



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

Antitrust and Competition Issues

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

Jorge L. Contreras, *Intellectual Property Licensing and Transactions: Theory and Practice*, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3695630

This Chapter offers a broad overview of the impact of U.S. antitrust laws on IP licensing and transactions. A basic understanding of antitrust law is critical to the analysis of IP licensing arrangements, whether concerning patents, copyrights or trademarks. This chapter offers a summary of the antitrust doctrines that arise frequently in IP and technology-focused transactions — price fixing and market allocation, resale price maintenance, tying, monopolization, refusals to deal, standard setting and pay-for-delay settlements, with coverage of the major cases and enforcement agency guidance. Antitrust issues also play a role in the analysis of joint ventures, which are discussed in Chapter 26, and IP pools, which are discussed in Chapter 27 (a preview of this topic is presented in Part E below).

Toward the Peaceful Coexistence of Patent and Antitrust Law

Richard Epstein (New York University School of Law)

The Global Antitrust Institute Report on the Digital Economy 11

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733691

This chapter explores the interrelationship between these two basic provisions, both as a matter of general theory and through their development in case law over the past 130 years—which spans multiple eras of technological innovation. It is easy to find cases where patent law appears to move in one direction and antitrust law in the opposite. But as a general matter, this chapter defends the thesis that, as the Federal Circuit has written, “[t]he patent and antitrust laws are complementary, the patent system serving to encourage invention and the bringing of new products to market by adjusting investment-based risk, and the antitrust laws serving to foster industrial competition.” As a descriptive matter, today, this thesis is largely, but not uniformly, respected.

More specifically, the central task of this chapter is to note how the concern with monopolization—explicit in the antitrust laws—plays a powerful, if somewhat concealed, role in the articulation of patent law as well. As is always the case, any concern with monopolization is a two-edged sword: It is always important to make sure that monopoly practices do not go undetected, but it is equally important that the doctrines of both patent and antitrust law do not impose penalties for supposed monopolistic practices that ultimately turn out to be procompetitive.

Technology Economics: Innovation, Licensing, and Antitrust

Luke M. Froeb (Vanderbilt University – Owen Graduate School of Management)

Bernhard Ganglmair (ZEW – Leibniz Centre for European Economic Research – Junior Research Group Competition and Innovation; University of Mannheim – Department of Economics; Mannheim Centre for Competition and Innovation (MaCCI))

Gregory J. Werden (N/A)

Steven Tschantz (Vanderbilt University – Department of Mathematics)

The Global Antitrust Institute Report on the Digital Economy 6

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733674

Public policy toward innovation faces a trade-off: Increasing the compensation of successful inventors increases dynamic efficiency by spurring technological progress, but it decreases static efficiency by enlarging a wedge between price and marginal cost. In making this trade-off, public policy is guided by two insights—economic growth is the prime driver of social welfare gains, and technological progress is the prime driver of economic growth. Patent and copyright law, therefore, were designed to help inventors and authors appropriate a significant share of the value of their inventions and writings. Antitrust law neither revokes nor restricts any right granted by patent law, and antitrust law can contribute little in resolving disputes arising from commitments to license on FRAND terms.

Economic theory and empirical research into innovation and the patent system reveal a complex and varied landscape. Two robust conclusions are that too little is invested in innovation and that both the innovation process and the role of patents in the process vary greatly across industries and inventions. Depending on the precise question posed, theory predicts that monopoly can enhance or retard innovation, and data generally support the hypothesis that both monopolies and unconcentrated markets are relatively inhospitable to innovation. Although patents are critical to innovation in the pharmaceutical and chemical industries, they are unimportant in many industries, and patent protection generally has been found to have no effect on the pace of innovation.

