



# IP Literature Watch

**CRA** Charles River  
Associates

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

## IP & Antitrust

### **The U.S. District Court for the Northern District of Illinois Dismisses Antitrust Case Challenging Patent Thicket (Humira)**

Michael A. Carrier (Rutgers Law School)  
*e-Competitions* (2020, Forthcoming)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3678198](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678198)

Whether behavior relating to a patent thicket presents an antitrust issue is a nuanced question. But a recent ruling involving the biologic Humira shows how not to decide these issues. This short piece discusses the court's opinion and highlights its errors analyzing sham behavior, patent settlements, and antitrust injury.

## IP & Licensing

### **Patent Exceptions in the Time of a Pandemic**

Jean Akl (Saba & Co. Intellectual Property)

*les Nouvelles – Journal of the Licensing Executives Society, Volume LV No. 3, September 2020*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3658629](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658629)

The blistering race and competition to find a COVID-19 vaccine is ongoing at a very fast pace. Pharmaceutical companies are scurrying to secure a legal monopoly for the treatment, to control the largest market share, and to ensure a considerable return on their investment, since the demand thereon would be immediate, global, and possibly extending for years and decades to come.

Whether it is Gilead's Remdesivir or any other treatment or vaccine that is ultimately found to have a proven curative or preventive outcome, researchers are ramping up their efforts, all while anticipating that a second wave of coronavirus is expected to swipe the globe again, as the Spanish flu did a century ago.

## **Patent Valuations across Markets – Patent Price, Royalty Rate, and Damage Award, Part II: Can Big Damages Awards Affect Patent Valuation Dynamics?**

Jack Lu (Intellectual Property Market Advisory Partners (IPMAP), LLC)

*Law360 Expert Analysis, 2020*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3676161](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3676161)

This article expands the analysis about patent valuations in patent transaction and licensing markets, by including patent damage awards and by exploring the dynamics, as well as the driving forces behind the dynamics, of the valuations across the markets of patent transaction, licensing, and litigation.

Valuation economics posits that patent price may comove with royalty rate, a hypothesis that has been confirmed by the data analysis in Part I. By contrast, the relationship between patent price and patent damage award can be tricky. Under the US patent laws, patent damage shall reflect the past damages in lost profits and/or lost royalties, connoting that damage award may represent a vindication and reparation, which presumably lags behind the valuations in licensing and transaction markets.

However, as a practical matter, the purpose of negotiation for patent license or sale, most likely, is to avoid potential litigation or to resolve litigation. Therefore, any positive news from litigation such as headline-making damage awards would signal a propitious litigation market and boost the sentiment in licensing and transaction markets. To this extent, patent damage award may have signaling effect on, and is supposed to lead, the valuations in licensing and transaction markets.

## **IP & Innovation**

### **Innovation and Own Prior Art**

Amy Motomura (Loyola Law School Los Angeles)

*Hastings Law Journal, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3691197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691197)

This Article analyzes a conflict between innovation and the patent system: innovation is a dynamic, iterative process, but a patent reflects only a single snapshot in time. Despite extensive scholarly and judicial discussion of when an invention is ready for patenting, there is rarely a perfect time to file a patent application. Instead of filing a single perfect application, companies and others engaged in innovation typically build a portfolio of patents by filing a series of applications over the course of research and development. Yet this is an imperfect strategy because each patent application sets up a potential barrier for the innovator's future applications. The barrier arises because future applications must be both new and nonobvious as compared to most of the innovator's existing patent applications.

This Article examines the interaction between patent applicants' own earlier-filed applications and patentability requirements. This interaction shapes how innovators seek patent rights, and it affects disclosure and innovation. Despite its significance, the legal treatment of successive patent filings by the same innovator developed haphazardly. The resulting statutory framework, built by the layering of various provisions, is not well-tailored to the original policy goals. Moreover, in its current form, the law has unintended effects that can hamper innovation. This Article proposes a statutory amendment that would provide a better mechanism for directly tailoring the statutory framework, and it illustrates how the parameters can be adjusted to reflect the balancing of competing concerns.

