



# 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 & Mergers

### **The impact of IP box regimes on the M&A market**

Sebastien Bradley (Drexel University)

Leslie A. Robinson (Dartmouth College - Accounting; Dartmouth College - Tuck School of Business)

Martin Ruf (University of Tübingen)

Tuck School of Business Working Paper

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3304559](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304559)

IP box regimes reward ownership of successful technology by imposing a lower tax rate on income derived from the commercialization of patented products relative to other sources of business income. Coupled with explicit provisions regarding the eligibility of acquired intellectual property, IP boxes may affect merger and acquisition (M&A) incentives through multiple channels. Applying panel difference-in-differences and event study methods at the firm level, we examine the effects of these modified incentives on the probability that a firm is acquired in the context of international and domestic acquisitions. In IP box regimes with strict nexus requirements, reducing the tax rate on patent income by 1 percentage point is associated with a 2.5 percent reduction in the probability of being acquired for patent-owning firms due to the potential loss of eligibility for preferential taxation. This effect dissipates where nexus requirements are relaxed. Significant positive effects of IP box tax savings on M&A activity in the latter more permissive regimes are indicative of increased after-tax valuations of merger-driven synergies.

# IP & Copyright

## **Truce in the copyright war? The pros and cons of copyright compensation systems for digital use**

Christian W. Handke (Erasmus University Rotterdam (EUR))

João Quintais (University of Amsterdam - Institute for Information Law (IViR))

Balázs Bodó (University of Amsterdam - Institute for Information Law (IViR))

Review of Economic Research on Copyright Issues, 2018, 15(2), 23–56

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3311019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311019)

This paper discusses copyright compensation systems (CCS) -- that provide licenses for downloading and non-commercial use of copyright works in return for a fee -- in the light of welfare economics and transaction cost economics. Recent empirical studies suggest that CCS could improve social welfare at least for recorded music. The general theme of the theoretical discussion in this paper is a simplicity-flexibility trade-off. On the one hand, CCS seek to reduce the costs of administering and trading copyrights online. On the other hand, standard copyright licenses distort the market mechanism. This paper discusses the costs and benefits of various CCS proposals compared to alternative ways of managing copyright online.

## **Getting pricing right on digital music copyright**

Joshua S. Gans (University of Toronto - Rotman School of Management; NBER)

Review of Economic Research on Copyright Issues, 2019, 15(2), 1–22

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3311018](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311018)

This paper provides an overview of economic approaches to the pricing of mechanical royalties for copy-protected music works. It argues that principles for such pricing can be provided usefully from principles of pricing access to essential facilities. In particular, the structure of the royalty should be such that the royalty level does not change if the business model of downstream entities (notably, digital music streaming platforms) changes (i.e., neutrality) and the level of the royalty should ensure that the copyright holders receive a return in excess of their next best alternative in reaching consumers (i.e., opportunity cost). Ways of using benchmarking to derive the relevant opportunity cost are then discussed including the use of methods inspired by economic bargaining approaches such as the Shapley Value.

## **EU proposal for a directive on copyright in the digital single market: Compatibility of Article 13 with the EU intermediary liability regime**

Aleksandra Kuczerawy (KU Leuven, Centre for IT & IP Law (CiTiP))

Bilyana Petkova, Tuomas Ojanen (eds.), Fundamental Rights Protection Online: The Future Regulation of Intermediaries, 2019, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3309099](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309099)

The stated aim of the new Copyright Directive is to strike the right balance between the position of authors, performers, and publishers on the one hand, and the internet platforms, which benefit of

the works made accessible online, on the other. The discrepancy between the remuneration received by authors and the profit made by the platforms is known as the value gap. The way the proposed Copyright Directive is attempting to deal with this discrepancy is considered controversial by many. Due to a few particularly contentious provisions, the proposal even became the subject of heated public debates and protests. The key areas of contention relate to the mandatory filtering of content (Art. 13) and the so-called 'link tax' (Art. 11). The aim of this chapter is to look closer at the former. Art. 13 of the proposed Copyright Directive essentially enlists Internet hosting providers to police content of their users. The idea is not entirely novel, but the proposed obligations for hosting providers would go much further than ever before, changing their role in the copyright enforcement process from reactive to proactive. The next section will start with a brief description of the current legal framework applicable to online content sharing. The current legal framework is mainly defined by virtue of the E-Commerce Directive as well as the existing copyright framework. Next, an analysis will be made of the different (competing) versions of Art. 13 in order to identify similarities and differences. The chapter focuses on the compatibility of Art. 13 with the E-Commerce Directive and the jurisprudence of the Court of Justice of the European Union (CJEU).

