and fact, who decides is driven by whether the question is more fact-like or more law-like. Categorizing such questions is, at its core, an allocative policy question. The policy answer is driven by the nature of the question, relative institutional skills, and the importance of the interest at stake. Properly seen as an affirmative right, and not an affirmative defense, the interests at stake in fair use cases are a user’s right to free expression balanced against a copyright holder’s statutory privilege.

This Article contributes to the scholarly conversations by laying bare the reality that who decides the question of copyright fair use is nakedly political. Courts are actively wrestling with this unresolved policy question. The Seventh Amendment fashions a policy preference for juries to decide questions of fact. Moreover, history confirms a long tradition of relying on juries to make fair use determinations. But it is unclear if this tradition will continue. Without Supreme Court guidance, categorizing fair use as more law-like or more fact-like is so slippery and malleable that the Seventh Amendment ceases to be an influence — much less a command.

### **Copyright law as an engine of public interest protection**

Haochen Sun (The University of Hong Kong – Faculty of Law)

*Northwestern Journal of Technology and Intellectual Property*, Vol. 16, No. 3, 2019

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3496452](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496452)

Courts around the world have been confronted with bewilderingly complex challenges in protecting the public interest through copyright law. This article proposes a public interest principle that would guide courts to settle fair use cases with better-informed decisions. I argue that the proposed principle would legally upgrade fair use from serving as an engine of free expression to serving as an engine of public interest protection.

Based on comparative study of the conflicting rulings handed down by the U.S. and Chinese courts on Google Library, the article first considers the necessity of adopting the public interest principle in guiding the judicial settlement of fair use cases substantively and procedurally. The article then canvasses the two substantive legal standards to be embodied in the public interest principle. First, the principle would create a public interest use standard for courts to utilize in weighing the first fair use factor without applying the dichotomy of transformative and non-transformative use. At the same time, it

would also require courts to employ the significant market harm standard when considering the fourth fair use factor. Second, the public interest principle would also modify the procedural rules concerning the assignment of burden of proof in fair use cases. It would place only the burden of proving a public interest use under the first factor on the user of a work who is the defendant in the judicial proceedings at hand.

Moreover, the article also demonstrates how the public interest principle could be used to develop a meaningful alternative that bridges the gaps between the fair use and fair dealing doctrines. By largely preserving the existing attributes of both, the principle would serve as a commonly shared principle for adjudicating cases and developing further legislative reforms in both fair use and fair dealing jurisdictions.

### **Can algorithms promote fair use?**

Peter K. Yu (Texas A&M University School of Law)

FIU Law Review, Vol. 14, 2020

*Texas A&M University School of Law Legal Studies Research Paper No. 19-72*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507612](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507612)

In the past few years, advances in big data, machine learning and artificial intelligence have generated many questions in the intellectual property field. One question that has attracted growing attention concerns whether algorithms can be better deployed to promote fair use in copyright law. The debate on the feasibility of developing automated fair use systems is not new; it can be traced back to more than a decade ago. Nevertheless, the recent technological advances have invited policymakers and commentators to revisit this earlier debate.

As part of the Symposium on "Intelligent Entertainment: Algorithmic Generation and Regulation of Creative Works," this Article examines whether algorithms can be better deployed to promote fair use in copyright law. It begins by explaining why policymakers and commentators have remained skeptical about such deployment. The article then builds the case for greater algorithmic deployment to promote fair use. It concludes by identifying areas to which policymakers and commentators should pay greater attention if automated fair use systems are to be developed.

## **Other IP Topics**

### **Keeping IP real**

Irina D. Manta (Hofstra University – Maurice A. Deane School of Law; St. John's University School of Law)

*Houston Law Review, Vol. 57, No. 349, 2019*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3504885](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504885)