## Artificial Intelligence and the Limits of Legal Personality

Simon Chesterman (National University of Singapore (NUS) – Faculty of Law)

*Forthcoming in International & Comparative Law Quarterly*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3682372](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682372)

As artificial intelligence (AI) systems become more sophisticated and play a larger role in society, arguments that they should have some form of legal personality gain credence. It has been suggested that this will fill an accountability gap created by the speed, autonomy, and opacity of AI. In addition, a growing body of literature considers the possibility of AI systems owning the intellectual property that they create. The arguments are typically framed in instrumental terms, with comparisons to juridical persons such as corporations. Implicit in those arguments, or explicit in their illustrations and examples, is the idea that as AI systems approach the point of indistinguishability from humans they should be entitled to a status comparable to natural persons. This article contends that although most legal systems could create a novel category of legal persons, such arguments are insufficient to show that they should.

## Patent Similarity Data and Innovation Metrics

Ryan Whalen (National University of Singapore (NUS) – Faculty of Law)

Alina Lungeanu (Northwestern University – School of Communication)

Leslie DeChurch (Northwestern University – School of Communication)

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*Journal of Empirical Legal Studies*, 2020

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3657462](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3657462)

We introduce and describe the Patent Similarity Data set, comprising vector space model-based similarity scores for United States utility patents. The data set provides approximately 640 million pre-calculated similarity scores, as well as the code and computed vectors required to calculate further pairwise similarities. In addition to the raw data, we introduce measures that leverage patent similarity to provide insight into innovation and intellectual property law issues of interest to both scholars and policymakers. Code is provided in accompanying scripts to assist researchers in obtaining the data set, joining it with other available patent data, and using it in their research.

## IP Law & Policy

### The Intellectual Property of COVID-19

Ana Santos Rutschman (Saint Louis University – School of Law)

*Forthcoming in Outsmarting Pandemics*, Elizabeth Kirley & Deborah Porter (Eds.) (2021)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3691239](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691239)

The response to COVID-19 is indissolubly tied to intellectual property. In an increasingly globalized world in which infectious disease pathogens travel faster and wider than before, the development of vaccines, treatments and other forms of medical technology has become an integral part of public health preparedness and response frameworks. The development of these technologies, and to a certain extent the allocation and distribution of resulting outputs, is informed by intellectual property regimes. These regimes influence the commitment of R&D resources, shape scientific collaborations and, in some cases, may condition the widespread availability of emerging technologies. As seen throughout this chapter, COVID-19 has exposed the shortcomings of ingrained reliance on intellectual property as a

channel for the production and dissemination of medical technologies needed to address the problems posed by pandemics and epidemics. At the same time, COVID-19 has brought new life to countervailing efforts to explore legal and policy mechanisms to potentially offset some of the problems posed by the pervasiveness of, and shortcomings associated with, intellectual property dynamics.

In tracing the dual ways in which intellectual property has affected preparedness for, and the response to, COVID-19, this chapter highlights three features of contemporary intellectual property regimes and examines their impact on innovation(s) needed to address public health crises. First, it explores the incentives function of patent law and policy, which places considerable emphasis on market-driven investment in R&D on medical technologies. In so doing, intellectual property becomes one of the driving forces of the commodification of goods—vaccines, drugs or ventilator parts, for example—which are best understood as public health goods.

Second, the chapter illustrates how intellectual property has reinforced an ethos of siloed R&D, as illustrated by the COVID-19 vaccine race, which at the time of writing includes hundreds of separate vaccine development projects. These siloes further extend into the allocative domain: with the development of medical technologies now largely steeped in proprietary frameworks, several countries have resumed the practice of reserving significant amounts of emerging technologies for their domestic populations, thus curtailing the possibility of equitable transnational approaches to a global public health crisis. This approach is commonly known in the field of vaccines as “vaccine nationalism.” Nationalism skews the distribution of medical technologies developed during a pandemic, reducing opportunities for transnational coordination and potentially limiting access to these technologies by populations in economically disadvantaged parts of the world.

