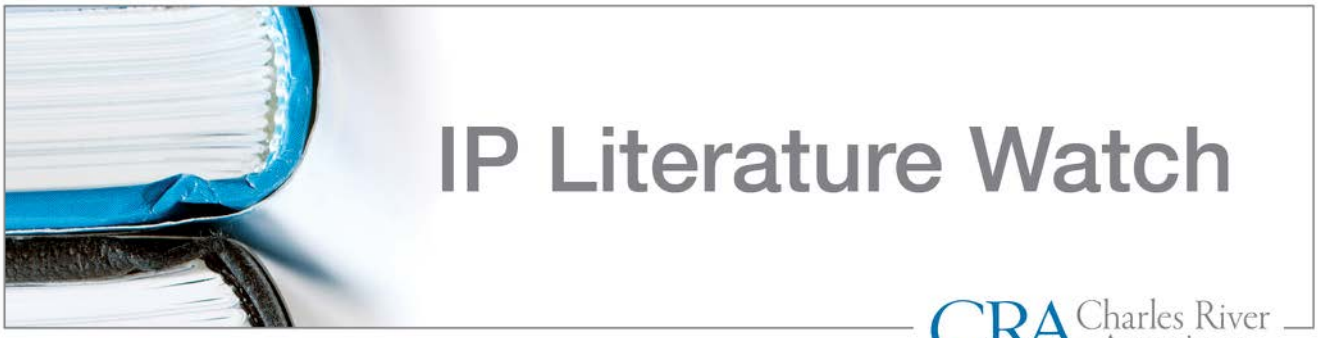

August 2020

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

It's Anti-Suit Injunctions All The Way Down – The Strange New Realities of International Litigation Over Standards-Essential Patents

Jorge L. Contreras (University of Utah – S.J. Quinney College of Law)
IP Litigator, 26(4):1-7 (July/August 2020)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647587

Today's markets for technology products — from smartphones to home appliances to automobiles — are inherently global. This is especially true of products that embody technical standards — protocols like 5G, Wi-Fi, Bluetooth and USB that are covered by hundreds, thousands, or tens of thousands of patents (so-called "standards-essential patents" or "SEPs"). Given the global scope and size of these markets, it is not surprising that patent litigation over standardized products is often conducted on a global scale. This article looks at an increasingly important aspect of these global standards wars: the ability of a court in one jurisdiction to prevent a party from pursuing litigation in another jurisdiction using a procedural mechanism called the anti-suit injunction (ASI). To complicate matters further, a litigant may also petition a court in one jurisdiction to prevent a party from seeking an ASI in another jurisdiction — the so-called anti-anti-suit injunction (AASI). And, curiouser still, litigants have recently re-invigorated the anti-anti-anti-suit injunction (AAASI), a procedural move that seeks to prevent a litigant from obtaining an AASI to block another litigant from requesting an ASI. If there is no theoretical limit to the procedural machinations to which parties can go in such disputes, it may, indeed, be injunctions "all the way down".

Patenting Inventions or Inventing Patents? Strategic Use of Continuations at the USPTO

Cesare Righi (Boston University – School of Law – Technology & Policy Research Initiative)
Timothy Simcoe (Boston University – Questrom School of Business; NBER)
NBER Working Paper No. w27686
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675238

Continuations allow inventors to claim technology developed after the original filing date of their patent, leading to concerns about inadvertent infringement and hold-up. We use the link between

patents and standards created by the disclosure of standard essential patents (SEPs) to analyze the relationship between standard publication - a key observable milestone in technology development - and continuations. More than half of the SEPs in our data are filed after standard publication. Consistent with opportunistic behavior by patentees, there is a large increase in continuations immediately after standard publication. Keywords in the claims of SEPs linked to the same standard also become more similar after that standard is published.

