



# IP Literature Watch

**CRA** Charles River  
Associates

January 2017

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

### **Why incentives for “patent holdout” threaten to dismantle FRAND, and why it matters**

Richard A. Epstein (Hoover Institution, New York University School of Law, University of Chicago Law School)

Kayvan B. Noroozi (Noroozi PC and Koios Pharmaceuticals LLC)

*IP<sup>2</sup> Working Paper No. 17006*

<http://hooverip2.org/working-paper/wp17006/>

An increasing number of judges, legislators and scholars wrongly believe that the FRAND commitment was principally created to advance the interests of technology implementers, and should be interpreted by giving a presumptive preference toward those interests. That premise has led courts to take a categorically hostile view toward awarding injunctions against implementers under all circumstances. Some courts have even allowed implementers to sue innovators for making an opening licensing offer that is “too high,” without making any counteroffer. An implementer-centric view of FRAND has also caused courts to conclude that innovators are not entitled to any share of the commercial benefits arising from the standardization of their technologies.

We demonstrate that an implementer-centric view of FRAND’s origins and purposes is false. FRAND is a contractual agreement that reflects a voluntary reciprocal exchange of benefits and obligations driven by the need to solve significant coordination problems in the face of otherwise prohibitive transaction costs. As part of that bargain, innovators agree to disclose their latest, confidential discoveries to standard-development organizations, and to waive their injunction rights as to eventual patents on those discoveries, in exchange for contractual protection against patent holdout by implementers who in turn are permitted to use standard-essential patents only on their willingness to pay fair and adequate royalties for that use.

Accordingly, we stress that implementers owe a significant duty to negotiate FRAND licenses in good faith, which courts have largely overlooked and under-enforced. We demonstrate that implementers’ good faith obligations are a critical component of basic FRAND architecture that is strictly necessary to

the development of innovation-driven standards. We further observe that the FRAND bargain gives implementers access to otherwise confidential discoveries— inventions too recent to be disclosed in patents or published applications. In this way, FRAND supplies a solution to an iteration of Kenneth Arrow's paradox of information, enabling the standards development effort to yield commercial benefits that would not exist absent innovators' voluntary participation. We show both theoretically and empirically that courts' failure to appreciate these aspects of the FRAND bargain, combined with their over-reliance on liability rules, i.e., damages over injunctions, incentivizes the very patent holdout problem FRAND was intended to avoid. That outcome, in turn, has motivated innovators to reduce their participation in FRAND bargains, threatening to unravel a massive innovation-commercialization marketplace, and its innumerable positive externalities to all parties.

To reverse these harms, we recommend that courts automatically issue an injunction where an implementer is found to infringe FRAND-committed patents that it did not attempt to license in good faith. We also recommend that a proper FRAND licensing rate should include some portion of the benefits achieved through standardization of the innovation(s) in question.

More broadly, we suggest that courts, policymakers, and academic commentators have wrongly favored implementation over innovation—"things" over ideas—unwisely frustrating the emergence of an "ideas economy" that correctly assigns profits to upstream innovators, and not to the low-margin firms that specialize in developing their commercial embodiments.

### **Is there an anti-commons tragedy in the smartphone industry?**

Alexander Galetovic (Universidad de los Andes)

Stephen Haber (Hoover Institution, Stanford University)

Lew Zaretzki (Hamilton IPV)

*IP<sup>2</sup> Working Paper No. 17005*

<http://hooverip2.org/working-paper/wp17005/>

An influential literature claims that standard setting in the smartphone industry creates monopoly power. Moreover, because there are many owners of standard-essential patents, and each may independently exercise monopoly power (a phenomenon called royalty stacking), an anti-commons tragedy may ensue. With actual data from the smartphone industry, we show that royalty stacking theory predicts a cumulative royalty yield of nearly 80 percent. That is, it predicts that four-fifths of the price of a smartphone will accrue to patent holders. Even if all patent holders would combine to eliminate the tragedy of the anti-commons and behave as a single monopolist, theory predicts a cumulative royalty yield of nearly 67 percent. That is, it predicts that two-thirds of the price of a smartphone will accrue to patent holders.