The chapter ends nonetheless on a positive note, as COVID-19 has also made it abundantly clear that the legal infrastructure needed to address many of these problems is already in place. Early in the pandemic, several countries signaled that they would rely on intellectual property mechanisms to ensure broad and equitable access to medical technologies developed during (and possibly after) the pandemic, such as vaccines and treatments for COVID-19. These mechanisms embody different types of commitments to share intellectual property, data and knowledge. At the allocative level, a significant number of countries joined an ad hoc vaccine distribution facility (COVAX) coordinated by Geneva-based international organizations. These efforts, albeit nascent and, in many cases, likely transient nature, constitute meaningful steps towards a better innovation ecosystem for medical technologies needed to prevent and respond to future pandemic.

### **Gendered ‘Objective’ Patent Law: Of Binaries and a Singularity**

Jessica C. Lai (Victoria University of Wellington)

*Journal of Law and Society*, Vol. 47, Issue 3, pp. 441-467, 2020

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3684621](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684621)

Patent law protects the technical. It is seemingly objective in terminology and application. Yet studies show that males are significantly more likely than females to be the inventors of patented inventions. Patenting is not objective, it is gendered. The reasons for this are multiple and include the fact that patent law itself, including its presumptions and interpretation, is gendered. This article examines how patent law reflects multiple gendered binaries, despite being drafted in ostensibly neutral terms. These serve to favour masculine modes and fields of creation, while ignoring and devaluing feminine knowledge and ways of knowing. We should be concerned that patent law is gendered because patents affect wealth distribution, what is invented and commercialized, and what information and knowledge is disseminated, built upon, and viewed as valuable. Thus, instead of embodying gendered binaries, the

law should reflect a singularity – a unique point, where the system degenerates or diverges to recognize and encourage the multiplicity of ways in which invention and innovation can and do occur, beyond socially constructed binaries.

### **Patents and Control: Ethics and the Patentability of Novel Beings and Advanced Biotechnologies in Europe**

Aisling McMahon (National University of Ireland, Maynooth (NUI Maynooth) – Department of Law)

*Forthcoming: (2021) 21(3) Cambridge Quarterly of Healthcare Ethics*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3662472](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662472)

This article focuses primarily on to what extent novel beings, and particularly, beings which display something akin to human consciousness or agency would be (or should be) patentable in Europe. Patents grant the patent holder a right to exclude others from using the patented invention for the period of patent grant (usually 20 years). This allows the patent holder to control how that invention can or cannot be used by others downstream. Accordingly, the potential for patentability of novel beings gives rise to a myriad of ethical issues including: to what extent is it appropriate for patent holders to retain and exercise patents over ‘novel beings’; how issues of ‘agency’ displayed by any ‘novel beings’ would fit within the current patent framework, if at all; and to what extent existing exclusions from patentability might exclude patents on ‘novel beings’ or whether changes within patent law may be needed if patents over ‘novel beings’ are deemed ethically problematic. This article focuses on such issues, and in doing so, also sheds light on the role of ethical issues within the patenting of advanced biotechnologies more generally.

### **Association for Molecular Pathology v. Myriad Genetics: A Critical Reassessment**

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

*27 Mich. Tech. L. Rev., Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3631901](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631901)

The Supreme Court’s 2013 decision in *Association for Molecular Pathology v. Myriad Genetics* is part of the Court’s recent quartet of patent eligibility decisions, which also includes *Bilski v. Kappos*, *Mayo v. Prometheus* and *Alice v. CLS Bank*. Each of these decisions has significantly shaped the contours of patent eligibility under Section 101 of the Patent Act in ways that have been both applauded and criticized. The *Myriad* case, however, was significant beyond its impact on Section 101 jurisprudence. Perhaps one of the most remarkable things about *Myriad* is that it meant so many different things to so many different people. It was seen, and tried, as a case impacting patient rights, access to healthcare, scientific freedom, and human dignity. In this article, portions of which will appear in a forthcoming book, I offer a close textual analysis of the *Myriad* decision, responding to both its critics and supporters. I then situate *Myriad* within the larger context of biotechnology patenting, the commercialization of publicly funded university research and the U.S. healthcare system. I conclude with observations about the ways that cases like *Myriad* exemplify the manner in which the common law evolves, particularly in areas of rapid technological change.

