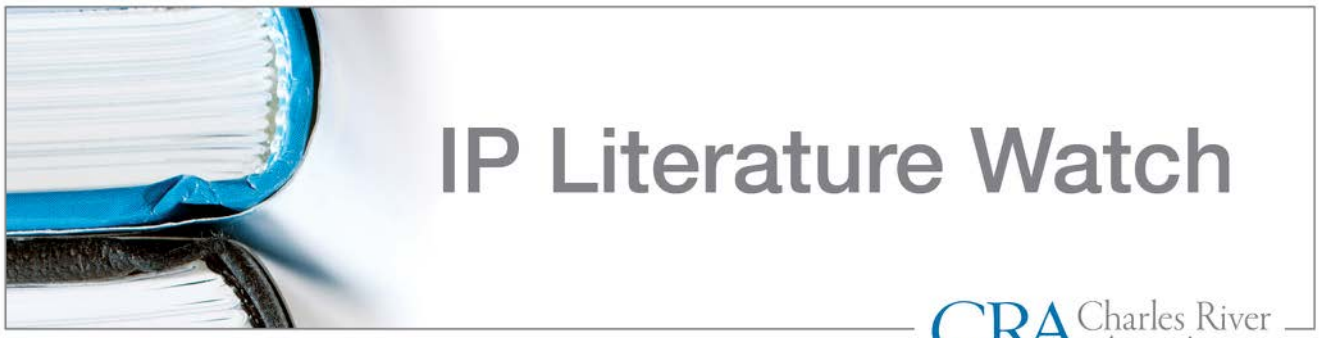

January 2021

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

Hacking Antitrust: Competition Policy and the Computer Fraud and Abuse Act

Charles Duan (R Street Institute)
Colorado Technology Law Journal, Forthcoming, Vol. 19.2, Spring 2021
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707016

The Computer Fraud and Abuse Act, a federal computer trespass statute that prohibits accessing a computer "without authorization or exceeding authorized access," has often been criticized for clashing with online norms, overcriminalizing common behavior, and infringing freedom of expression interests. These controversies over the CFAA have raised difficult questions about how the statute is to be interpreted, with courts of appeals split on the proper construction and the Supreme Court set to consider the law this Term.

This article considers the CFAA in a new light, namely its effects on competition. Rather than merely preventing injurious trespass upon computers, the CFAA has become a favorite legal tool for dominant firms in the computer services industry to suppress competition, expand their market control, and impose transaction costs that limit consumer choice. To explore how the CFAA implicates competition, two novel approaches are used. First, this article compares prior uses of the CFAA to competition issues identified in the computer industry and other fields. This comparison reveals that the CFAA has the ability to insulate from legal scrutiny activity that at a minimum raises serious questions about negative effects on competition. Second, the article draws upon the theory and law of intellectual property, in particular trade secrets and copyright. Because it protects information but lacks the competition-protective features of copyrights and trade secrets, the CFAA essentially creates an ad hoc intellectual property regime that enables the improper suppression of competition.

Insofar as Congress presumably did not intend the CFAA to be an anticompetitive legal tool, the question is how to avoid this result. This article posits that the anticompetitive consequences of the CFAA can be avoided if the law is narrowly construed such that access "without authorization" does not include violations of restrictions on how accessed data is subsequently used. At least from a competition policy perspective, then, a narrow construction is favorable over the broad one.

IP & Litigation

Deconfounding and Sandboxing Patent Litigation with a Specialized Patent Trial Court

Jeremy Bock (Tulane University Law School)
Maryland Law Review, Vol. 80 (2021, Forthcoming)
Tulane Public Law Research Paper No. 20-16
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747411