### **Article 13 of EU Copyright Directive – A step forward or rearward?**

Himanshu Arora (Georg August Universität)

Working Paper

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3296955](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296955)

The present two-part post critically evaluates the much-discussed question in European Union as to whether Article 13 of the Proposal for a Directive on Copyright in the Digital Single Market (2016) entitled “use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”, strikes a fair balance between, on the one hand, the protection of copyrighted-content of copyright-holders on the internet, and, on the other, the competing interests and rights of internet-intermediaries and end-users, keeping in view the current European law and CJEU precedents. The first part of this two-part series would provide some elementary information, which culminated into the formulation of aforesaid directive, while the second part would manifest my views as to the workability and validity of the Directive and its potential to strike a fair balance inter-se competing parties, along with some suggestions.

### **Indirect copyright infringement liability for an ISP: An application of the theory of the economics of contracts under asymmetric information**

Richard Watt (University of Canterbury - Economics and Finance; The Society for Economic Research on Copyright Issues (SERCI))

Frank Mueller-Langer (European Commission, Joint Research Center; Max Planck Institute for Innovation and Competition)

Review of Economic Research on Copyright Issues, 2018, 15(2), 57–79

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3311021](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311021)

Under current copyright law in many countries, Internet Service Providers (ISPs) can be found liable for the traffic on the websites that they host. While the ISPs themselves are not undertaking

acts that infringe copyright, indirect liability asserts that they either contribute to, or encourage in some way, infringing activities, and thus they are liable to claims of indirect involvement by the affected copyright holders. The present paper explores indirect liability in a standard principal-agent setting, where both moral hazard (the act of monitoring) and adverse selection (differential costs of monitoring over ISPs) are present. The model considers the kinds of contracts that could be signed between the copyright holders (acting through a collective) and the ISPs (acting individually). We specify the contracts that are self-selecting and incentive compatible for the set of feasible scenarios.

## IP & Innovation

### **Transparency in the patent system – Artificial intelligence and the disclosure requirement**

Alfred Frueh (University of Zurich - Center for Information Technology, Society, and Law (ITSL))

Forthcoming in Žaneta Pacud and Rafał Sikorski: Rethinking Patent Law as an Incentive to Innovation, 2019

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3309749](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309749)

The patent system is fundamentally challenged by the recent breakthroughs in Artificial Intelligence (AI). While issues such as patentability and non-obviousness of AI-related inventions have already attracted attention, this paper deals with the specific research question whether patent law's disclosure requirement is (also) under attack by AI. Building on the presumption that the patent system's legitimacy – at least to some extent – is founded on a working disclosure requirement, the issue at hand is highly relevant: If the disclosure requirement were indeed fundamentally challenged by AI, the patent system would run the risk of losing its legitimacy.

The research question can also be framed through the lens of transparency. Conditioning the grant of patents to patentees to the disclosure of their inventions, the patent system arguably aims to increase transparency. But as AI is scolded for being particularly non-transparent often compared to a 'black box': does its use in the inventive process jeopardize or decrease the desired transparency? This paper argues that the disclosure requirement indeed is challenged by AI, but that the challenges are less grievous than in other areas of patent law. To be more precise: use of AI may lead to new disclosure deficits and some AI-related patents may be considered insufficiently disclosed because they lack reproducibility. But timely anticipation of these risks allows patent law to adapt, particularly because AI is not only a threat but could also remedy imbalances in the disclosure requirement: provided that the issues are addressed properly, AI may lead even to more instead of less transparency.

The research question will be approached in four steps: The paper first examines the disclosure requirement in patent law (II.) and the state of the art regarding AI (III.). It then combines these parts in order to address the looming challenges of an AI-confronted disclosure requirement (IV.) It also highlights new opportunities brought about by AI (V.), before drawing conclusions (VI.)

### **A survey of empirical evidence on patents and innovation**

Bhaven N. Sampat (Columbia University - Mailman School of Public Health)

NBER Working Paper No. w25383

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3306090](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306090)

This report surveys the empirical literature from economics and related fields on patents and innovation. In particular, it reviews and synthesizes the empirical evidence on patents and first-generation innovation, the disclosure function of patents, and patents and follow-on innovation. The main results are summarized in fifteen charts.

