



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 & Licensing

FRAND licensing levels under EU law

Jean-Sébastien Borghetti (Université Paris 2 Panthéon Assas)

Igor Nikolic (University College London)

Nicolas Petit (European University Institute – Department of Law (LAW))

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532469

This paper investigates whether EU or national law provide legal authority to impose a direct or indirect obligation on Standard Essential Patent (“SEP”) holders to license at all levels of the value chain, including at component level (“license to all”, hereafter LTA). Extensive analysis of EU text and case-law (general principles of EU law, patent, contract and competition laws) suggests that there are only very limited doctrinal grounds to impose an LTA obligation on SEP holders that made a FRAND commitment. Similarly, French contract law – which applies to FRAND – committed SEP before the European standard setting organisation ETSI – does not give rise to a legal basis for the introduction of a ‘license to all’ regime. In the rare cases where licensing obligations might be imposed on SEP holders, these would effectively be akin to compulsory licensing, where public policy calls for restraint.

Acquisition for sleep

Pehr-Johan Norbäck (Research Institute of Industrial Economics (IFN))

Charlotta Olofsson (Lund University)

Lars Persson (Research Institute of Industrial Economics (IFN); Centre for Economic Policy Research (CEPR))

CESifo Working Paper No. 8095

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3538008

Within the policy debate, there is a fear that large incumbent firms buy small firms’ inventions to ensure that they are not used in the market. We show that such “acquisitions for sleep” can occur if and only if the quality of a process invention is small; otherwise, the entry profit will be higher than the entry-detering value. We then show that the incentive for acquiring for the purpose of putting a patent to sleep decreases when the intellectual property law is stricter because the profit for the entrant then increases more than the entry-detering value does.

IP & Litigation

Neilson v. Harford: Shape and form in patent law

Jeffrey A. Lefstin (University of California Hastings College of the Law)

Forthcoming, Research Handbook on Creativity, Entrepreneurship, and Intellectual Property: Comparative Perspectives on Forgotten Legal Lore

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516370

Neilson v. Harford has cast a long shadow over patent law. For American courts in the nineteenth century, the 1841 case from the Court of Exchequer was an authority whose “correctness has never been doubted and denied.” More recently, Neilson served as the ostensible authority for some of the Supreme Court’s most significant changes to the doctrine of patent eligibility under § 101. Parker v. Flook took from Neilson the notion that fundamental principles cannot contribute to the patent-eligibility of a claim, and Mayo v. Prometheus relied on Neilson to support its requirement for unconventional application of new discoveries.

Drawing on a complete account of the Neilson trial that has never been examined by legal scholars, this chapter shows that the true story of Neilson v. Harford is very different than the one told by the Supreme Court. The Court of Exchequer never treated fundamental principles as part of the prior art, nor did it require inventive application of new discoveries; Neilson’s patent was sustained largely because discovery required only well-known, routine, and conventional means for application. The central question in Neilson was to what extent Neilson’s invention – and by extension patents in general – were bound by shape and form.

The Exchequer’s conclusion that Neilson’s patent transcended form was key to three of the Supreme Court’s foundational nineteenth century cases: Winans v. Denmead’s extension of infringement beyond the patentee’s embodiment; Tilghman v. Proctor’s separation of a process from its instrumentalities; and O’Reilly v. Morse’s delineation of the outer bounds of enablement. In particular, the Morse Court’s contrast between Neilson’s invention and Morse’s illustrates that Morse was based on conventional enablement reasoning, not on the unpatentability of scientific discoveries.

January 2020: On the Unified Patent Court agreement

Olena Butriy (Independent Legal Counsel)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525534

The Unified Patent Court is designed as a sole forum of litigation in patent matters in the European Union. Namely, the national patent courts of EU Member States will lose their jurisdiction in patent matters in favour of the Unified Patent Court. This makes the Unified Patent Court a one of the kind in Europe and the European Union, because, for example, the Boards of Appeal of the European Patent Office share their jurisdiction over the patents granted by the European Patent Office with the national patent courts of EU Member States.