This symposium contribution analyzes the relationship between intellectual property and tangible property, focusing on four types of intellectual property: copyrights, trademarks, patents, and trade secrets. It posits that—contrary to popular conceptions—the question of rivalrousness should be viewed as central both to owners' use of IP-protected goods and to others' infringement of the underlying IP rights (just as that attribute lies at the heart of the concept of real and other tangible property). Rivalrousness typically arises where consumption of a good by a consumer prevents simultaneous consumption of that good by other consumers or, in the tangible property context, where simultaneous physical occupation of the same space is impossible. This symposium piece, however, adopts an understanding of rivalrousness that rests on economic rather than physical conceptions of rivalrousness. Previous scholarship, including my own, has questioned the boundary between intellectual property and tangible property by examining binary conceptions of rivalrousness, whereby physical goods (including real property) are understood to be completely rivalrous, and intangible goods

completely nonrivalrous. This piece studies in depth how “(real) property-like” the different forms of intellectual property are when it comes to economic rivalrousness, and concludes that most trademarks and trade secrets hew quite closely to our understanding of real property and other tangible property as far as economic rivalrousness is concerned. There is more variance in that respect within copyrights and patents (with the associated goods often ranging from not rivalrous at all to highly rivalrous), which suggests that there may be more flexibility in those areas when granting rights to third parties. For copyright and patent rights, economic space might be more shareable than for trademarks or trade secrets, in the sense that the goods can sometimes more easily coexist in the market without the owner of the original intellectual property suffering profit losses.

### **Unregistered patents & gender equality**

Miriam Marcowitz-Bitton (Bar-Ilan University – Faculty of Law)

Yotam Kaplan (Bar-Ilan University – Faculty of Law)

Emily Michiko Morris (Penn State Dickinson Law)

*Harvard Journal of Law and Gender*, Vol. 43, No. 1, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3502178](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502178)

Women do not get a fair share when it comes to patenting and are far less likely to own patents. This disparity is in part because of not only the inherent biases in science and technology and in the patent system itself, but also because of the high costs of even applying for patents. This article therefore proposes an unconventional new regime of unregistered patent rights to relieve women and other disadvantaged inventors of the costs of applying for registered patent rights and to help them gain greater access to patent protections. Patents are a glaring exception to the unregistered protections provided in other areas of intellectual property, which are more egalitarian in design. By providing automatic patent rights, our proposed regime would allow for greater protection for disadvantaged innovators, in much the same way that copyright, trademark, and other forms of intellectual property currently do.

To explain our proposal, we detail the challenges facing women and other disadvantaged inventors in applying for patents as well as the fact that other intellectual property regimes do not require such applications. We also address a number of objections that our proposal would inevitably raise. In particular we show that, because our proposed unregistered patent system would grant rights for only three years and would protect only against direct copying, these rights would be unlikely to deter incremental or complementary innovation. Such rights would also be fully subject to invalidation under a preponderance of the evidence standard.

Our proposed regime does not solve all of the issues female innovators face. Nonetheless, our proposed regime would benefit women and others by providing protection at no cost, without filing or renewal fees, and equally importantly, by protecting even inventors with little or no knowledge of the patent system and its importance in realizing the benefits of their inventive efforts.

### **Streaming wars: Episode I**

Nicole E. Pottinger (Independent)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507038](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507038)

This paper seeks to highlight issues surrounding the Transmit Clause of the Copyright Act as they concern modern streaming services and innovation in online television. Any and all criticism and commentary is welcome.

## Are there as many trademark offices as trademark examiners?

Michael Frakes (Duke University School of Law)

Melissa F. Wasserman (The University of Texas at Austin – School of Law)

*Duke Law Journal*, Vol. 69, 2020

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3503984](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3503984)

Federal trademark registration rights have grown in import and trademark owners have taken notice. In the fiscal year of 2018, over 660,000 federal trademark registration applications were filed with the U.S. Patent & Trademark Office (Trademark Office or Agency), representing a 60% increase from a decade prior. Yet despite the fact there is growing concern that the Agency is routinely issuing inconsistent trademark determinations, systematic empirical studies of the administrative process of obtaining federal registration rights are virtually nonexistent. This Article begins to close this gap by conducting the first large scale study of trademark officials, known as trademark examining attorneys, that make the initial determination on whether to accept or decline a federal trademark registration. Utilizing a novel dataset comprising over 7.8 million trademark applications, this Article examines the extent to which trademark examining attorney's determinations differ from one another. We find substantial heterogeneity in Trademark Office outcomes. Trademark examining attorneys have wildly divergent publication rates and registration rates even while controlling for a range of characteristics of the applications. The duration of time an application is before the Trademark Office also varies considerably among trademark examining attorneys as does whether a filed opposition is sustained.

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