Antitrust, Intellectual Property, and Dynamic Efficiency: An Essay in Honor of Herbert Hovenkamp

Thomas F. Cotter (University of Minnesota Law School)

Concurrences No.3, 2020

Liber Amicorum Herbert Hovenkamp, Nicolas Charbit & Sonia Ahmad eds., Institute for Competition Law, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3687013

This essay argues that, while intellectual property (IP) and antitrust often operate as complementary bodies of law, in some residuum of cases there will be widespread disagreement among forecasters about whether antitrust constraints on the exercise of IP rights are likely to inhibit or promote innovation. Among the most contentious of these at present are cases involving the assertion of FRAND-committed standard-essential patents (SEPs) and, relatedly, joint conduct on the part of firms that belong to standard development organizations (SDOs). To assist policymakers in coming to principled decisions in matters such as these, I propose and defend three guiding principles: (1) do not assume that stronger IP rights/weaker antitrust enforcement necessarily promotes innovation; (2) do

consider whether other bodies of law are up to the task of addressing the potential severity of the harm alleged; and (3) filter out ideology and self-interest as much as possible. Although these recommendations will not reconcile all conflicting views, and may not provide definitive answers regarding whether or how to proceed, I argue that the quality of the ongoing debate would improve if enforcers made an effort honestly to engage them.

Self-Preferencing

Michael A. Salinger (Boston University – Questrom School of Business)

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733688

From the standpoint of competition policy, it might seem desirable to modularize competition to the greatest extent possible so that the best and cheapest products prevail at every stage of a production process and in every component of systems of complementary products. But integration can also create efficiencies – both real and contractual/organizational. Producers at one stage of a value chain often have the greatest incentive and the greatest technical capacity to lower prices or improve products at an adjacent stage. The challenge for public policy is how to trade off the costs of foreclosure resulting from self-preferencing against the efficiencies of integration. Because these trade-offs are complicated, it is perhaps not surprising that there have been pendulum swings in enforcement philosophies and expert opinions. Through the 1960's, antitrust enforcement in the United States was generally hostile to vertical integration. Then, starting in the late 1970's, antitrust enforcers began viewing vertical mergers and vertical integration as being almost entirely benign. In recent years, the pendulum seems to have at least started to swing back as several prominent scholars have argued for a much more aggressive stance against vertical integration and foreclosure. A general theme of this chapter is that despite these swings in opinion, the economics of how to weigh the competing effects on a case-by-case basis is still under-developed. As a result, presumptions play an important role in enforcement. A key question for policy makers is whether there should still be a presumption that the economic relationship between the production of vertically-related and complementary products is fundamentally different from the economic relationship between the production of substitute products. If so, intervention with respect to vertical/complementary mergers, agreements, and expansion should be far more limited than intervention with respect to horizontal mergers, agreements, and (to a lesser extent) expansion.

IP & Litigation

The Effect of New Information on Patent Litigation: Evidence from U.S. Inter Partes Review

Christian Helmers (Santa Clara University – Leavey School of Business; Universidad Carlos III de Madrid)

Brian J. Love (Santa Clara University School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720709

We analyze the effect of new information on the subsequent behavior of litigants in patent cases. A party accused of patent infringement in the U.S. may – in parallel with defending itself in court – additionally challenge the validity of the allegedly infringed patent by petitioning the Patent Trial and Appeal Board (PTAB), an administrative tribunal within the U.S. Patent and Trademark Office. PTAB validity challenges generate new information at several points in time, and this new information can directly affect the district court case. We study this effect empirically, with a focus on settlement. Using data on U.S. district court cases and PTAB validity challenges initiated between 2012 and 2016, we examine each of the three main events that comprise a PTAB proceeding: (i) the filing of a petition to challenge a patent's validity, (ii) PTAB's decision to grant or deny the petition based on its assessment

of a “reasonable likelihood” of invalidity, and (iii) PTAB’s final determination of the patent’s validity. We find that all three decision points have large effects on the settlement of parallel court proceedings. While the filing of a petition increases the likelihood of settlement, we find to the contrary that PTAB’s preliminary assessment of validity reduces the odds of settlement. Moreover, we find that the effect of the PTAB’s final decision depends on whether the patent is determined to be valid or (partially) invalid.

PTAB Challenges and Innovation: A Probabilistic Approach

Matteo Sabattini (Ericsson Inc.)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668216

Patents exist to provide our country’s innovators with the ability to be compensated for the important technological contributions that they create in exchange for the disclosure of their inventions. This is a concept so important that our Nation’s founding fathers enshrined patents in the US Constitution. However, in recent years, and especially after the America Invents Act (AIA) was enacted in 2011 and the Patent Trial and Appeals Board (PTAB) created, it became suddenly much easier to challenge the validity of patents in multiple venues and at multiple times.