The Unified Patent Court, as a Europe exclusive jurisdiction litigation forum, will represent a certain judicial monopoly in the area of patent intellectual property and, with that, will possess a policy power within the European Union market.

The important issues to be scrutinised are the following. How much power the national patent courts of the EU Member States must give up in favour of the Unified Patent Court? What would be the impact of the judicial monopoly of the Unified Patent Court on the sovereignty and economic integrity of the participating EU Member States? How to implement check and balance in the governance of the Unified Patent Court, especially when it goes about the legislative basis for functioning of the Unified Patent Court.

IP Law & Policy

Justice Department's new position on patents, standard setting, and injunctions

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Regulatory Review, Jan. 6, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3514516

A deep split in American innovation policy has arisen between new economy and old economy innovation. In a recent policy statement, the Antitrust Division of the Justice Department takes a position that tilts more toward the old economy. Its December, 2019, policy statement on remedies for Standard Essential Patents issued jointly with the U.S. Patent and Trademark Office and the National Institute of Standards and Technology reflects this movement.

The policy statement as a whole contains two noteworthy problems: one is a glaring omission, and the other is a mischaracterization of the scope of antitrust liability. Both positions are strongly relevant to the pending Qualcomm litigation in the Ninth Circuit.

First, the Statement says nothing about the conduct of patent holders. The Patent Act authorizes patent injunctions “in accordance with the principles of equity.” Under the equitable principle of “unclean hands,” a patentee who is in serious default of its own legal obligations cannot obtain an injunction, at least not until its own bad conduct has been terminated.

Second, the Statement's declaration that FRAND disputes do not raise antitrust issues is false. In the first instance FRAND disputes are about contracts. But if a firm's anticompetitive use of FRAND-encumbered patents meets the power and conduct requirements of the antitrust laws it can be unlawful under them as well.

Guidelines from the government are very useful when they state the law or an agency's own enforcement position, or when they clarify ambiguities. But they are not legislation. They do not bind courts, other government agencies, or private plaintiffs, particularly not when they conflict with clearly established law.

‘Nonfunctional Descriptive Material’ vs. ‘Printed Matter’—The PTAB’s defiance of Federal Circuit precedent

David Boundy (Cambridge Technology Law LLC)

Landslide (American Bar Ass’n) vol 12 nr 3, pp 46-51 (Jan-Feb 2020)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516864

One of the truly remarkable phenomena in the history of both patent law and administrative law is the five-decade dispute between the Patent Trial and Appeal Board (PTAB) vs. the Federal Circuit on the definition of “printed matter.”

The Federal Circuit has been consistent in defining a “printed matter” rule: claim language that consists of “printed lines or characters, useful and intelligible only to the human mind,” recited for the information content it communicates, and not “functionally related to its substrate,” may be denied patentable weight for § 102 and § 103 purposes. The court has held several times that the “printed matter” rule has no relevance to computer data.

In contrast, the Board has settled into a long-term disagreement with the Federal Circuit. The PTAB’s view is that any “nonfunctional descriptive material” (a term that is nowhere defined) is to be denied patentable weight for § 102 and § 103 purposes, even if it is computer data entirely imperceptible to humans, and that the relationship between computer data and its containing memory is generally not “functional.”

The Board adheres to this view despite the Federal Circuit’s regular warnings, both under administrative law, that “[j]udicial precedent is as binding on administrative agencies as are statutes,” “the PTO lacks the substantive rulemaking authority to administratively set aside judicial precedent”; and under substantive law, that the Federal Circuit is “notably weary” in reminding the Board that the “printed matter” rule does not apply to computer data.

This article discusses the long-standing conflict between the Board and Federal Circuit. Is there a systemic problem in the USPTO’s legal apparatus? What corrective actions could be taken?