We then use actual data from licensors in the smartphone value chain to estimate the actual cumulative royalty yield. We find that in 2015 the cumulative royalty yield in the smartphone value chain was only 3.4 percent of the average selling price of a smartphone. This suggests that patent holders do not exercise any meaningful monopoly power to increase prices, much less that there is an anti-commons tragedy in the smartphone industry.

## Technology entry in the presence of patent thickets

Bronwyn H. Hall (UC Berkeley, NBER, IFS, and NIESR)

Christian Helmets (Santa Clara University)

Georg von Graevenitz (Queen Mary University of London, CCP, CREATE)

*IP<sup>2</sup> Working Paper No. 17001*

<http://hooverip2.org/working-paper/wp17001/>

We analyze the effect of patent thickets on entry into technology areas by firms in the UK. We present a model that describes incentives to enter technology areas characterized by varying technological opportunity, complexity, and the potential for hold-up due to the presence of patent thickets. We show empirically that our measure of patent thickets is associated with a reduction of first time patenting in a given technology area controlling for the level of technological complexity and opportunity. Technological areas characterized by more technological complexity and opportunity, in contrast, see more entry. Our evidence indicates that patent thickets raise entry costs, which leads to less entry into technologies regardless of a firm's size.

## Landscaping study of standard essential patents in Europe

IPLYTICS for the European Commission

[http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=8981](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8981)

This study provides unique statistical evidence on the importance of standard essential patents (SEPs) for key technologies in Europe. Based on a unique dataset, the report highlights trends at major standardisation bodies as well as the behaviours of SEP owners and information on their patent portfolio. Key evidence on the need and feasibility of essentiality checks for SEPs is also provided. The study also offers insight on SEPs value and licensing patterns as well as on the timing of SEPs declarations and standard releases at SSOs.

The dataset used comes from declared standard essential patents published by major standardisation bodies (SSOs) worldwide.

## Technical standards, standards-setting organizations and intellectual property: a survey of the literature (with an emphasis on empirical approaches)

Jorge L. Contreras (University of Utah – S.J. Quinney College of Law)

*Research Handbooks on the Economics of Intellectual Property Law, Vol. 2 - Analytical Methods (Peter S. Menell and David Schwartz, eds., Edward Elgar, 2017, Forthcoming)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2900540](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2900540)

Despite their potential benefits, voluntary consensus standards have over the past decade become the subject of significant private litigation, regulatory enforcement and policy debate. Much of the current controversy centers on the perceived proliferation of patents covering standardized technologies, potentially abusive enforcement of such patents against manufacturers and users of standardized products, and the terms on which patent holders may be required to license the use of those patents to others. This chapter offers an overview of the empirical, legal and economic literature concerning the interaction of inter-operability standards and standards-setting organizations with intellectual property rights (primarily patents, with attention to copyrights and trademarks as well).

## **Licensing terms of standard essential patents: a comprehensive analysis of cases**

Chryssoula Pentheroudakis (IP consultant/Lawyer)

Justus Baron (Northwestern University – Searle Center for Law, Regulation and Economic Growth; Mines ParisTech, PSL – Cerna)

*JRC Science for Policy Report, 2017; ISBN 978-92-79-64458-0*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2898394](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2898394)

The prospect of licensing patents that are essential to standards on an industry-wide scale is a major incentive for companies to invest in standardization activities. Most standard development organizations (SDOs) have defined intellectual property rights (IPR) policies whereby SDO members must commit to licensing their standard-essential patents (SEPs) on Fair, Reasonable and Non-Discriminatory (FRAND) terms. This study aims to provide a consistent framework for both the interpretation of FRAND commitments and the definition of FRAND royalties. Our methodology is built on the analysis of landmark and significant decisions taken by courts and competition authorities in Europe and worldwide. The purpose of the comparative analysis is to provide a comprehensive overview of how FRAND licensing terms have been defined in the evolving case law, while testing the economic soundness of the concepts and methodologies applied by courts and antitrust authorities.