The goal of the PTAB, and in particular of Inter Partes Reviews (IPRs), was to create a cheaper, alternative option to litigation. Some have argued that the PTAB helped to provide a check on patents that had been issued prior to the USPTO instituting an improved system of checks and balances on patent quality prior to issuance. However, in some cases, the PTAB has been used for a more nefarious intent and has simply become a burdensome overlay to any litigation, and sometimes used offensively even before any assertion or licensing demand is brought by a patent owner.

While some argue that the PTAB is a useful, sometimes necessary tool to ensure patent quality, others have argued that the very high invalidity rates show a bias against patent owners in favor of those challenging their patents. One of the main problems at the heart of the IPR system is the possibility to challenge, an endless number of times, the same patent in light of newly found prior art. While we recognize that sometimes more petitions are justified and possibly necessary, and the fact that a patent is challenged multiple times is not per se an abuse of the system, one should be mindful of the effects of allowing a very large number of serial challenges against the same patent or claims. The issue of many multiple challenges undermines predictability in the innovation community, and defending from many multiple petitions also represents a significant cost for patent owners, further disincentivizing innovation.

However, as we will explain in this short article, the lack of predictability and financial burden are not the only issues faced by patent owners and innovators in general. In fact, there is a more subtle and yet significant effect on the innovation ecosystem in allowing parties to challenge a patent an inexhaustible number of times: Endless challenges to the same patent, even if each individual challenge is poor, will eventually lead to a denial of that patent right. If any patent can be killed in this manner, a fair question can be asked whether our patent system as constructed still upholds its constitutional directive to encourage innovation.

We will mathematically prove below that given even a small probability to invalidate a patent with multiple poor challenges, all patents can be invalidated. In practice, since arguments based on a patent’s “obviousness” actually are endless (as one example), then given enough chances to bring those arguments, no patent can survive, no matter how poor each obviousness argument actually is individually.

IP & Licensing

Per Unit and Ad Valorem Royalties in a Patent Licensing Game

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Rupayan Pal (Indira Gandhi Institute of Development Research)

Marcella Scrimatore (Università di Lecce – Dipartimento di Scienze Economiche e Matematico-Statistiche)

FEEM Working Paper No. 14. 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719794

In a context of product innovation, we study two-part tariff licensing between a patentee and a potential rival which compete in a differentiated product market characterized by network externalities. The latter are shown to crucially affect the relative profitability of Cournot vs. Bertrand when a per unit royalty is applied. By contrast, we find that Cournot yields higher profits than Bertrand under ad valorem royalties, regardless of the strength of network effects.

An Economic Model of Patent Exhaustion

Olena Ivus (Smith School of Business)

Edwin Lai (Hong Kong University of Science & Technology (HKUST))

Ted Sichelman (University of San Diego)

Journal of Economics & Management Strategy, Vol. 29, Issue 4, pp. 816–833, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719217

The doctrine of patent exhaustion implies that the authorized sale of patented goods “exhausts” the patent rights in the goods sold and precludes additional license fees from downstream buyers. Courts have considered absolute exhaustion, in which the patent owner forfeits all rights upon an authorized sale, and presumptive exhaustion, in which the patent owner may opt-out of exhaustion via contract. This paper offers the first economic model of domestic patent exhaustion that incorporates transaction costs in licensing downstream buyers and considers how the shift from absolute to presumptive exhaustion affects social welfare. We show that when transaction costs are high, the patent owner has no incentive to individually license downstream users, and absolute and presumptive exhaustion regimes are equivalent. But when transaction costs are at the intermediate level, the patent owner engages in mixed licensing, individually licensing high-valuation buyers and uniformly licensing low-valuation buyers. Presumptive exhaustion is socially optimal when social benefits from buyer-specific pricing outweigh social costs from transaction cost frictions in individualized licensing, which requires sufficiently low transaction costs.