Intellectual property harms: A paradigm for the twenty-first century

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99 Boston University Law Review 2448 (2019)

Northeastern University School of Law Research Paper No. 366-2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523762

This short essay is part of a larger book project that investigates how contemporary intellectual property debates, especially in the digital age, are taking place over less familiar terrain: fundamental rights and values. Its argument draws from the diverse, personal accounts of interviews from everyday creators and innovators and focuses on descriptions of harms and, as some say “abuses,” they suffer within their practicing communities. The harms are not described are the usual harms that intellectual property law is understood to prevent. Typically, intellectual property injuries are conceived in individual terms and as economic injuries. An infringer is a thief. A corporation overclaiming intellectual property rights is greedy or engaged in immoral financial conquest. Intellectual property injuries are conceived as uncompensated benefits, foregone licensing fees, or substitutional rivalry. The individualized and economic terms are unmistakable. But accounts from everyday creators and innovators instead

describe harms to communities, systems, and institutions. They concern patterns of violence, institutionalized corruption and incumbency biases, and disproportionality that is experienced as irrationality. The underlying concern is these intellectual property harms, which intellectual property law for the digital eco-system seems to promote, erode the interdependent connections and mutual obligations that secure individuals in groups (communities, organizations and institutions) on which we rely to live and work. This leads to a sense of personal and professional precarity further degrading essential structure and relations, threatening an essentially sustaining belief of a shared fate in our connected times.

Interviewees describe a longing for affective relations with invigorated political, economic, and social power built around the new forms of alliances that can resist the power of capitalized incumbents. The accounts from everyday creators and innovators conjure an ideal structure with moral narratives of collaboration, accountability, and quality standards. These are antidotes to the digital age's exacerbation of intellectual property's doubling-down on ownership, exclusivity, and accumulation or appropriation for its own sake. When translated to more generalizable values, these are calls for reciprocity, transparency, and proportionality and (whether or not they know it) a return to basic rule of law principles. In doing so, everyday creators and innovators revive the rule of law's fundamental purpose, and what, in intellectual property law is an ultimate goal: to promote the common good by promoting and protecting a healthy public sphere. The surprising conclusion is that accounts of intellectual property harms do not champion the protection of private property as maximizing science and the useful arts but instead the protection of socio-political systems that promote fundamental values the rule of law serves.

The 'evergreening' metaphor in intellectual property scholarship

Erika Lietzan (University of Missouri School of Law)

Akron Law Review, Forthcoming

University of Missouri School of Law Legal Studies Research Paper No. 2020-08

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537035

This article is a plea for changes in the scholarly dialogue about “evergreening” by drug companies. Allegations that drug companies engage in “evergreening” are pervasive in legal scholarship, economic scholarship, medical and health policy scholarship, and policy writing, and they have prompted significant policymaking proposals. This Article was motivated by concern that the metaphor has not been fully explained and that policymaking in response might therefore be premature. It canvasses and assesses the scholarly literature — more than 300 articles — discussing or mentioning “evergreening.” It catalogues the definitions, the examples, and the empirical studies. Scholars use the term when describing certain actions taken by the innovative companies that develop and introduce new medicines to market. But they are inconsistent in their descriptions of the circumstances to which the term applies. And though most claim the innovator has “extended” something in these circumstances, they do not agree on the particulars. The literature is similarly in disarray about what has been “evergreened” — an invention, a product, a price, a patent, or something else entirely. All of this makes it hard to know from the literature what exactly scholars are writing about. After sorting through the definitions and examples — and considering the legal framework and practical landscape in which drug innovators and their generic competitors operate — this Article offers an answer and, more importantly, identifies the implicit normative claim. In simple terms the normative claim in the literature is something like this: “an innovator should not enjoy an exclusive market and supra-competitive pricing for innovations that stem in some fashion from a separate innovation for which it already enjoyed a 20-year patent term. Or at least, a drug innovator should not.” This Article does not defend, or reject, this normative claim. Instead, it makes a different claim: that policymaking should be based on descriptive scholarship that is careful

and precise about the relevant law and facts, normative work that is clear and candid about its claim and thorough in its reasoning, and empirical studies that document the actual problem the normative proposals and policymaking proposals are meant to address. Significant policymaking would be premature today, because we have not yet produced this body of work. Constant use of the “evergreening” metaphor may be obscuring this failure. The Article concludes with recommendations for scholars continuing to work on these topics, focusing on ways that we can provide quality work to assist policymakers considering the normative claim.