## Copyright Law

### **Fair Use, the Internet Age, and Rulifying the Blogosphere**

Michael Goodyear (University of Michigan – University of Michigan Law School)

*IDEA: The IP Law Review, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3645065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645065)

The fair use analysis in copyright law is, at present, a confusing and sometimes contradictory entanglement of four factors whose outcome is not guaranteed until it comes before a court *ex post*. Despite the four factors being listed as clearly delineated points in § 107, in reality, these factors have substantial overlap and courts have provided contradictory rulings even in the same circuit. This article builds on the earlier suggestions of Niva Elkin-Koren and Orit Fischman-Afori in suggesting rulification of fair use in specific creative contexts to better distinguish the legal standards for fair use for the population at large. In particular, this article grounds this discussion in a case example of individually published online content, broadly termed blogs for the purposes of this paper, finding, by reviewing all fair use decisions on posted online content, that these decisions are primarily decided by evaluating three factors: trans-formative use, commercial purpose, and market effect. The example of rulifying fair use for blogs should just be the beginning, an example of how the delineation of more concrete fair use rules for different creative mediums would benefit the U.S. population at large.

### **Is There No Way to the Truth? Copyright Liability as a Model for Restricting Fake News**

Michael Goodyear (University of Michigan – University of Michigan Law School)

*Harvard Journal of Law & Technology*, Vol. 34, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3647504](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647504)

A proliferation of fake news has flooded U.S. websites and social media. From misinformation affecting the 2016 election to individuals making profits off of creating false stories, the United States desperately needs a legal response to the fake news crisis. However, U.S. law has effectively forestalled any attempts to bring fake news to heel. The First Amendment has been held to protect fake news. The Communications Decency Act, codified as Section 230, protects online platforms from the remaining potential sources of vicarious liability for fake news. Instead, gradually, self-regulation by websites has started to fill this void.

Proposed solutions have tried to look forward, suggesting revisions to the First Amendment and Communications Decency Act doctrine, or analyzing self-regulation by websites. However, these proposals have ignored an already existing model for regulating unwanted conduct online: the Digital Millennium Copyright Act. The Digital Millennium Copyright Act imposes certain obligations on online service providers to remove copyright infringing content posted on their websites in exchange for a liability safe harbor. While copyright and fake news are different, ten distinct principles can be elucidated from the Digital Millennium Copyright Act. These principles provide insights into how online regulations could advance, whether through websites' own self-regulation, or in codified law if the First Amendment and § 230 regime is relaxed in the future.

### **Long Live the Common Law of Copyright!: Georgia v. Public.Resource.Org., Inc. and the Debate over Judicial Role in Copyright**

Shyamkrishna Balganesh (University of Pennsylvania Law School)

*Columbia Law Review Forum*, Vol. 121, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3677260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677260)

In *Georgia v. Public.Resource.Org, Inc.*, the Supreme Court resurrected a nineteenth century copyright doctrine — the government edicts doctrine — and applied it to statutory annotations prepared by a legislative agency. While the substance of the decision has serious implications for due process and the rule of law, the Court's treatment of the doctrine recognized an invigorated role for courts in the development of copyright law through the use of principled reasoning. In expounding the doctrine, the Court announced a vision for the judicial role in copyright adjudication that is at odds with the dominant

approach under the Copyright Act of 1976, which sees courts as limited to interpreting and deferring to the text of the statute. This Essay unpacks the longstanding debate about judicial role in copyright that manifested itself rather vividly in the majority and dissenting opinions in the case. In the process, it shows how Chief Justice Roberts' opinion for the Court consciously unraveled a delicate — but undesirable — institutional balance that has come to be accepted within the world of copyright law, and imagines the consequences that it might have for the future of copyright adjudication and law-making.