Patent Counting and the 'Top-Down' Approach to Patent Valuations: An Economic and Public Policy Appraisal of Reasonable Royalties

David Teece (Institute for Business Innovation)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3691721

In many circumstances it is helpful, and sometimes necessary, to assess (possibly even to quantify) the technological prowess of a business enterprise, either overall or with respect to particular fields of application, or possibly with respect to the firm's relative position in an industry. In such circumstances, it is tempting to use as a measure the number of patents that has been granted to a firm. However, patent counts are an imperfect and unreliable metric. Using them may create an aura of accuracy, but it is false (scientific) accuracy for the reasons discussed in this article. In particular, the “top-down” approach to the valuation of standard-essential patents (SEPs), which relies heavily on patent counting, is a poor surrogate for the determination of the value of patented technologies.

I will start with some basics. In scientific inquiry, precision refers to how close the measurement of a variable is to what is being measured. Precision is, however, independent of accuracy. Indeed, it is possible to be precise but highly inaccurate. Accuracy is, of course, more important than precision. In this paper, I will show that patent counting, while having the possibility of being precise, does not always meet that criterion in part because of ambiguities as to scope. For instance, sometimes standards are at issue with patents “reading on” or being “essential” to one or more technical standards. However, there may be ambiguities around how many patents in a given portfolio are in fact essential, versus simply declared essential by the owner or some third party.

In this article, I make two suggestions. First, patent-count metrics are at best poor proxies of technological strength or value. This is not just because of inaccurate patent counts in the numerator or denominator of some index. It is also because there is at best only a weak connection between even well-specified patent indices and underlying economic value of a patent or patent portfolio. It is often the case that one will have to look downstream to the user to figure out the incremental value that the technology yields to the consumer.

Second, when it comes to valuing intellectual property that “reads on” a standard, the numerical proportionality of standard-essential patents (SEPs) is a bogus measure. It is unlikely to measure the relative value of patents, let alone the value of technology. The problem is compounded because numerical proportionality requires the determination of a “total value” associated with all patents that “read on” a standard, which has typically been arrived at arbitrarily.

Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727085

Do owners of standard-essential patents (SEPs) “holdup” companies that produce standard-compliant products? To explore this question, we use detailed information from the dockets of all U.S. patent cases filed 2010-2019 that assert or challenge SEPs to construct measures of opportunistic conduct by SEP licensors, including actions that took place before the lawsuit was filed. We find evidence of opportunistic behavior by the SEP enforcer in at least 75% of SEP assertions in court, and we analyze various factors that determine which opportunistic behaviors SEP enforcers rely on. We also show that opportunistic behavior can affect case outcomes, although the effect on settlement is ambiguous. Some behaviors increase the likelihood of a settlement, while others decrease it.

Standard Development Organizations, Intellectual Property, and Standardization: Fundamentals and Recent Proposals

Joanna Tsai (Charles River Associates)

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733732

This chapter begins with a primer on SDOs in Section I, followed by a review of the competition policy debate on SDOs and intellectual property rights in Section II. In Section III, I summarize some of the recent proposals that relate to standards and interoperability and offer my thoughts on those proposals.

IP & Innovation

Artificial Intelligence Inventions & Patent Disclosure

Tabrez Ebrahim (California Western School of Law)

Penn State Law Review, Vol. 125, No. 1, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722720

Artificial intelligence (“AI”) has attracted significant attention and has imposed challenges for society. Yet surprisingly, scholars have paid little attention to the impediments AI imposes on patent law’s disclosure function from the lenses of theory and policy. Patents are conditioned on inventors describing their inventions, but the inner workings and the use of AI in the inventive process are not properly understood or are largely unknown. The lack of transparency of the parameters of the AI inventive process or the use of AI makes it difficult to enable a future use of AI to achieve the same end state. While patent law’s enablement doctrine focuses on the particular result of the invention process, in contrast, this Article suggests that AI presents a lack of transparency and difficulty in replication that profoundly and fundamentally challenge disclosure theory in patent law. A reasonable onlooker or a patent examiner may find it difficult to explain the inner workings of AI. But even more pressing is a non-detection problem—an overall lack of disclosure of unidentified AI inventions, or knowing whether the particular end state was produced by the use of AI.