Technical Standards For Bioinformatics and Medical Informatics

Jorge L. Contreras (University of Utah – S.J. Quinney College of Law)
Adrian Thorogood (McGill University – Centre of Genomics and Policy)
Bioinformatics, Medical Informatics and the Law (Jorge L. Contreras, A. James Cuticchia & Gregory Kirsch, eds., Edward Elgar: 2021 Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665429

With a few exceptions, the biomedical industry, and the informatics field in particular, have not been affected by the standards litigation that has plagued the ICT sector. But with the increasing adoption of standards by informatics researchers and vendors, the issues faced by ICT standards groups will become increasingly relevant. This chapter summarizes general legal issues associated with standards development, then surveys standardization efforts in the informatics space and reviews the policies and procedures adopted by SDOs operating in the informatics area. It concludes with recommendations regarding prudent policy adoption by SDOs developing standards for informatics applications.

Chapter 20 – Technical Standards: Fair, Reasonable and Non-Discriminatory (FRAND) Licensing

Jorge L. Contreras (University of Utah – S.J. Quinney College of Law)
Jorge L. Contreras, Intellectual Property Licensing and Transactions: Cases and Materials, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669316

This chapter in the forthcoming case book “Intellectual Property Licensing and Transactions” covers licensing transactions involving standards-essential patents (SEPs), including recent legal developments regarding the disclosure (and concealment) of SEPs, fair, reasonable and nondiscriminatory (FRAND) royalty rates, non-discriminatory licensing, the availability of injunctive relief for FRAND-encumbered patents, and transfers of FRAND commitments, as well as specific SDO policy clauses and license text addressing each of these issues.
[Note: updated to address Ninth Circuit decision in FTC v. Qualcomm, 8/11/20]

IP & Innovation

The Patent Buyout Price for Human Papilloma Virus (HPV) Vaccine and the Ratio of R&D Costs to the Patent Value

Mario Songane (N/A)
Volker Grossmann (University of Fribourg – Faculty of Economics and Social Science; Institute for the Study of Labor (IZA); CESifo (Center for Economic Studies and Ifo Institute))
CESifo Working Paper No. 8488
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676094

Human papillomavirus (HPV) is responsible for almost all of the 570,000 new cases of cervical cancer and approximately 311,000 deaths per year. HPV vaccination is an integral component of the World Health Organizations (WHO) global strategy to fight the disease. However, high vaccine prices enforced through patent protection are limiting vaccine expansion, particularly in low- and middle-income countries. By limiting market power, patent buyouts could reduce vaccine prices and raise HPV vaccination rates while keeping innovation incentives. We estimate the global patent buyout price as the present discounted value (PDV) of the future profit stream over the remaining patent length for Merck's HPV vaccines (Gardasil-4 and 9), which hold 87% of the global HPV vaccine market, in the range of US$ 15.6–27.7 billion (in 2018 US$). The estimated PDV of the profit stream since market introduction amounts to US$ 17.8–42.8 billion and the estimated R&D cost to US$ 1.05–1.21 billion. Thus, we arrive at a ratio of R&D costs to the patent value of the order of 2.5–6.8%. We relate this figure to typical estimates of the probability of success (POS) for clinical trials of vaccines to discuss if patent protection provides Merck with extraordinarily strong price setting power.

Intellectual Property in the New Technological Age: 2020 - Chapters 1 and 2

Peter S. Menell (University of California, Berkeley – School of Law)
Mark A. Lemley (Stanford Law School)
Robert P. Merges (University of California, Berkeley – School of Law)
Shyamkrishna Balganesh (University of Pennsylvania Law School)
Stanford Public Law Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3648735

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

Innovation Consolidation

Peter Lee (University of California, Davis – School of Law)
54 U.C. Davis L. Rev. (2020 Forthcoming)
UC Davis Legal Studies Research Paper Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641858

One of the most striking and undertheorized aspects of fields that commercialize patented technologies is the dynamic interplay of structural forces pushing toward consolidation. Of course, technological industries are complex ecosystems featuring numerous players of different sizes along the value chain spanning "upstream" research and development and "downstream" commercialization. However, when focusing on downstream industry segments that bring patented technologies to market—"innovation" in an economic sense—a relatively small number of large companies frequently play outsize roles. Technological industries tend to be patent-intensive, and legal and economic theory has long explored the role of patents in shaping industry structure—the number, size, and character of firms in an industry. However, such theory only explains one facet of industry structure. This Article provides a more holistic account of the forces shaping the commercialization of patented technologies by examining three industries: biopharmaceuticals; agricultural biotechnology, seeds, and agrochemicals; and software.