IP & Innovation

AI patents: A data driven approach

Brian S. Haney (Independent)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527154

The global technology market exceeds \$12 trillion. The market’s fastest growing niche is artificial intelligence (AI). Yet, while the literature on technology patents is theoretically robust - the literature on AI patents is relatively uncharted. As a consequence, lawyers, scholars, and commentators often refer to AI as a black box – arguing not even advanced computer scientists understand how it works. But all AI technology is written with formal logic, mathematics, and computer code. Thus, all AI systems are syntactically describable, repeatable, and explainable. In other words, there is no black box. This Article empirically analyzes the unique intellectual property strategy decisions technology firms face by introducing a dataset including four specific types of machine learning patents: deep learning, reinforcement learning, deep reinforcement learning, and natural language processing. Dataset charts, models, and graphs, provide insight into market alcoves, while analysis of each machine learning technology shines a light through the “black box.” Further, patent claims analysis reveals significant overlap in patented AI technologies. In sum, this Article draws on a growing body of informatics, intellectual property, and technology scholarship to provide novel patent analysis and critique.

Stock liquidity and the value of innovation: Evidence from US patent data

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516442

Does stock liquidity increase the value of innovation? Exploiting a quasi-random experiment, we show that stock liquidity increases the economic value of innovation. These results are mainly driven by firms in innovation-oriented sectors, such as those that are science-based or software-related or involve specialized suppliers. We show that stock liquidity increases concentrated institutional ownership; monitoring can potentially make innovation valuable. The literature shows that stock liquidity reduces the quantity of innovation, but the U.S. as a nation continues to be highly innovative despite having one of the most liquid stock markets. Our findings help solve this puzzle.

IP & Asia

Legal framework of IPR laws in India & China post TRIPS regime

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526695

The present paper gives insight what are Intellectual Property Rights and the Role of TRIPS Agreement in framing of IP Laws. The Paper also discuss how intellectual property is enacted in India and China. The paper also talks what is Shanzhai Culture in China and its effect. The paper also focuses on the will of both the governments in implementing the IP Laws.

Intellectual property as a human right: New dimensions under the Indian Law

Anjali Dixit (Independent)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3515260

Intellectual property rights (IPR) have been described as ideas, inventions, and creative expressions primarily based on which there is a public willingness to bestow the popularity of property. IPR supply positive different rights to the inventors or creators of that property, in order to allow them to reap commercial benefits from their creative efforts or reputation. There are various sorts of intellectual property protection like patent, copyright, trademark, etc. Patent is cognizance for an invention, which satisfies the criteria of global novelty, non-obviousness, and industrial application. India has a well-established legislative, administrative and judicial framework to safeguard Intellectual Property Rights (IPRs), which meets its global obligations whilst utilizing the flexibilities furnished in the global regime to tackle its developmental concerns. India has a Trade Related Aspects of Intellectual Property Rights (TRIPS) compliant, robust, equitable and dynamic IPR regime. The Indian IP system continues a great balance between private rights through IPRs on one hand, and rights of the society as public interest on the different hand. Two TRIPS Agreement has allowed coverage area to countries to evolve a regime that fine suits its condition. This policy house is a sine qua non for sustainable development of the country. In latest decades, the relationship between intellectual property and necessary human rights has attracted growing scrutiny. While the proper to safety of the “moral and material interests” of an individual’s intellectual product is enshrined in the canon of international human rights, with express inclusion in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the dominant regime of intellectual property rights has traditionally come into hostilities with other critical human rights.