## IP & Litigation

### **Disgorgement of profits as a California breach of contract remedy: Intellectual property and other guideposts**

Andrew Halaby (Snell & Wilmer LLP)

Patrick Kelly (Snell & Wilmer LLP)

UC Davis Business Law Journal (Forthcoming)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3311602](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311602)

Disgorgement of profits has long been available as a remedy for certain property-related torts, including multiple varieties of intellectual property infringement. But until recently, conventional breach of contract theory has excluded disgorgement of the breacher's profits from the monetary remedies available to the breach victim. Moreover, the California Civil Code generally limits the monetary remedy for breach of contract to damages sufficient to compensate the victim for "detriment" caused by the breach, capped at the equivalent of full contract performance by the breacher — all of which would seem at first blush to foreclose disgorgement of the breacher's profits to the extent those profits exceed the victim's loss. Here, we examine the history of, and limitations on, the new disgorgement-of-profits remedy for breach of contract under Restatement (Third) of Restitution and Unjust Enrichment § 39. We suggest that up to the "cost of modification" — the figure the breacher hypothetically would have had to pay to "buy out" its remaining performance obligation under the contract but, choosing instead to breach, did not — disgorgement-of-profits is not inconsistent with the Civil Code's limitations on monetary recovery for breach of contract. We also identify intellectual property infringement analogs — chiefly focusing on the "reasonable royalty" calculation from patent law — that may guide California businesses and courts in applying disgorgement-of-profits in future breach of contract disputes and cases.

## **Top tens in 2018: Patent, trademark, copyright and trade secret cases**

Stephen M. McJohn (Suffolk University Law School)

Working Paper

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3304079](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304079)

The courts continued to grapple with patentable subject matter, in differentiating abstract ideas, laws of nature and natural phenomena from patentable inventions applying them. International patent battles flared over patent rights to the chips that run smartphones and to the new, efficient methods of editing genomes. The Supreme Court held that lost profits abroad may be recovered where caused by infringement in the US. The Federal Circuit emphasized flexibility in allowing prior art that could invalidate a patent as lacking novelty. The PTAB heard dozens of post-grant challenges, with its constitutionality upheld by the Supreme Court. Other issues included standing (some unsuccessful PTAB challengers cannot appeal the case) and sovereign immunity (tribes and states may not have the same immunity in the PTAB as they have in federal litigation). In trademark, notable issues included: can a real restaurant name itself after one in a TV cartoon show? Can a construction company adopt the name of the late company that built the Hoover Dam? Can a shoe company copy old famous sneakers? What effect does bankruptcy have on trademark licenses?

In 2019, copyrights will expire for the first time (almost) since 1978. Courts in copyright cases similarly wrestled with differentiating ideas from expression. Fair use did not permit copying of application programming interfaces, a holding which will jolt software practices unless the Supreme Court chimes in. Copyright did not protect technical standards embedded in law. Images embedded in web pages were held to infringe. International issues arose: streaming video into the US may infringe; moral rights from other jurisdictions did not translate into US enforcement. Courts denied copyrights to non-human authors, to claimants straining the language of agreements, and producers of remastered albums. Mathematical applications of the fair use factors was rejected. In trade secret, fundamentals prevailed: contracts govern, not all confidential information qualifies as a trade secret, information lost trade secret protection once public. With its adoption in Massachusetts, the Uniform Trade Secret Act is now in effect in 48.8 states.

## **IP Law & Policy**

### **Bigger and better patent examiner statistics**

Shine (Sean) Tu (West Virginia University College of Law)

IDEA: The IP Law Review, Vol. 59, 2018

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3313446](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313446)

The American government charges the United States Patent and Trademark Office (USPTO) with reading and reviewing patent applications to determine what new or improved inventions, machines, and processes qualify for patent protection. Each application is reviewed by a specific patent examiner

who theoretically applies the standards of patentability in an even, fair, unbiased and consistent manner. This task requires the examiner to not only be internally consistent with the applications she reviews but also consistent with the behavior of other examiners within the same technology center. I have conducted two studies based on data from hundreds of thousands of patents, thousands of examiners, and millions of Office Actions. Both studies point to consistency issues within the USPTO that may undermine the very duty with which it is tasked. These studies also posit possible solutions that will help the USPTO create more effective guidelines and, ultimately, better patents. Part I introduces why the efficiency and quality of the patent process is so important. Part II outlines the two studies that informed this paper and discusses the results. Finally, Part III summarizes what both studies suggest for the patent prosecution process.