This Article argues that the commercialization of patented technologies is subject to several "concentration drivers" pushing toward consolidation, including direct barriers to entry based on exclusive rights and cost, indirect barriers to entry based on efficiencies of size, and significant merger

and acquisition activity. It also argues that several common “fragmentation drivers” push in the opposite direction to increase the number of participants in these industries, including technology-based entry, voluntary divestures, and antitrust enforcement. While such forces are significant, the formidable strength of concentration drivers results in substantial consolidation in the commercialization of drugs, genetically modified seeds, and software. Turning to normative analysis, this Article argues that such consolidation can be salutary to a point but that undue concentration ultimately harms innovation, efficiency, consumer welfare, and democratic representation. It argues that patent law should more fully consider the myriad forces beyond exclusive rights that shape technological commercialization, and it provides prescriptions for enhancing industry entry through private ordering, federal innovation policy, and antitrust enforcement.

IP Law & Policy

The Death of the Genus Claim

Dmitry Karshtedt (George Washington University – Law School)
Mark A. Lemley (Stanford Law School)
Sean B. Seymore (Vanderbilt University – Law School)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668014

The central feature of patent law in the chemical, biotechnology, and pharmaceutical industries is the genus claim – a patent that covers not just one specific chemical but a group of related chemicals. Genus claims are everywhere, and any patent lawyer will tell you they are critical to effective patent protection.

But as we show in this article, the law has changed dramatically in the last twenty-five years, to the point where it is no longer possible to have a valid genus claim. Courts almost always hold them invalid. Remarkably, they do this without having acknowledged that they have fundamentally changed an important area of law. More remarkably, patent lawyers and patent owners don’t seem to have noticed. Invention, investment, patenting, and patent litigation continue much as they had before. It’s just that the patents that are the basis of all that activity are invalid.

We document this surprising shift in the law. We explain why we think it represents both bad law and bad policy. We also explain why it hasn’t seemed to matter, and what that fact says about the relevance of law more generally in governing business behavior.

Expanding Access to Patents for COVID-19

Jorge L Contreras (University of Utah – S.J. Quinney College of Law)
Burris, S., de Guia, S., Gable, L., Levin, D.E., Parmet, W.E., Terry, N.P. (Eds.) (2020). Assessing Legal Responses to COVID-19. Boston: Public Health Law Watch
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675857

Two competing and linked sets of goals must be addressed when considering patent policy in response to a public health emergency. First is the allocation of existing resources among potential users (hospitals, patients, etc.); second is the creation of new technologies over time (innovation). Patents provide financial incentives to develop new technologies. Yet shortages of patented products often plague crisis response. In the case of COVID-19, allocative goals, particularly satisfying demand for patented medical products (e.g., vaccines, ventilators, PPE, and test kits), may be achieved

through governmental interventions such as march-in and governmental use rights (compulsory licensing). But in cases involving the development of new technologies such as vaccines and therapies, incentive structures must be preserved to ensure that the private sector is appropriately motivated to act. In addition to patents, which reward inventors for financially successful innovations, a range of other incentives such as prizes, grants, and subsidies also exist to motivate technological innovation. Incentives like these, coupled with a requirement that resulting discoveries be made available on a broad and open basis, can achieve a balance between allocation and innovation goals. Governments can encourage such measures using both the incipient threat of compulsory licensing and the reward of procurement preferences and other up-front rewards.