The complexities of AI require enhancing the disclosure requirement since the peculiar characteristics of the end state cannot be described by the inventive process that produced it. This Article introduces a taxonomy of AI and argues that an enhanced AI patent disclosure requirement mitigates concerns surrounding the explainability of AI-based tools and the inherent inscrutability of AI-generated output. Such emphasis of patent disclosure for AI may steer some inventors toward trade secrecy and push others to seek patent protection against would-be patent infringers despite added ex ante costs and efforts. Utilitarian and Lockean theories suggest justifications for enhanced AI patent disclosure while recognizing some objections. Turning to the prescriptive, this Article proposes and assesses, as means for achieving enhanced disclosure, a variety of disclosure-specific incentives and data deposits for AI. It concludes by offering insights for innovation and for a future empirical study to verify its theoretical underpinnings.

Attracting Profit Shifting or Fostering Innovation? On Patent Boxes and R&D Subsidies

Andreas Haufler (University of Munich – Seminar for Economic Policy; CESifo (Center for Economic Studies and Ifo Institute))

Dirk Schindler (Erasmus School of Economics; CESifo (Center for Economic Studies and Ifo Institute))
CESifo Working Paper No. 8640

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720397

Many countries have introduced patent box regimes in recent years, offering a reduced tax rate to businesses for their IP-related income. Patent boxes are supposed to increase innovative activity, but they are also suspected to aim at attracting inward profit shifting from multinational firms. In this paper, we analyze the effects of patent box regimes when countries can simultaneously use patent boxes and R&D subsidies to promote innovation. We show that when countries set their tax policies unilaterally, innovation is fostered, at the margin, only by the R&D subsidy. The patent box tax rate is instead targeted at attracting international profit shifting, and it is optimally set below the corporate tax rate. With cooperative tax setting, the optimal royalty tax rate is instead equal to, or even above, the statutory corporation tax. Hence, patent box regimes emerge in the decentralized policy equilibrium, but never under policy coordination. Enforcing a nexus principle, as proposed by the OECD, is helpful to mitigate harmful competition for paper profits, but it comes at the price of increased strategic competition in direct R&D subsidies to attract physical R&D units instead of intangible patents.

Identifying Crisis-Critical Intellectual Property Challenges during the COVID-19 Pandemic: A Scenario Analysis and Conceptual Extrapolation of Innovation Ecosystem Dynamics Using a Visual Mapping Approach

Alexander Moerchel (University of Cambridge; Institute for Manufacturing; Centre for Technology Management)

Frank Tietze (University of Cambridge)

Leonidas Aristodemou (University of Cambridge)

Pratheeba Vimalnath (University of Cambridge)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715374

The COVID-19 pandemic exposed firms, organisations and their respective supply chains which are directly involved in the manufacturing of products that are critical to alleviating the effects of the health crisis, collectively referred to as the Crisis-Critical Sector, to unprecedented challenges. Firms from other sectors, such as automotive, luxury and home appliances, have rushed into the Crisis-Critical Sector in order to support the effort to upscale incumbent manufacturing capacities, thereby introducing Intellectual Property (IP) related dynamics and challenges. We apply an innovation ecosystem perspective on the Crisis-Critical Sector and adopt a novel visual mapping approach to identify IP associated challenges and IP specific dynamic developments during and potentially beyond the crisis. In this paper, we add methodologically by devising and testing a visual approach to capturing IP related dynamics in evolving innovation ecosystems and contribute to literature on IP management in the open innovation context by proposing paragon IP as a novel IP type. Finally, we also deduce managerial implications for IP management practitioners at both incumbent firms and new entrants for navigating innovation ecosystems subject to crisis-induced dynamic shifts.

IP Law & Policy

Extraterritorial Damages in Patent Law

Thomas F. Cotter (University of Minnesota Law School)

39 Cardozo Arts & Entertainment Law Journal (2021 Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3705703

In 2018, the Supreme Court in *WesternGeco LLC v. ION Geophysical Corp.* held that the owner of a U.S. patent could recover its lost profit on sales it would have made outside the United States, but for the defendant's violation of 35 U.S.C. § 271(f)(2)—a rarely-used provision of the Patent Act that prohibits, subject to certain conditions, the export of patented components for combination abroad. The Court left open the question of whether owners also can recover extraterritorial damages resulting from the (much more common) setting in which the defendant is accused of an initial act of making, using, or selling the invention within the United States, in violation of § 271(a). Consideration of this question exposes an ostensible tension between two long-established principles of U.S. patent law: first, that owners are, in general, entitled to full compensation for their losses; and second, that patent rights are territorial, that is, unenforceable against conduct occurring outside a nation's borders.