Imitator to innovator: China’s two-pronged approach to intellectual property

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3515060

In a globalized world where the free-flow of creative thinking and new ideas carries a price tag, intellectual property (IP) plays a pivotal role. To lay ground rules and standardize intellectual property rights, members of the global community have devised international bodies like the World Intellectual Property Organisation (WIPO) and agreements, such as the Trade-Related Aspects of Intellectual

Property Rights (TRIPS), to protect and monopolize these ideas in the form of intellectual property laws. However, countries like China, for the longest time, have deviated from a normative path to a self-serving ideal, and have counterfeited commodities while lagging in ensuring stringent intellectual property laws. Known as the imitator or copycat for the longest time, China has slowly developed itself into an innovator in multiple fields utilizing its dual approach to intellectual property. The need to slowly build trust and reputation among foreign investors as Foreign Direct Investment (FDI), a major chunk of China's economy is dependent upon it. Thus to achieve this idiosyncratic aim, the normative approach towards the Intellectual Property Litigation System is appropriated by China. Through this mechanism, China has been able to portray a more welcoming stance to the western world in search of new investment opportunities. Meanwhile, the true nature of China's renewing IP policy stems from a self-centric and protectionist place. Understanding China from a single point-of-view would deem weak, as they have crafted a very sound portrayal accepting a standardized intellectual property framework. The article identifies both normative and idiosyncratic approaches by China in the development of their Intellectual Property Framework.

Copyright Law

Publication in the history of patents and copyright: Harmony or happenstance?

David J. Brennan (University of Technology Sydney, Faculty of Law)

Chapter 4 in Across intellectual property: essays in honour of Sam Ricketson edited by Graeme Austin, Andrew Christie, Andrew Kenyon, Megan Richardson (Cambridge University Press, 2020)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516529

Aspects of patent and copyright law might be better understood by a greater appreciation of a shared history between patent and copyright law. Such an appreciation leads to the recognition that, ostensibly, the resolution of the question of literary property could have sparked a reshaping of patent doctrines in the late 18th Century, and that in turn those patent doctrines could have had a reciprocal influence upon an important aspect of English copyright law of the 19th Century. While these connections are speculative, when patent history and copyright history are put in overlay, the connections emerge as plausible ones.

Two centuries of trademark and copyright law: A citation-network-analysis approach

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Chicago-Kent Journal of Intellectual Property, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523115

The Supreme Court has decided many more patent cases than trademark or copyright cases. This is so not just in the past decade—the focus of the tenth annual Supreme Court IP Review at the Chicago-Kent College of Law, in September 2019, at which I presented this research—but in the past 20 decades. In gathering the entire body of the Court's i.p. caselaw, for a study with citation-network-analysis tools, I found that patent cases greatly outnumber trademark and copyright cases. Moreover, patent cases, especially patent & antitrust cases, dominate the metrics for the most central cases in the citation network. One can, however, take the Court's trademark and copyright cases out of the shadow of the patent cases, creating a citation network focused on those areas of i.p. law. This paper does so. Specifically, I focus on the basic citation and co-citation networks embedded in all the Supreme Court trademark and copyright cases that cite out to one or more prior Supreme Court cases in any doctrinal

area. These i.p. cases run from *Stevens v. Gladding*, 58 U.S. (17 How.) 447 (1855), to, most recently, *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). The lesson is as clear as it is brief: trademark dominates the jurisprudence through 1972, then copyright dominates from 1973 to the present.

Google v. Oracle amicus merits stage brief: Vindicating IP’s channeling principle and restoring jurisdictional balance to software copyright protection

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U of Penn Law School, Public Law Research Paper No. 20-07

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3517514

The Federal Circuit’s decisions in *Oracle v. Google* conflict with this Court’s seminal decision in *Baker v. Selden*, 101 U.S. 99 (1879), misinterpret Congress’s codification of this Court’s fundamental channeling principle and related limiting doctrines, and upend nearly three decades of sound, well-settled, and critically important decisions of multiple regional circuits on the scope of copyright protection for computer software. Based on the fundamental channeling principle enunciated in *Baker v. Selden*, as reflected in § 102(b) of the Copyright Act, the functional requirements of APIs for computer systems and devices, like the internal workings of other machines, are outside of the scope of copyright protection even as non-merged aspects of the implementing code for APIs are protectable. Google independently implemented the functional specifications of the 37 APIs at issue and hence did not infringe Oracle’s copyrights.