## **The US Federal Trade Commission issues report on patent assertion entities**

Michael A. Carrier (Rutgers Law School)

*e-Competitions Bulletin, No. 82367, December 2016*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2892643](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892643)

In October 2016, the Federal Trade Commission (FTC) issued its long-awaited report on patent assertion entities (PAEs). Sometimes called “patent trolls,” these actors have elicited fierce debate, with critics lamenting their ability to demand ransom money and hold up an industry while proponents applaud their role in making markets more efficient and returning money to individual inventors. Pursuant to FTC Act Section 6(b), the agency issued subpoenas, seeking to obtain information not previously available on these questions. This brief article summarizes the report and then elaborates on the following five observations.

First, the report did not answer the \$64,000 question about the effect PAEs have on inventors, as the agency could not “quantify the frequency or magnitude of revenue sharing with independent inventors” due to the “significant differences in how [the] PAEs maintained their data.”

Second, and more successfully, the report uncovered useful information on PAEs’ patents, in particular the timing of enforcement and number of citations.

Third, the FTC gained crucial insights on PAE enforcement, distinguishing between “Litigation PAEs” (which settle after filing suit, enter into licenses less than litigation costs, and pose transparency challenges for defendants) and “Portfolio PAEs” (which are more likely to resemble manufacturing firms in obtaining complex licenses without filing suit).

Fourth, the FTC offered four policy recommendations relating to discovery, transparency, litigation management, and notice. Although they make sense, the proposals do not directly follow from the report, which was “descriptive and limited to the observed sample,” rather than being “generalizable to the universe of all PAE activity.”

Fifth, the report was silent on the appropriate antitrust assessment of PAEs. Despite its robust detail, the report's findings are not likely to affect antitrust analysis. As I have previously written (<http://ssrn.com/abstract=2209521>), the antitrust agencies can challenge PAE conduct based on the individual facts of cases, scrutinizing the evasion of standards-based promises through transfer, challenging mergers reflecting an ability and incentive to harm competition, and bringing Section 1 claims against collusive agreements.

In short, the FTC report sheds needed light on a phenomenon that has been shrouded in secrecy and controversy. Though it does not answer the question of the contribution PAEs offer in the innovation ecosystem and its proposals do not bear direct support from its findings, the report sheds invaluable light on PAEs' patents and enforcement behavior, offering benefits that policymakers should consider in the years ahead.

## IP & Innovation

### **Patent trolls or patent elves? Evidence from publicly-traded patent assertion entities**

Noel Maurer (George Washington University)

Stephen Haber (Hoover Institution, Stanford University)

*IP<sup>2</sup> Working Paper No. 17003*

<http://hooverip2.org/working-paper/wp17003/>

We assess whether patent assertion entities (PAEs), specialized firms that acquire and enforce patents on inventions that they do not actually produce or market, impose substantial burdens on operating companies. Using a sample of all publicly traded PAEs, we proceed in four steps. First, we estimate an upper-bound for the size of privately-owned PAEs. Second, we estimate an upper bound for the revenues collected from and legal costs imposed on operating companies by all PAEs. Third, we assess the publicly-traded PAEs performance against the overall stock market. Fourth, we test whether the PAEs earn outsized risk-adjusted returns, as a measure of economic rents. Finally, we examine how much the PAEs spend on acquiring or developing new technology relative to major firms in the "Computer and Electronic Product Manufacturing" sector (NAICS Code 334). We find that the total PAE sector is miniscule relative to the operating; publicly-traded PAEs are relatively unprofitable and highly risky with no evidence of economic rents (including Intellectual Ventures, the largest privately-held PAE); and publicly-traded PAEs spent 21% of their total revenues on R&D and a further 14% on acquiring outside IP — substantially more than Google, Cisco, Microsoft or Apple and on a par with Intel and Qualcomm. In short, we find little evidence that PAE activity poses a substantial burden on operating companies.