## IP & Trade

### **The TRIPS Agreement Article 73 Security Exceptions and the COVID-19 Pandemic**

Frederick M. Abbott (Florida State University – College of Law)

*Research Paper 116, South Centre, Geneva (August 2020)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3682260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3682260)

The COVID-19 pandemic has caused Governments to contemplate measures to override patents and other intellectual property rights (IPRs) in order to facilitate production and distribution of vaccines, treatments, diagnostics and medical devices. This paper discusses whether the COVID-19 pandemic may be considered an “emergency in international relations” and how WTO Member States may invoke Article 73 (“Security Exceptions”) of the TRIPS Agreement as the legal basis for overriding IPRs otherwise required to be made available or enforced. It concludes that the pandemic constitutes an emergency in international relations within the meaning of Article 73(b)(iii) and that this provision allows Governments to take actions necessary to protect their essential security interests.

### **Copyright Protection in Times of Regional Instability: National Security and the Relevance of the WTO Case Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights**

Giovanni Gruni (ESADE Law School)

*Measures Concerning the Protection of Intellectual Property Rights, 2020*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3658268](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658268)

A recent WTO case on copyright law tells us why the use Donald Trump makes of the GATT national security exception is illegal. I published a brief summary of the case on The IPKat.

### **Analysis of Special 301 Listings, 2009–2020**

Michael Palmedo (American University – Program on Information Justice and Intellectual Property)

*Shamnad Basheer IP/Trade Fellow White Paper, Texas A&M University School of Law, 2020*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3680332](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680332)

Since its inception, the Special 301 Report has been an instrument used by the U.S. Trade Representative (USTR) to pressure foreign nations to change their laws at the behest of American business interests. Policies that allow countries to access lower-priced generic medicines feature prominently in USTR's allegations of inadequate, ineffective protection of intellectual property.

This working paper reviews trends in Special 301 listings over the past 12 years. USTR has reduced the number of countries listed in the Report, but it has been consistent in its responsiveness to country listing requests by the Pharmaceutical Research and Manufacturers of America (PhRMA). This is especially true for the countries prioritized by PhRMA (those which PhRMA asked to have designated a Priority Foreign Country or placed on the Priority Watch List). USTR included between 75% and 100%

of these PhRMA-prioritized countries in each year's Special 301 Report over the period studied. USTR also consistently focused its attention on middle-income countries and populous countries.

USTR has regularly used the report to criticize countries for using TRIPS flexibilities. There has been an increased number of complaints about countries issuing compulsory licenses or adopting pro-compulsory licensing policies. Data exclusivity, patent linkage and the scope of patentability continue to be criticized in the Special 301 Reports. There have been increased complaints against countries for inadequate enforcement of intellectual property that affects pharmaceutical firms, and complaints over allegedly discriminatory market access policies.

## Other IP Topics

### Federal Judge Seeks Patent Cases

Jonas Anderson (American University – Washington College of Law)

Paul R. Gugliuzza (Temple University – James E. Beasley School of Law)

*Temple University Legal Studies Research Paper No. 2020-25*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3668514](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668514)

Imagine the following advertisement popping up on Craigslist: "FEDERAL JUDGE SEEKS PATENT CASES! (Waco) — Former patent litigator, recently appointed to the U.S. District Court for the Western District of Texas, longs for the intellectual challenge of a good patent fight. Can promise special procedural rules, efficient discovery, and speedy trials. Dismissal, stay, or transfer of case extremely unlikely. File in Waco and get the patent court you've always dreamed of!"

That probably seems bizarre. Still — and startlingly — it accurately portrays what's happening right now in the Western District of Texas. One judge, appointed to the court less than two years ago, has been advertising his district — through presentations to patent lawyers, comments to the media, procedures in his courtroom, and decisions in patent cases — as the place to file your patent infringement lawsuit. And he has succeeded. In 2018, the Western District received only 90 patent cases — a mere 2.5% of patent suits nationwide. In 2020, the Western District is on track to receive more than 800 — the most of any district in the country. Importantly, these suits are overwhelmingly filed by so-called patent trolls — entities that don't make any products or provide services but instead exist solely to enforce patents. The centralization of patent cases before a single judge, acting entirely on his own to seek out patent litigation, is facilitated by the Western District's case filing system, which allows plaintiffs to choose not just the court but the specific judge who will hear their case. These dynamics — a judge advertising for patent cases and plaintiffs shopping for that judge — undermine public confidence in the impartiality of the judiciary, make the court an uneven playing field for litigants, and facilitate the nuisance suits patent trolls favor. Two reforms would help solve this problem: first, district judges should — by law — be randomly assigned to cases and, second, venue in patent cases should be tied to geographic divisions within a judicial district, not just the district as a whole.