This paper was prepared as part of Assessing Legal Responses to COVID-19, a comprehensive report published by Public Health Law Watch in partnership with the de Beaumont Foundation and the American Public Health Association.

Did the America Invents Act Change University Technology Transfer?

Cynthia Dahl (University of Pennsylvania Law School)
U of Penn Law School, Public Law Research Paper No. 20-25
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669313

University technology transfer offices (TTOs) are the gatekeepers to groundbreaking innovations sparked in research laboratories around the U.S. With a business model reliant on patenting and licensing out for commercialization, TTOs were positioned for upheaval when the America Invents Act (AIA) transformed U.S. patent law in 2011. Now almost ten years later, this article examines the AIA's actual effects on this patent-centric industry. It focuses on the five key areas of most interest to TTOs: i) first to file priority; ii) broadening of the universe of prior art; iii) carve-out to the prior commercial use defense; iv) micro-entity fees; and v) post grant proceedings to challenge patent validity.

For the most part, TTOs have adapted well to the AIA changes. This is not least because universities have a widespread pro-publication culture that caused TTOs to adopt policies that were already AIA-friendly. But some AIA changes have caused TTOs to rethink certain patent filing strategies and in some cases shift how they work with their university faculty clients. TTOs are also facing other cultural challenges to their licensing model that they must address with creative solutions, some of which may push the boundaries of the traditional TTO mission. This article presents and analyzes the AIA changes. It then discusses their effect on university technology transfer by relaying anecdotes and explanations collected directly from the TTOs through interviews. Beyond reporting about policy shifts, the nuanced and at times surprising explanations also convey the tensions faced by TTOs as they market innovation, including balancing earning revenue for the inventor and the university with a mission to transfer the innovation into the world for impact. The article can therefore serve as a springboard for discussing broader questions, including the AIA's effect on all industries that are reliant on patent value, and extrapolating generally to reflect on the true impact of the AIA.

Copyright Law

A License to Plagiarize

Brian L. Frye (University of Kentucky – College of Law)
University of Arkansas at Little Rock Law Review, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3674371

This essay reflects on Creative Commons licenses and plagiarism norms. Among other things, it provides a model plagiarism tool that authors can use to indicate that they permit plagiarism of their works.

A Remix Compulsory Licensing Regime for Music Mashups

Peter S. Menell (University of California, Berkeley – School of Law)
THE ROUTLEDGE COMPANION TO COPYRIGHT AND CREATIVITY IN THE 21ST CENTURY
(Michelle Bogre & Nancy Wolff, eds.) (2020)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3652693

Spurred by advances in digital technologies, music mash-ups emerged as a defining musical genre in the early twenty-first century, reshaping content industries and the broader culture. Digital technology and file-sharing platforms enabled creators to reach vast audiences without the high share of proceeds demanded by traditional record labels, publishers, and distributors. Creators seeking to earn a living in the creative arts faced new challenges in this environment. The very technologies that liberated them from the shackles of the old intermediaries made it ever more difficult to achieve an adequate return on their investments in training, time, expense, and opportunity cost to produce art. Aggressive copyright enforcement, which was rarely a problem in the pre-internet age, took center stage in the twenty-first century, especially for independent creators.

A just, effective, and forward-looking copyright system would channel internet-age creators and consumers into well-functioning digital-content marketplaces. Such a system must come to grips with the reality that a growing segment of the population does not view traditional markets for copyrighted works as the only means to access creative works. To many, participation in markets for copyrighted works is voluntary; it is more about convenience and fairness than compliance with the rule of law. Thus, trends in technology, social dynamics, and moral conscience have eroded copyright protection. Heavy-handed responses by copyright owners — such as mass litigation campaigns threatening outsize statutory damages, efforts to ramp up enforcement tools, and troll litigation — have alienated consumers, judges, and legislators and spurred work-arounds that lead new generations away from authorized digital content marketplaces and copyright-based creative careers.