In this Article, I argue that allowing patent owners to recover damages for extraterritorial losses stemming from violations of § 271(a) does not, in fact, undermine the territoriality principle, as long as courts are consistent in their application of three limiting principles. The first is that the domestic infringement must be the cause-in-fact (or "but-for" cause) of the defendant's subsequent foreign sales. While this requirement might seem obvious, in the present context it means that, if the defendant could have avoided infringing the U.S. patent by outsourcing production, then as a matter of economic logic the domestic infringement is not a cause-in-fact of the extraterritorial sales, and at most the patent

owner is entitled to a royalty reflecting the lower cost, if any, of domestic manufacture. Second, even if the domestic infringement is the cause-in-fact of foreign sales, the patent owner cannot recover damages unless those sales also are proximately caused by the domestic infringement. Contrary to the views of some commentators, however, there is nothing inherently unforeseeable, indirect, remote, or speculative about foreign sales tied to domestic infringement, and no sound public policy reason for categorically excluding them from consideration. The third principle is that courts should not compensate patent owners twice for the same loss. Fortunately, courts in the U.S. and elsewhere have considerable experience applying, under a range of circumstances, the “single recovery” rule (otherwise known as the rule against double recovery). Taken together, application of these principles should enable courts to avoid the parade of horrors that some commentators fear will result from any slackening of the territoriality principle.

The Harmonization Myth in International Intellectual Property Law

Sarah R. Wasserman Rajec (William & Mary Law School)

Arizona Law Review, Vol. 62, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699873

There is a dominant narrative in international intellectual property (“IP”) law of ever-increasing harmonization. This narrative has been deployed in ways descriptive, prescriptive, and instrumental: approximating the historical trend, providing justification, and establishing the path forward. Appeals to harmonization are attractive. They evoke a worldwide partnership and shared sacrifice to meet the goals of innovation and access to technology through certainty, efficiency, and increased competition through lowered trade barriers. Countries with strong IP protections consistently and successfully tout the importance of certainty and lower trade barriers when seeking new and stronger protections from countries with lower levels of protection. Yet the harmonization narrative is a myth. Harmonization can account for only some attributes of international IP law development, and even those are often better explained by a maximalist account of IP protection.

Maximization of IP rights better explains much of the substance of international IP law development, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which sets floors — but not ceilings — for IP protections. Maximization is particularly evident in the forum-shifting behavior that has resulted in a proliferation of IP commitments in investment, bilateral, and regional trade treaties in the years since the TRIPS Agreement went into effect. These commitments often increase IP protection in signatory countries in ways that bring them out of harmony with the majority of the world. As a result, prior commitments to harmonization are discarded for maximization.

Copyright Law

Artificial Creativity? A Case Against Copyright Protection for AI Generated Works

Patrick Zurth (Ludwig Maximilian University of Munich (LMU))

UCLA Journal of Law & Technology, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707651

Today, many areas of our daily lives are determined by artificial intelligence (AI). Machines program software, translate texts rapidly, create beautiful images, and design fashion efficiently. They are capable of superhuman performances. And finally, they make the impression of boundless creativity. AI's achievements in traditional areas of copyright subject matters inevitably raise the question of legal protection through an exclusive right. This paper will first expound various accomplishments of AI technology and outline the legal status quo. Subsequently, it will discuss potential copyright protection mainly from the perspective of creativity. Then, the paper will also address other arguments put forward in the discussion on the protection of AI products, such as the economic aspects of incentive and market failure. The paper contemplates the issue from an international perspective and will conclude that neither copyright nor other similar protection rights, i.e. sui generis rights (which already exist for different subject matters, for example, in Europe), should be implemented. This finding holds true regardless of the legal jurisdiction, may it be common law or civil law.