### Linguistic Metrics for Patent Disclosure: Evidence from University Versus Corporate Patents

Nancy Kong (University of Queensland)

Uwe Dulleck (Queensland University of Technology – School of Economics and Finance)

Adam B. Jaffe (Motu Economic and Public Policy Research; Brandeis University; National Bureau of Economic Research (NBER))

Shupeng Sun (Government of Queensland – Queensland Treasury)

Sowmya Vajjala (N/A)

NBER Working Paper No. w27803

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3692159](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3692159)

This paper proposes a novel approach to measure disclosure in patent applications using algorithms from computational linguistics. Borrowing methods from the literature on second language acquisition, we analyze core linguistic features of 40,949 U.S. applications in three patent categories related to nanotechnology, batteries, and electricity from 2000 to 2019. Relying on the expectation that universities have more incentives to disclose their inventions than corporations for either incentive reasons or for different source documents that patent attorneys can draw on, we confirm the relevance and usefulness of the linguistic measures by showing that university patents are more readable. Combining the multiple measures using principal component analysis, we find that the gap in disclosure is 0.4 SD, with a wider gap between top applicants. Our results do not change after accounting for the heterogeneity of inventions by controlling for cited-patent fixed effects. We also explore whether one pathway by which corporate patents become less readable is use of multiple examples to mask the “best mode” of inventions. By confirming that computational linguistic measures are useful indicators of readability of patents, we suggest that the disclosure function of patents can be explored empirically in a way that has not previously been feasible.

### **Indoor Rock Climbing: The Nuts and Bolts of Routesetting Copyright Protection Post-Star Athletica**

Julie Tamerler (Villanova University – School of Law)

*Jeffrey S. Moorad Sports Law Journal*, Volume 28, Issue 1 (Fall 2020)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665017](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665017)

Indoor rock climbing is a relatively new sport; as a result, many legal issues as applied to the sport have not yet been explored. Because indoor rock climbing is rapidly increasing in popularity, issues like the copyright of indoor rock climbing routes will become relevant to the industry’s legal landscape. The growth of modern indoor rock climbing gyms has put a spotlight on route-setting. Today, it is clear that one of the main ways an indoor rock climbing gym becomes and remains successful is through innovative and sensitive route-setting that provides customers with new and challenging climbing experiences. Route-setting has become its own art form; the route-setter is the artist, the holds are the paint, the blank slab of wall is the canvas, and the climbing customer is the individual experiencing the route-setter’s creation. Despite the fact that indoor rock climbing routes are works of sculptural art, there is no legal scholarship exploring potential copyright protection of these works. As useful articles, indoor rock climbing routes would have to survive a separability analysis to achieve protection for its fixed, artistic elements. However, indoor rock climbing routes currently pass separability analysis under the new standard established by the Supreme Court in *Star Athletica, L.L.C. v. Varsity Brands, Inc* (“*Star Athletica*”), allowing the routes themselves to be eligible for copyright protection.

This comment presents a framework for analyzing the ability to copyright indoor rock climbing routes in light of recent developments established by *Star Athletica* and subsequent cases. Indoor rock climbing routes are eligible for copyright protection as artistic sculptural works. Section II discusses the history of indoor rock climbing and the development of the modern route-setting profession. Section III advances the framework that proves that indoor rock climbing routes are copyright-able, first by discussing the issue of issue articles and separability, then by examining the new test for separability as set forth in *Star Athletica* and its progeny. Section IV discusses the details associated with copyright protection for indoor rock climbing routes, comparing and contrasting literal movement with physical aesthetic similarity. Finally, Section V discusses the future of the indoor rock climbing industry, how copyright will co-exist with the development of the sport, and concludes.

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*The editor would like to acknowledge the contributions of Sherry Zhang.*

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