According to a recent study, patent litigation has been the target of multiple reform efforts over the past several decades, with mixed results that have left its fundamental dynamics—and problems—stubbornly intact. To make patent litigation more amenable to diagnosis and treatment, this Article proposes setting up a single, specialized Article III patent trial court that has exclusive original jurisdiction over patent cases and is empowered to promulgate its own rules of practice and procedure. Although the suggestion to set up a specialized patent trial court is not new, the existing rationales for doing so focus primarily on enhancing the quality of adjudication and eliminating forum shopping. But the literature has overlooked other potential benefits of such a court. Specifically, it can provide a controlled environment that could: (1) improve the ability of judges and policymakers to diagnose problems in patent litigation by removing certain variables, keeping other variables constant, or mitigating their variance (e.g., in the procedural rules, venue, trial judge experience), thereby decreasing the number and influence of potential confounders; and (2) allow for "sandboxing," which can facilitate the adoption of reforms and expand the universe of solutions because the impact of a change that could materially alter the dynamics of patent litigation (and the risk of failure) may remain localized without affecting other parts of the federal court system or raise trans-substantivity concerns. More importantly, the controlled environment provided by a specialized trial court may make it easier to have an iterative diagnosis-treatment cycle, which is necessary for a complex system (like patent litigation) where the initial attempt at diagnosis or reform is unlikely to yield a definitive answer or a lasting solution. It is expected that the diagnostic- and reform-facilitating benefits of a specialized trial court—when aggregated with the other theorized benefits of specialized courts suggested in the literature—could outweigh the potential downsides, such as a lack of percolation, susceptibility to capture, and tunnel vision from the loss of the generalist perspective.

Patent Trolls and Capital Structure Decisions in High-Tech Firms

Ran Duan (University of Rochester – Simon Business School)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730425

Under the growing threat of patent trolls, high-tech firms face substantial legal fees, increased cash flow volatility, and greater expected costs of distress. I show that the exposure to patent litigation leads to overly conservative capital structures in high-tech firms. My identification exploits a 2017 U.S. Supreme Court decision limiting the ability of patent trolls to seek favorable venue outside the defendant's incorporating state. Following the decision, firms incorporated in states with strong anti-patent troll laws increased leverage. Treatment effects are stronger for high-tech firms, the premier targets of patent trolls. Decreased cash flow volatility, especially in treated firms closer to financial distress, provides a key channel for my results.

IP & Licensing

Licensing Life-Saving Drugs for Developing Countries: Evidence from the Medicines Patent Pool

Alberto Galasso (University of Toronto – Strategic Management)
Mark Schankerman (London School of Economics & Political Science (LSE) – London School of Economics)
CEPR Discussion Paper No. DP15544
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3753944

We study the effects of a patent pool on the licensing and adoption of life-saving drugs in low- and middle-income countries. Using data on licensing and sales for HIV, hepatitis C and tuberculosis drugs, we show that there is an immediate and large increase in licensing by generic firms when a patent is included in the Medicines Patent Pool (MPP). This finding is robust to identification strategies to deal with endogeneity of MPP patents and countries. The impact of the MPP is especially large for small, non-Sub-Saharan countries. The impact on actual entry and sales, however, is much smaller than on licensing, which is due to geographic bundling of licenses by the MPP. More broadly, the paper highlights the potential of pools in promoting technology diffusion of biomedical innovation.

IPR Policy As Strategy – The Battle To Define the Meaning of FRAND

Bowman Heiden (Center for Intellectual Property – Chalmers University of Technology, University of Gothenburg, and Norwegian University of Science and Technology; University of California, Berkeley – Coleman Fung Institute for Engineering Leadership)
Heiden, B. (2020). IPR Policy as Strategy: The Battle to Define the Meaning of FRAND. Antitrust Chronicle, March vol., Competition Policy International
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3722424

The current contentions over SEP licensing in mobile telecommunications is primarily a result of the success of standardization to build a multi-trillion-dollar market. This success has generated a large economic surplus, whose distribution among different actors in the value chain is the focus of these contentions. This article illustrates the battle among market actors to define the meaning of FRAND through policy interventions that seek to change the rules of the game in alignment with their strategic interests. This article takes a first step towards building an operative model to describe the political processes behind the construction of the meaning of FRAND by defining the self-assertive interests, key normative concepts and claims, and legitimizing arenas where the concept of FRAND is actively socially constructed.