### **The taking of business method patents?**

Matthew J. Rizzolo (Ropes & Gray LLP – DC)

Kathryn Thornton (Associate)

Richmond Journal of Law and Technology, Vol. XXV, No. 2, 2018

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3309681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309681)

In *Oil States Energy Services v. Greene’s Energy Group*, the Supreme Court rejected a Constitutional challenge to the Inter Partes Review proceedings created in the 2011 America Invents Act (AIA), finding that these proceedings violate neither Article III nor the Seventh Amendment. But in doing so, the Supreme Court reiterated its longstanding view that patents are property rights which are protected by other Constitutional provisions—such as the Fifth Amendment’s Taking Clause or Due Process Clause. This article raises the question as to whether, in light of *Oil States*, patent owners who have had their patents canceled through certain AIA trial proceedings may have a viable claim for just compensation against the U.S. government under the Takings Clause.

### **Brandeis’s I.P. federalism: Thoughts on Erie at eighty**

Joseph Scott Miller (University of Georgia School of Law)

Akron Law Review, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3311114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3311114)

Justice Brandeis is, in intellectual property law’s precincts, most famous for his lone dissent in *International News Service v. Associated Press*, the misappropriation case one can find in virtually every i.p. survey casebook (and many property law casebooks as well). But in the wider legal world, Brandeis is likely most famous for his earthquake opinion in *Erie Railroad Co. v. Tompkins*. Do Brandeis’s opinions in these two cases speak to each other? Can considering them together inform broader reflections on the texture of our federalism in the i.p. context? This piece, prepared in connection with an “Erie at Eighty” conference in fall 2018, makes the case that the answer to both questions is “yes.”

### **Policy pilots: Experimentation in the administration of the law**

Colleen V. Chien (Santa Clara University - School of Law; Stanford Computational Policy Lab; Columbia Law School)

Iowa Law Review, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3300167](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300167)

Policy problem solvers and academics generally express their recommendations in terms of new or revised laws or policies they'd like to see. But just as products aren't developed overnight, it's unrealistic to expect policymakers to introduce new policy or policy changes without first testing them. This essay proposes that policy problem solvers frame their suggestions in terms of experiments to try, not just policies to enact. With a focus on federal agencies, this essay provides a framework for proposing experiments that specify: 1) questions that matter, 2) treatments that can be tested with existing authority and resources, 3) theory of change, 4) testing protocol, and 5) evidence, and, with the outputs from these steps, 6) reflecting and revising accordingly ("MATTER"). An appropriate testing protocol comprises power, randomization or other experimental strategy, proper inference, method, ethics, and resources ("PRIMER"). The United States Patent and Trademark Office (USPTO) is an ideal agency for experimentation due to its strong foundation of open data and commitment to innovation, learning, and improvement. To demonstrate the framework, I propose four experiments related to enhancing patent quality that the agency could try. The proposed experiments are: applicant-deferral of section 101 subject matter rejections, examiner cited non-patent literature as a quality metric, team or time examination on demand, and using artificial intelligence or other technologies to carry out error correction and improve applicant readiness. The decision to experiment must ultimately be made by agency leaders. These ideas are intended to provide starting points, rather than definitive recommendations, for agency action.

## Other IP Topics

### **In vino veritas? The dubious legality of the EU's claims to exclusive use of the term 'Prosecco'**

Mark Davison (Monash University - Faculty of Law)

Caroline Henckels (Monash University - Faculty of Law)

Patrick Emerton (Monash University - Faculty of Law)

Australian Intellectual Property Journal, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3304239](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3304239)

The European Union (EU) maintains that the word "Prosecco" is a geographical indication for a type of wine made in Northern Italy, rather than a grape variety. This position has been relied on by the EU to ban the importation of any wine labelled as Prosecco into the EU, and into other countries with which the EU has free trade agreements. Moreover, the EU is demanding that Australian wine producers be prohibited from marketing wine labelled Prosecco in Australia, as a condition of its entry into a bilateral trade agreement. Based on a detailed historical analysis of the use of the term Prosecco in Italy, this

article argues that that the EU's characterization of the term is erroneous and is intended to operate to protect Italian Prosecco producers from international competition. By implication, the EU regulation is likely to contravene Article 20 of the World Trade Organization's Trade Related Aspects of Intellectual Property Agreement (which prohibits governments from unjustifiably encumbering the use of trademarks) and Article 2.1 of the Agreement on Technical Barriers to Trade, (which prohibits, inter alia, technical regulations pertaining to terminology and labelling that unjustifiably discriminate between similar domestic and imported products). Furthermore, a prohibition on the use of the word Prosecco on Australian products in the Australian market may be inconsistent with the Australian Constitution, which prohibits the acquisition of property by government on other than just terms. These issues also point to a more fundamental question: namely, whether and if so to what extent domestic legal systems may permissibly be used to generate claims to intellectual property that are then used to leverage international protection for that intellectual property.