Notwithstanding the decline of the copyright system's public approval rating, the core social, economic, and moral foundations on which copyright was built have not been rendered obsolete by technological advance. To a large extent, what many creators want and need has remained the same: freedom to create and fair compensation based on the popularity of their art. What many consumers want has also largely remained the same: easy access to creative original art at a fair price. These two forces create the conditions for copyright to provide a critical engine of creative and free expression in the digital age. For the copyright system to remain vital, copyright reform must channel post-Napster creators and consumers into a balanced marketplace, not alienate them. This essay explores why and how to transition the copyright system to the internet age through the lens of music mash-ups, a salient art form that has a particular cultural and social significance.

Copyright Guidance for Using Films in Online Teaching During the COVID-19 Pandemic

Emily Hudson (King's College London – The Dickson Poon School of Law)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667025

This Guidance discusses copyright options for using feature films and other audiovisual content in online teaching. It responds to concerns amongst UK higher education institutions (HEIs) that moving education online as a result of the COVID-19 pandemic raises new copyright risks. At many HEIs, in-

person lectures may not be possible in the coming academic year due to COVID-related social distancing requirements. Even if some face-to-face teaching is possible, many students will undertake some or all of their studies remotely. One particular concern has been ensuring that Film Studies departments can screen feature films to students online, this being an essential part of those programmes. But lecturers in other disciplines also use a variety of films in their teaching, making these copyright questions of broader relevance. HEIs are keen to know whether they may use audiovisual content in online teaching without a licence. The key take-home message from this Guidance is that there are a number of exceptions in the Copyright, Designs and Patents Act 1988 (CDPA) on which HEIs may be able to rely. It focuses in particular on the fair dealing exception for illustration for instruction in s. 32 of the CDPA, and quotation in s. 30(1ZA).

IP & Trade

Facilitating Access to Cross-Border Supplies of Patented Pharmaceuticals: The Case of the COVID-19 Pandemic

Frederick M. Abbott (Florida State University – College of Law)
Jerome H. Reichman (Duke University School of Law)
Journal of International Economic Law (Oxford), Forthcoming Volume 23, Issue 3, Sept. 2020
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656725

The COVID-19 pandemic has brought into stark relief the gaps in global preparedness to address widespread outbreaks of deadly viral infections. This article proposes legal mechanisms for addressing critical issues facing the international community in terms of providing equitable access to vaccines, treatments, diagnostics and medical equipment. On the supply side, the authors propose the establishment of mandatory patent pools ('Licensing Facilities') on a global or regional, or even national basis, depending upon the degree of cooperation that may be achieved. The authors also discuss the importance of creating shared production facilities. On the demand side, the authors propose the establishment of Regional Pharmaceutical Supply Centers for the collective procurement of products, and the need to coordinate the issuance of necessary compulsory licenses for production and/or importation, depending on relevant circumstances. The authors envisage that centralized coordination by Regional Pharmaceutical Supply Centers should assist in overcoming difficulties individual countries may encounter in addressing administrative and technical issues in procuring supplies, as well as creating improved bargaining leverage with potential suppliers. The authors finally address the problem created by the decision of various High-Income Countries (HICs) to 'opt out' as eligible importing countries under the WTO TRIPS Agreement Article 31bis amendment that addresses the predominant export of pharmaceutical products under compulsory licenses.

Avoiding the TRIPS Trap: A Path to Domestic Disclosure of Clinical Drug Data Consistent with International Norms

Cynthia M. Ho (Loyola University of Chicago School of Law)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3667995

Should doctors, patients and policy makers have complete information about new drugs? Although complete transparency may seem like the obvious answer, the reality is that publicly available information is often incomplete. Before a drug may be approved for sale, a regulatory agency such as the Food and Drug Administration (FDA) will review extensive data created by a company seeking approval of such a drug. However, the FDA considers such information to be protected from public

disclosure as a commercially confidential trade secret. In the United States, scientific papers concerning new drugs are often based on proprietary data and published articles often present skewed results compared to the complete data possessed by the FDA. The implications of articles based on proprietary data typically get short shrift. However, two articles on Covid-19 were recently retracted after independent scientists questioned the conclusions and the authors admitted that the articles were based on proprietary data that could not be verified, leading to their retraction. Although the intense public spotlight on Covid-19 highlighted this problem, doctors are generally forced to rely on incomplete information based on similar proprietary data in making prescribing decisions. This unnecessarily compromises patient health and safety.