By way of brief illustration, copyright protects artistic and literary works, such as a creative metal sculpture or haiku. Nonetheless, the proprietors of those works cannot complain when third parties replicate elements of that expression that are essential to the operation of a particular machine. For instance, a car manufacturer could secure the ignition switch for its automobiles via a metal key with an original cut pattern on the blade. Although that pattern might be protected as a modern sculpture, the car manufacturer could not use copyright law to prevent others from utilizing the same expression for the purpose of starting the car. The same consideration applies to a car manufacturer that secures a digital ignition switch via entry of a haiku. Copyright law does not bar third parties from utilizing the necessary expression of that otherwise protectable literary work for the purpose of starting the car. The computer program implementing that digital key may be protected by copyright law, but the law places no bar on copying the essential functional elements needed to operate the ignition switch — the haiku text and any other indispensable functional features of the computer program.

As *Baker v. Selden* recognized, copyright law’s limiting doctrines implement a constitutional and statutory balance intended to promote progress by channeling functional features exclusively to the utility patent regime. Although copyright can protect separable expressive features, such as surface ornamentation of an ignition key or non-merged implementing code of a digital ignition key, it does not bar the use of functional specifications — the essential technological elements. Only utility patent law can protect those features.

Other IP Topics

Design patents are sinking in international seaway: Rethinking design patent anticipation

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3540940

The current test for design patent anticipation, as stated in the 2009 Federal Circuit case of *International Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, is the ordinary observer test, the same test as used for design patent infringement. This is legally and logically flawed.

Chief Justice Webster

Mark A. Lemley (Stanford Law School)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537211

The Supreme Court has a love affair with the dictionary. Half of its decisions in the 2018 term cited a dictionary, often as the primary or exclusive means of defining a term in the statute. The Solicitor General may long have been the “tenth Justice,” but in the 21st century the Chief Justice of the Supreme Court may as well be, not John Roberts, but Noah Webster.

The Court’s obsession with dictionaries as the arbiter of statutory meaning is a recent phenomenon. A review of cases from 50 or 100 years ago reveals no such focus. The Court’s increased use of dictionaries may stem from the idea – very much in vogue today in some quarters – that courts are not to make law but simply “call balls and strikes.” Looking up a term in the dictionary can seem like the height of judicial restraint. A court that does so isn’t consciously or subconsciously imposing its own ideology on a statute; it’s just turning to a trusted neutral source.

That impression is misleading. Dictionaries are not the neutral, commonly-accepted panacea the Court seems to suppose. In this Article, I discuss a historical test case for the use of dictionaries to interpret legal documents. In the early 2000s, patent law flirted with the use of dictionaries to define the terms of patent claims, a process akin to statutory interpretation. The Federal Circuit (the national patent court) unanimously abandoned that experiment after only three years, for a simple reason: it was a disaster. The lessons of patent law’s brief flirtation with dictionary primacy in claim construction suggest that it’s a bad idea to turn to dictionaries to interpret statutes. That’s true for several reasons. Dictionaries aren’t designed to give what courts want: a single definitive meaning (or complex of considerations) that define what the law is. Dictionaries deliberately define terms expansively and in self-contradictory ways, seeking to capture all possible meanings of a term, not to pick among them. They don’t take legal nuance into account, and they can’t incorporate a background pattern of behavior or centuries of precedent against which Congress may have adopted a term. The use of legislative history is often attacked as a cover for judicial activism, but in fact it is the dictionary that provides the easiest cover for activist decisions that depart from Congressional intent and precedent. Dictionaries can literally justify any plausible meaning of a term. Courts that turn to them are doing exactly what they purport to disdain: picking the meaning of a statute based on their own personal preferences.

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