### **Intellectual property law and the right to repair**

Leah Chan Grinvald (Suffolk University Law School)

Ofer Tur-Sinai (Ono Academic College)

Suffolk University Law School Research Paper No. 19–4

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3317623](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317623)

In recent years, there has been a growing push in different U.S. states towards legislation that would provide consumers with a “right to repair” their products. Currently 18 states have pending legislation that would require product manufacturers to make available replacement parts and repair manuals. This grassroots movement has been triggered by a combination of related factors. One such factor is the ubiquity of microchips and software in an increasing number of consumer products, from smartphones to cars, which makes the repair of such products more complicated and dependent upon the availability of information supplied by the manufacturers. Another factor is the unscrupulous practices of large, multinational corporations designed to force consumers to repair their products only through their own offered services, and ultimately, to manipulate consumers into buying newer products instead of repairing them. These factors have rallied repair shops, e-recyclers, and other do-it-yourselfers to push forward, demanding a right to repair.

Unfortunately, though, this legislation has stalled in many of the states. Manufacturers have been lobbying the legislatures to stop the enactment of the right to repair laws based on different concerns, including how these laws may impinge on their intellectual property rights. Indeed, a right to repair may not be easily reconcilable with the United States' far-reaching intellectual property rights regime. For example, requiring manufacturers to release repair manuals could implicate a whole host of intellectual property laws, including trade secret. Similarly, employing measures undercutting a manufacturer's control of the market for replacement parts might conflict with patent exclusivity. Nonetheless, this Article's thesis holds that intellectual property laws should not be used to inhibit the right to repair from being fully implemented.

In support of this claim, this Article develops a theoretical framework that enables justifying the right to repair in a manner that is consistent with intellectual property protection. In short, the analysis

demonstrates that a right to repair can be justified by the very same rationales that have been used traditionally to justify intellectual property rights. Based on this theoretical foundation, this Article then explores, for the first time, the various intellectual property rules and doctrines that may be implicated in the context of the current repair movement. As part of this overview, this Article identifies those areas where intellectual property rights could prevent repair laws from being fully realized, even if some of the states pass the legislation, and recommends certain reforms that are necessary to accommodate the need for a right to repair and enable it to take hold.

### **Intellectual property law gets experienced**

Victoria F. Phillips (American University - Washington College of Law)

59 IDEA: The IP Law Review, 249 (2018)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3300302](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3300302)

A decade ago, in *Clinical Legal Education and the Public Interest in Intellectual Property Law*, I described with my faculty colleagues our motivations for launching a public interest intellectual property law clinic at the American University Washington College of Law. That article introduced our goals and framework for a pioneering clinic framed around a variety of live-client student representations performed under close faculty supervision, weekly case rounds focusing on issues experienced directly by the students in their representations, and a seminar built around a year-long lawyering simulation addressing the public interest dimensions of intellectual property. In that article, we chronicled one live-client student representation in the copyright policy area, the Copyright Office's 1998 Digital Millennium Copyright Act's exemption proceedings, to illustrate our effort to help students better understand the interaction of theory, doctrine, and practice in the dynamic field of intellectual property law.

In this essay, I reflect on developments in the decade since publication of that piece and explore the growth and maturing of the new community of law school intellectual property law clinics. I find that in most respects these new clinics stand comfortably on shoulders of the pioneers of the clinical legal education movement. The founders of the early clinical programs were responding to the social ferment and legal rights explosion of the 1960s. They envisioned the clinical method as much more than merely a way to enrich legal education with professional and skills training. They also saw it as a means of encouraging law schools to attend to the legal needs of the disenfranchised and to engage students in the pursuit and understanding of social justice. In the last decade, the IP clinical community has matured to serve the very same access to justice goals. The new clinics are strong voices in the IP realm for the public interest, consumer and civil liberties communities. The IP clinic community has also expanded and inspired much needed access to pro-bono IP and related legal services for underserved communities of creators, non-profits, small businesses, and start-up entities.

## Contact

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