Although the EU and Canada have recognized the public health benefit of more transparency and increased publication of clinical data for new drugs, understudied aspects of international intellectual property laws may limit disclosure. In particular, all member countries of the World Trade Organization (WTO), including Canada and the EU member states, must comply with certain intellectual property minimum requirements, including one that governs the data at issue. Article 39(3) of the Trade Related Intellectual Property Agreement (TRIPS) requires WTO countries to protect data submitted to regulatory agencies from "uncommercial fair use." This highly contested term has never been definitively clarified in the WTO's dispute settlement process. Moreover, TRIPS permits countries to disclose such data under one of two exceptions that have been largely ignored in the literature so far. This Article provides the first comprehensive analysis of whether domestic disclosure of clinical data is permissible under either of these two exceptions.

In doing so, this Article contributes to broader policy issues. First, although some policy makers have long recognized that international obligations may constrain domestic options, this Article provides a concrete case study of the dangers of creating new international intellectual property norms—especially when such norms are created by a select group of stakeholders that may not represent all interests. This is a timely and important issue since nations have generally been entering into international agreements with increasing levels of intellectual property rights since the conclusion of the WTO. Second, the Article suggests actions to consider in both the domestic and international contexts regarding clinical data, including specific suggestions to improve clinical data disclosure in the United States.

International Trade, Intellectual Property, and Innovation Policy: Long-Term Lessons from the COVID-19 Crisis

Jeremy de Beer (University of Ottawa – Common Law Section)
E. Richard Gold (McGill University – Faculty of Law)
C.M. Flood, V. MacDonnell, J. Philpott, S. Theriault & S. Venkapuram, eds, Vulnerable: The Policy, Law and Ethics of COVID-19 (Ottawa: University of Ottawa Press, 2020).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678291

This chapter addresses intersections among international trade law, intellectual property rights, and domestic innovation policies to prevent, detect, and treat pandemics. Structural issues with Canada's innovation system affected preparedness for this pandemic and, unless remedied, will impede responses to future crises. In this chapter, we suggest aligning domestic and international policy measures to nuance Canada's approach to intellectual property and accelerate Canada's global contributions through open science.

From Struggle to Surge: China's TRIPS Experience and Its Lessons for Access to Medicines

Peter K. Yu (Texas A&M University School of Law)
MAPPING THE THREE GENERATIONS OF STRUGGLE TO ACCESS TO MEDICINES UNDER THE TRIPS AGREEMENT, Amaka Vanni and Srividhya Ragavan, eds., Routledge, 2021, Forthcoming
Texas A&M University School of Law Legal Studies Research Paper No. 20-16
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677329

The WTO TRIPS Agreement has imposed unprecedented burdens on countries in the developing world. Although many developing and least developed countries continue to struggle with the Agreement's high intellectual property protection and enforcement standards, large or populous emerging economies, such as Brazil, China, India, South Africa, Thailand, have managed to adapt the Agreement with some success. As economic and technological conditions improved, these emerging economies began to secure even greater benefits from the TRIPS-based intellectual property system, thereby initiating a self-reinforcing virtuous cycle.