### **Common institutional ownership and diffusion of innovation**

Leonard Kostovetsky (Carroll School of Management, Boston College)

Alberto Manconi (Bocconi University – Department of Finance; Tilburg University)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2896372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896372)

Can institutional ownership act as a vehicle for the diffusion of innovation? We take this question to the data, using information on institutional ownership and patent citations over the period 1980-2010. Higher common institutional ownership is associated with a higher intensity of patent citations among firms. To

address the potential omitted variables and selection problems, we resort to a difference-in-differences, regression discontinuity analysis around the entry of a stock in the Russell 1000 and 2000 indexes. As the composition of the firm's institutional owners changes around the index entry, firms joining the Russell 1000 (2000) index receive more citations from Russell 1000 (2000) firms, and fewer from Russell 2000 (1000) firms. Our results suggest a role for institutional investors beyond the mere provision of financing, and indicate that common institutional ownership can have benefits, facilitating the spread of innovation.

### **Cumulative innovation, open source and distance to frontier**

Luigi Balletta (University of Palermo)

Antonio Tesoriere (SEAS, Università di Palermo)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2903867](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903867)

We develop a multistage game in which firms do cumulative R&D to complete a lengthy process, and we study whether firms patent intermediate results or release them in Open Source. A patent holder obtains a larger reward in the market, but since in equilibrium it forecloses R&D it remains alone to complete the process and so pays a larger cost than an Open Source firm. We have Open Source equilibria when R&D is highly complementary, R&D costs are large, and firms are sufficiently different and far from the frontier. We identify two market failures, in the forms of free riding and coordination failure, and we discuss public intervention.

### **How do patents affect research investments?**

Heidi L. Williams (MIT Department of Economics; NBER)

*NBER Working Paper No. w23088*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2903809](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903809)

While patent systems have been widely used both historically and internationally, there is nonetheless a tremendous amount of controversy over whether patent systems – in practice – improve the alignment between private returns and social contributions. In this paper, I describe three parameters – how the disclosure function affects research investments, how patent strength affects research investments in new technologies, and how patents on existing technologies affect follow-on innovation – needed to inform the question of how patents affect research investments, and review the available evidence which has attempted to empirically estimate these parameters.

## **IP & Litigation**

### **Studying the impact of eBay on injunctive relief in patent cases**

Kirti Gupta (Qualcomm Inc.)

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

*IP<sup>2</sup> Working Paper No. 17004*

<http://hooverip2.org/working-paper/wp17004/>

We find that the U.S. Supreme Court decision in eBay v. MercExchange has had a significant impact on injunctive relief in patent cases. Our extensive analysis with a significant dataset involving thousands of patent cases both pre- and post- eBay shows that the eBay decision has reduced, rather dramatically,

both the level at which injunctive relief is sought in patent cases and the rate at which they are granted, particularly for preliminary injunctions. We find that all entities – practicing and non-practicing – are less likely to file for a motion of an injunction after eBay, and that this likelihood of filing for an injunction reduces at a higher rate for NPEs compared to PEs. Therefore, the fact that the rate at which injunctions are granted – calculated as a proportion of the total number of patent cases filed – is decreasing is clearly occurring due to the self-selection by patentees who are moving less often for an injunction.

We also study the impact of the eBay decision on the quality of patents for which injunctive relief is sought and the nature of the patent plaintiff (operating company vs. non-operating company) and their relative success rates with obtaining injunctive relief. We do find a statistically significant difference between some of the observable patent quality characteristics of the patents held by PEs vs. NPEs, for which a motion for an injunction is filed, but we find that NPEs tend to file a motion for an injunction for higher quality patents on average. We do not find that the overall quality characteristics of patents for which a motion for an injunction is filed has increased after eBay, which could have served as one potential mechanism of the self-selection by firms to seek injunctions only for slightly higher quality patents post-eBay.

By controlling for various patent and case level observable characteristics, we estimate whether or not the likelihood of obtaining an injunction varies across PEs and NPEs. We find that both for preliminary and permanent injunctions, NPEs are less likely to obtain an injunction, after controlling for patent characteristics and the length of the case (from filing to termination) throughout the 2000-2012 time period. We also find that the eBay ruling reduced the likelihood of all firms receiving either preliminary or permanent injunctions.