'Fair Use' through Fundamental Rights: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations

Christophe Geiger (Université de Strasbourg – CEIPI)

in: S. Balganesch, W.L. Ng-Loy and H. Sun (eds.), "The Cambridge Handbook of Copyright Limitations and Exceptions", Cambridge, Cambridge University Press, 2020, 174 (forthcoming)

Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2020-06

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3725013

This chapter discusses the evolution in jurisprudential understanding of the relationship between copyright and freedom of artistic expression in the European Union. It demonstrates how courts in France and several other EU member states have accepted a "fair use" approach that applies fundamental rights as external limitations to copyright law, in compliance with the case law of the European Court of Human Rights but contrasting with the recent conflicting position of the Court of Justice of the European Union. The chapter first analyses the application of freedom of artistic expression to copyright law on a case-by-case basis and shows that, although long contested, such an approach is now mandated by EU primary law, thus "flexibilizing" significantly the legal framework in this area. It then examines the balancing act between fundamental rights and copyright, with particular attention paid to the weight the judiciary should afford freedom of artistic expression versus copyright law in cases of creative appropriation, in order to comply with the obligations resulting from European, national, and international human rights provisions. Finally, the chapter concludes with a discussion and evaluation of the growing need for legislative reform to render freedom of artistic expression fully compatible with copyright law in the context of creative reuses of protected works.

Location, Location, Location! Copyright Content Moderation at Non-content Layers

Sebastian Felix Schwemer (Centre for Information and Innovation Law (CIIR))

in: Rosati, E. (2021). Handbook of European Copyright Law, Routledge. (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3688204

In the moderation and enforcement of copyright content, online platforms as well as internet access service providers play a prominent role. This contribution looks at less prominently addressed "layers" of the internet, namely in relation to the addressing system in form of domain name system (DNS). It first looks at the functioning of the DNS and its location within the content blocking landscape, before

contrasting the DNS with linking, which is well-explored in the copyright jurisprudence and literature, in order to shed light on the role of the DNS in relation to copyright-infringing material. It then turns towards the liability exemption regime of the E-Commerce Directive and the cases of IP address rental and DNS-based content delivery networks. Finally, it looks at the practical role of registration data in the enforcement of copyright and scarce information on “voluntary” arrangements at the DNS-level. The “location” layer of the internet is, compared to online platforms, “far” from copyright-infringing content. Currently, the public consultation in connection with the ongoing review of the E-Commerce Directive under the working title Digital Services Act is touching upon the DNS space. Traditionally, the DNS has not featured prominently in copyright-enforcement debates and it would be wrong to see a prominent role for the DNS going forward. Whereas the “location” layer might be appealing for enforcement purposes, issues and concerns of DNS blocking are manifold and can have serious repercussions on fundamental rights. Yet, already today, there exist voluntary arrangements for the moderation or enforcement of copyright content and the current discussions around the Digital Services Act might be the right place to expand transparency and accountability principles beyond the well-discussed platform enforcement also in the less visible layer of voluntary moderation or enforcement at the “location” layer.

Other IP Topics

COVID-19: Hope for a New World of IP?

Matthieu Dhenne (Max Planck Institute for Innovation and Competition)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3714584

The COVID-19 pandemic is having a two-fold impact on the world of IP: after an initial retreat towards the classic utilitarian model, focused on the utility of property to its holder, the modern utilitarian model, focused on societal utilities of property, is rising in such a way that IP could now, more than ever, constitute a geopolitical tool as much as a potential economic lever.

Information Asymmetry and the Inefficiency of Informal IP Strategies Within Employment Relationships

Runhua Wang (Chicago-Kent College of Law)

Technological Forecasting & Social Change (forthcoming 2021)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697163

Employee mobility and betrayal increase the risks of disclosing unpublished technical information. This study builds a theoretical foundation for the loss of unpublished technical information regarding human capital. It analyzes the inefficiency of informal intellectual property (“IP”) strategies, which include non-disclosure agreements (“NDAs”), covenants not to compete (“CNCs”), and trade secrets, from the maximum probable loss approach. It bridges the legal literature and the economics literature by emphasizing and explaining the information asymmetries in employment relationships regarding the informal IP strategies. NDAs need to be supplemented by CNCs or trade secret law. Enforceable CNCs and trade secrets have a reward function, but trade secrets are more efficient in informal IP management and innovation. Beyond the legal risks imposed by informal IP, companies should actively improve employee loyalty and their security culture through employee management.

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