Out of all emerging economies, no country provides a better illustration for a complete transformation of its intellectual property system and pharmaceutical landscape than China. This chapter therefore aims to document the country's journey from its struggle with the TRIPS Agreement to its recent surge in the global pharmaceutical arena. It begins by recounting China's initially reluctant effort to introduce high and externally driven intellectual property standards, including the TRIPS standards that were introduced before and shortly after the country's accession to the WTO. The chapter then discusses China's innovative turn, which began in the mid-2000s when its leaders made a major policy push toward the development of independent innovation. The chapter further examines the recently proposed amendments to Chinese patent law and pharmaceutical regulations. It concludes with five distinct lessons that China's TRIPS experience has provided for the debate on the TRIPS Agreement and on access to medicines.

Other IP Topics

Settling Lawsuits with Pirates

Xinyu Hua (Hong Kong University of Science & Technology (HKUST) – Department of Economics)
Kathryn E. Spier (Harvard University – Law School – Faculty; National Bureau of Economic Research (NBER))
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647244

A firm licenses a product to overlapping generations of heterogeneous consumers. Consumers may purchase the product, pirate/steal it, or forego it. Higher consumer types enjoy higher gross benefits and are caught stealing at a higher rate. The firm may commit to an out-of-court cash settlement policy that is “soft” on pirates, so high-types purchase and low-types steal. This facilitates price discrimination. Firm profits rise if the firm bundles a license agreement with the cash settlement. However, requiring pirates to sign license agreements as part of the settlement has ambiguous welfare effects and may deter the entry of more efficient competitors.

Trade Marks and Innovation?

Dev Saif Gangjee (Faculty of Law, University of Oxford)
G.B. Dinwoodie and M.D. Janis (eds.), Trademark Law and Theory II: Reform of Trademark Law (Edward Elgar), Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658725

Until relatively recently, there was a stable consensus: trade mark law had nothing to do with innovation. This consensus was based on the origin indicating function of trade marks. There is no requirement for either the sign or the underlying product to be innovative and many protected marks consist of pre-existing words or images, such as the surnames Ford or McDonald. Trade mark law has therefore not only been historically indifferent to innovation, it has also actively policed this boundary with patent law.

However cracks are beginning to appear in the consensus, for three inter-related reasons.

1. It has been suggested that successful branding generates a feedback cycle, which helps firms to recoup investments in R&D, while also encouraging such investments in the future.

2. Trade mark registrations are analysed as indirect and complementary indicators of innovation. They help to identify patterns of innovation, which can be useful for policy formulation.

3. Trade marks also help to protect and reward forms of innovation which cannot be accommodated in other fields of IP, such as service or marketing innovation.

This chapter critically engages with these claims, to assess their normative implications (if any).

The COVID-19 Vaccine Race: Intellectual Property, Collaboration(s), Nationalism and Misinformation

Ana Santos Rutschman (Saint Louis University – School of Law)
Washington University Journal of Law and Policy, Vol. 64, 2020
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656929

Vaccines have long played a crucial role in the prevention, mitigation and eradication of infectious diseases. More than any other recent outbreak, the COVID-19 pandemic has brought the phenomenon of the vaccine race to the forefront of personal, national and global preoccupations. This symposium contribution examines the early features and takeaways of the COVID-19 vaccine race in four parts. The essay begins by situating the ongoing vaccine race into contemporary frameworks for biopharmaceutical research and development (R&D). Part II examines the role of proprietary and nationalistic modes of vaccine production and distribution, with an emphasis on the effects of patents and pre-production agreements on distributive outcomes of the COVID-19 vaccine race. Part III then turns to emerging efforts to counter overly patent-dependent and nationalistic approaches to vaccine R&D. It describes and assesses the role(s) played by the World Health Organization, as well as public-private partnerships like CEPI (the Coalition for Epidemic Preparedness Innovations) and Gavi, a Geneva-based vaccine procurement organization. Moreover, it offers a case study on COVAX, a quasi-global push and pull mechanism designed during the early stages of the COVID-19 pandemic to promote vaccine affordability and equity. Part IV concludes the essay by looking ahead to the end of the race and pondering the increasingly salient role of vaccine misinformation and disinformation in the uptake of emerging COVID-19 vaccines.

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