In order to understand whether or not the eBay ruling had a differential impact on PEs vs. NPEs, we utilize a diff-in-diff model. We find that the eBay ruling did not have a differential impact on the likelihood of NPEs to be granted a preliminary injunction as compared to PEs – in other words – the likelihood of being granted a preliminary injunction reduced equally both for NPEs and PEs post eBay. However, we do find a differential impact of the eBay ruling on PEs vs. NPEs for permanent injunctions. We find that NPEs are less likely to be granted a permanent injunction post-eBay compared to PEs, after eBay. In sum, this study raises important policy questions about the current diminished role for injunctive relief in patent cases.

### **The end user's predicament: user standing in patent litigation**

Gaia Bernstein (Seton Hall University – School of Law)

*Boston University Law Review*, Vol. 96, No. 1929, 2016

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2894922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894922)

The traditional parties in patent litigation are technologically savvy competitors. Yet recently, patent owners have begun hauling end users — including farmers, small cafés, and podcasters — into patent disputes. This Article shows that end users, unlike competitors, cannot take proactive measures to protect their interests in defending against patent enforcement. The standing doctrine impedes end users' access to federal court to challenge a patent's validity in a declaratory judgment action. At the same time, standing and timing requirements prevent end users from taking advantage of the new procedures created under the America Invents Act to challenge patents at the U.S. Patent and Trademark Office ("PTO").

This Article argues that although standing requirements impose a significant obstacle for competitors as well as end users, the unique characteristics of end users place them in a particular predicament. First, the U.S. Court of Appeals for the Federal Circuit requires that plaintiffs filing a declaratory judgment suit show that they undertook “meaningful preparations” to use the patented technology. Yet since users “use” but do not “make” technology, they often do not engage in complex preparations. Second, the Federal Circuit requires plaintiffs to point to enforcement acts by the patentee, known as the reasonable apprehension test. Users, however, are usually part of a large group, and those users who have been sued or threatened with suit are not necessarily the ones with the motivation and resources to file declaratory judgment suits. Third, patent enforcement against other similarly situated parties is more likely to chill a user’s engagement with a patented technology than a competitor’s engagement because users usually lack the technological sophistication to assess the validity of a patent threat. Fourth, the standing doctrine does not protect users because it assumes competitors will defend them. Yet the involuntary appearance of thousands of users on the defense side of patent litigation underscores the fallacy of this assumption. Fifth, end users typically enter patent conflicts late in the life of the patent. By that point, most procedures at the PTO — the forum to challenge patents outside federal court — are unavailable to them.

This Article concludes that although end users’ current standing status is unclear, end users should qualify for standing under the Federal Circuit’s currently diluted reasonable apprehension test. This Article also concludes that end users can satisfy the meaningful preparations test because they do not need complex preparations, which fulfills the immediacy criteria of the test.

## IP Law & Policy

### **Screening for patent quality: examination, fees, and the courts**

Mark A Schankerman (London School of Economics and Political Science; Centre for Economic Policy Research (CEPR))

Florian Schuett (Tilburg Law and Economics Center (TILEC); Tilburg University – Center and Faculty of Economics and Business Administration)

*CentER Discussion Paper Series No. 2016-046*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2885197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885197)

We develop an integrated framework to study how governments can improve the quality of patent screening. We focus on four key policy instruments: patent office examination, pre- and post-grant fees, and challenges in the courts. We show that there are important complementarities among these instruments, and identify conditions under which they can be used to achieve either partial or complete screening. We simulate the model to study the welfare effects of different policy reforms. We show that intensifying patent office examination, frontloading patent fees and capping litigation costs all generate welfare gains, while replacing examination with a pure registration system reduces welfare.

## Functionality screens

Christopher Buccafusco (Yeshiva University – Benjamin N. Cardozo School of Law)

Mark A. Lemley (Stanford Law School)

*Stanford Public Law Working Paper No. 2888094*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2888094](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888094)

Among intellectual property (IP) doctrines, only utility patents should protect function. Utility patents offer strong rights that place constraints on competition, but they only arise when inventors can demonstrate substantial novelty after a costly examination. Copyrights, trademarks, and design patents are much easier to obtain than utility patents, and they often last much longer. Accordingly, to prevent claimants from obtaining “backdoor patents,” the other IP doctrines must screen out functionality. As yet, however, courts and scholars have paid little systematic attention to the ways in which these functionality screens operate across and within IP law.

We have four tasks in this Article. First, we identify three separate functionality screens that IP laws use: Filtering, Exclusion, and Threshold. Second, we illustrate the use of these different screens in copyright, trademark, and design patent laws. Each law takes a different approach to screening functionality. Third, we model the relative costs and benefits of the different screening regimes, paying particular attention to administrative and error costs and how these costs affect incentives and competition. Finally, we assess the current screening regimes and offers suggestions for how they might be improved. Among other things, our analysis provides a way to resolve the dispute currently before the U.S. Supreme Court in *Star Athletica LLC v. Varsity Brands, Inc.* over the copyrightability of cheerleader uniforms.

## Intellectual property law and the promotion of welfare

Christopher Buccafusco (Yeshiva University – Benjamin N. Cardozo School of Law)

Jonathan S. Masur (University of Chicago – Law School)

*Forthcoming in Research Handbook on the Economics of Intellectual Property Law (Vol. I -- Theory) Ben Depoorter & Peter Menell, eds. (Edward Elgar Publishing)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2905936](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905936)

The U.S. Constitution grants Congress the power “to Promote the Progress of Science and the Useful Arts” by granting copyrights and patents to authors and inventors. Most courts and scholars understand this language to entail a utilitarian or consequentialist approach to intellectual property (IP) law. Unlike IP systems in other parts of the world, U.S. IP law generally eschews so-called “moral” or deontological considerations such as justice and fairness. Yet while there is considerable consensus regarding U.S. IP law’s philosophical orientation, there has been little discussion of its deeper normative goals. Most courts and scholars agree with the idea that IP law should provide incentives to creators, but there has been almost no analysis of why creativity and innovation are good. What, exactly, are the interests that IP law should promote? Various answers to these questions exist. One possibility would be to interpret the constitutional language literally and narrowly. On this view, IP law should encourage developments in knowledge and technology irrespective of broader interests. Another option would be to interpret the constitutional language broadly to encompass a general social welfare calculus. In this chapter we discuss a variety of ways of understanding the normative goals of a consequentialist IP regime. We argue that the best approach derives from recent work in the field of hedonic psychology. The principal consequentialist goal of IP law should be to maximize social welfare, where welfare is understood as subjective well-being. We do not argue that IP law cannot have other interests beyond consequentialism; there may be room for deontological considerations such as fairness and justice as well. But where IP

law is motivated by welfare considerations, it should be structured to maximize individuals' happiness. In support of this objective, we offer some suggestions for how a happiness-based IP regime might differ from the status quo.

## Copyright Law

### **A transactional theory of the reader in copyright law**

Zahr Said (University of Washington – School of Law)

*Iowa Law Review*, Vol. 102, No. 2, pp. 605-50, 2017

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2902765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902765)

Copyright doctrine requires judges and juries to engage in some form of experiencing or “reading” artistic works to determine whether these works have been infringed. Despite the central role that this reading — or viewing, or listening — plays in copyright disputes, copyright law lacks a robust theory of reading, and of the proper role for the “reader.” Reading matters in copyright cases, first, because many courts rely on the “ordinary observer” standard to determine infringement, which requires figuring out or assuming how an ordinary observer would read the works at issue. Second, most courts characterize a key part of infringement analysis as a matter for the jury, largely on the basis of the jury’s ability to apply the ordinary observer standard. But the ordinary observer concept has not received much attention as a feature — really, a bug — in copyright law. The ordinary observer standard is unclear both in theory and in practice, and it misaligns with how jurors (or judges, or ordinary people) actually experience works of art. As a result of persistent confusion about the role of the ordinary observer, many cases produce outcomes that distort copyright doctrine and create unfairness for litigants. This Article demonstrates the need in copyright law for a better understanding of how readers read works of art, and it proposes a theory of reading from the humanities. Louise Rosenblatt’s theory of transactional reading helps diagnose copyright law’s reading problem and offers support for several concrete prescriptions. Instead of assuming that reading is a one-size-fits-all process, a transactional theory suggests that reading depends on why one reads and who does the reading. A less simplistic, more dynamic, and phenomenologically informed model of reading could help reshape the ordinary observer standard. This Article proposes that copyright adopt four changes: (1) more work should be done by judges as a matter of law, thus narrowing the role of the jury in determining infringement; (2) expert evidence ought to play a greater role in copyright litigation; (3) the jury should be instructed to do a more informed kind of reading when it evaluates works of art for infringement; and (4) courts should explore the use of special verdicts to render jury deliberation more transparent. These changes will mitigate the problems of the ordinary observer standard, while capturing its strengths.

### **Competition and piracy**

Gregory Day (Oklahoma State University – Stillwater – Spears School of Business)

*Berkeley Technology Law Journal*, Vol. 32, No. 2, 2017

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2904373](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2904373)

Intellectual property (IP) infringement has been characterized by over two hundred years of judicial opinions and scholarly writings as an antisocial behavior akin to theft and trespassing. Modern IP laws are faithful to this approach, punishing those who willfully infringe upon patent rights with treble damages and remedying acts of copyright infringement with statutory damages and, in some instances, prison time. This Article argues, however, that deterring infringement with such hyper-compensatory remedies

squanders the benefits of piracy. Using an economic framework, certain acts of infringement are shown to increase society's level of innovation and efficiency in ways that the law should—but does not currently—encourage. From a conceptual standpoint, infringement should be reframed as a rational response to IP's anticompetitive structure, as opposed to a normatively bad behavior.

## IP & Asia

### **Issues preceding CCI investigation of abuse of dominance in SEP cases: its relevancy at the stage of initiating investigation against SEP holders**

Indranath Gupta (Jindal Initiative on Research in IP and Competition, Jindal Global Law School)

Vishwas H. Devaiah (Jindal Initiative on Research in IP and Competition, Jindal Global Law School)

*IP<sup>2</sup> Working Paper No. 17002*

<http://hooverip2.org/working-paper/wp17002/>

This paper seeks to understand the SEP related incidents in the ICT cases leading up to the stage of prima facie investigation by the Competition Authority of India (CCI). The prima facie investigation decides abuse of dominance and may trigger further investigation. This paper observes the process of investigation adopted by CCI upon a complaint filed by an implementer and looks at the further possibility for the CCI to consider certain relevant information, while initiating investigation against the SEP holder.

### **Utility model patent regime 'strength' and technological development: experiences of China and other East Asian latecomers**

Dan Prud'homme (GLORAD Center for Global R&D and Innovation)

*China Economic Review 42 (2017) 50-73*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2892130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2892130)

This paper analyzes how strategic calibration of utility model patent regimes – which provide a type of patent right that is distinct from invention patents and is far less studied in the literature – over time is intended to facilitate technological development. To do this, the paper develops what appear to be the first indexes of utility model patent regime “strength” (divided into “strictness” and “appropriability” indexes), which it tabulates for mainland China, Japan, South Korea, and Taiwan per every year from the time of inception of their laws governing utility models (the first of which was in 1905) till 2016. It then analyzes these indexes via fixed effects regressions and case studies. The results show that East Asian latecomers instituted utility model patent regimes that were less strict and offered less appropriability during earlier stages of economic catch-up, likely in order to facilitate technological learning. Subsequently, the strictness of the regimes was increased as knowledge accumulation and, to some extent, technological capabilities increased and, in mainland China's case especially, as patent quality problems were experienced. It is also found that increasing the strictness of utility model patent regimes may reduce patenting in the short-term, but not the long-term. Six propositions are formulated, including the overall conclusion that successful latecomers seem to have pursued a dynamic catch-up strategy of transitioning from imitative to more sophisticated technological development by increasing both the strictness and appropriability-strength of their utility model patent regimes in conjunction with increasing knowledge accumulation and, to some extent, technological capabilities. It is suggested that mainland China might benefit from further increasing the strictness of its utility model patent regime in the future.

## **Compulsory licence for diabetes drug: legality of Lee Pharma's application**

B N Pandey (Independent)

Prabhat Kumar Saha (Banaras Hindu University (BHU) – Faculty of Law)

*Economic & Political Weekly*, vol. LI no. 2

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2902807](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902807)

This article examines the legality of the Indian pharmaceutical company Lee Pharma's application for compulsory licence for Saxagliptin (Onglyza and Kombiglyze), an anti-diabetes drug, the patent for which is held by the Swedish multinational company AstraZeneca. What are the merits of the prima facie view taken by the controller of patents and the possibility of Lee Pharma getting the licence under the Indian patents law?

## **Other IP Topics**

### **Intellectual property challenges for the modern biotechnology enterprise**

Mindaugas Kiskis (Mykolas Romeris University)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2894514](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2894514)

The paper investigates the IP protection in the field of biotechnology among new innovators. Incompatibilities of the development process in modern biotechnology and the current IP systems are highlighted. Development process in biotechnology is notoriously slow, characterized by long delays in obtaining experimental data and marketing approvals. Initial development stages have been accelerated by the development in silico, by the global competition and accessibility of information. Thus, the most valuable part of the innovation (e.g., genetic sequence, protein structure) may be known years before the full experimental data. This significantly increases the risks of losing IP protection due to competing development, espionage, accidental disclosure, urging the premature patenting despite lack of resources to maintain global patents. Moreover, in biotechnology enterprise prohibitive costs of international patenting deplete the limited development resources and adversely affect both patenting and development. Costs are compounded by the increasing complexity of obtaining IP protection. Some of the complexities are recognized and underline multiple legislative interventions in establishing special regulations for biotechnology. The market also adjusted through practices such as evergreening. Unfortunately, legislative and market responses are not serving new innovators and may be contributing to the biotechnology patenting conundrums. The paper suggests that new legal innovation is needed in order to sustain healthy innovation in biotechnology and address the needs of new innovators. Several general and specific features for advancement of the legal protection of biotechnology are proposed for further research and discussion.

## About the editor

**Dr. Anne Layne-Farrar** is a vice president in the Antitrust & Competition Economics Practice of CRA. She specializes in antitrust and intellectual property matters, especially where the two issues are combined. She advises clients on competition, intellectual property, regulation, and policy issues across a broad range of industries with a particular focus on high-tech and has worked with some of the largest information technology, communications, and pharmaceuticals companies in the world.

## Contact

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

Anne Layne-Farrar  
Vice President  
Chicago  
+1-312-377-9238  
[alayne-farrar@crai.com](mailto:alayne-farrar@crai.com)

[www.crai.com/antitrust](http://www.crai.com/antitrust)

[www.crai.com/ip](http://www.crai.com/ip)

CRA's Competition and Intellectual Property Practices provide clients with a unique combination of antitrust economics expertise and IP valuation, damages, transactions, and strategy experience.



The publications included herein were identified based upon a search of publicly available material related to intellectual property. Inclusion or exclusion of any publication should not be viewed as an endorsement or rejection of its content, authors, or affiliated institutions. The views expressed herein are the views and opinions of the authors and do not reflect or represent the views of Charles River Associates or any of the organizations with which the authors are affiliated. Any opinion expressed herein shall not amount to any form of guarantee that the authors or Charles River Associates has determined or predicted future events or circumstances, and no such reliance may be inferred or implied. The authors and Charles River Associates accept no duty of care or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this paper. If you have questions or require further information regarding this issue of *IP Literature Watch*, please contact the contributor or editor at Charles River Associates. This material may be considered advertising. Detailed information about Charles River Associates, a registered trade name of CRA International, Inc., is available at [www.crai.com](http://www.crai.com).

Copyright 2017 Charles River Associates