IP & Innovation

The Missing 15 Percent of Patent Citations

Cyril Verluise (Paris School of Economics (PSE); Collège de France)
Gabriele Cristelli (Ecole Polytechnique Fédérale de Lausanne)
Kyle Higham (Hitotsubashi University – Institute of Innovation Research)
Gaétan de Rassenfosse (Ecole Polytechnique Fédérale de Lausanne)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3754772

Patent citations are one of the most commonly-used metrics in the innovation literature. Leading uses of patent-to-patent citations are associated with the quantification of inventions' quality and the measurement of knowledge flows. Due to their widespread availability, scholars have exploited citations listed on the front-page of patent documents. Citations appearing in the full-text of patent documents have been neglected. We apply modern machine learning methods to extract these citations from the text of USPTO patent documents. Overall, we are able to recover an additional 15 percent of patent citations that could not be found using only front-page data. We show that 'in-text' citations bring a different type of information compared to front-page citations. They exhibit higher text-similarity to the citing patents and alter the ranking of patent importance.

Intellectual Property Rights, Holdup, and the Incentives for Innovation Disclosure

Chris Armstrong (University of Pennsylvania – Accounting Department)
Stephen Glaeser (University of North Carolina (UNC) at Chapel Hill – Accounting Area)
Stella Y. Park (University of Pennsylvania – The Wharton School)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724041

We study how the assignment of property rights between employees and their employers influences disclosures that reveal the productivity and ability of individual employees. To do so, we examine the effect of a court ruling that significantly shifted the assignment of intellectual property rights from inventors to their employers, but that was otherwise likely exogenous with respect to disclosure. Using a within-firm-year difference-in-differences design estimated across a sample of multiple firms, we find that firms accelerate their patent disclosures for innovations created by their inventors affected by the ruling, relative to their patent disclosures for innovations created by their unaffected inventors. Our results suggest that the assignment of intellectual property rights and the potential for hold up problems between employees and their employers can affect disclosure decisions.

Are Works of Artificial Intelligence in Need for Further Protection?

Sarah Legner (University of Konstanz)
E.I.P.R. 2021, 43:2 (Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3735360

Due to technological advancement artificial intelligence can create works of art and literature, which easily meet the threshold of creativity copyright laws demand for protection. Traditionally, however, copyright legislation, notably in continental Europe, focuses on work created and conveyed by the human spirit. The missing protection of machined-authored work has led to the question of whether the legal framework still meets the spirit of the time, or rather, needs to be adjusted to face the spread of creative artificial intelligence. This opinion considers if free access to machine-made work should be constrained.

IP Law & Policy

The Distributive Effects of IP Registration

Miriam Marcowitz-Bitton (Bar-Ilan University – Faculty of Law)
Emily Michiko Morris (Penn State Dickinson Law)
Stanford Technology Law Review, Vol. 23, 2020
Bar Ilan University Faculty of Law Research Paper No. 21-01
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3770641

Although the law often seeks to level the playing field, all too often the law has the opposite effect and tilts the playing field in favor of some over others.

Intellectual property law is no different. This article focuses in particular on the registration of intellectual property (IP) rights, which has long been a prerequisite for full protection under patent, trademark, and copyright law. Registering IP rights yields significant advantages, but it also imposes significant costs, which in turn may create distributive effects by hindering some more than others. Acknowledging IP rights without registration can therefore be a more egalitarian way of protecting innovation and creativity.

Indeed, some forms of IP—specifically copyright and trademark—allow for both registered and unregistered rights. Yet this article is the first to explore the distributive implications of such two-tiered regimes. On the one hand, register-ing IP rights helps provide the public with notice of those rights and their (approximate) boundaries. Some registration systems, such as those in U.S. patent and trademark law, also examine whether the work in question substantively qualifies for protection. On the other hand, registration of IP rights can be not only a complex and costly process (particularly for patent rights) but also one fraught with inherent biases. Requiring registration of IP rights therefore has serious negative implications for women, racial minorities, and other disadvantaged creators. Protection of IP rights without registration, by contrast, gives creators of innovative works greater access to IP protections and the consequent possibility of leveraging the value of their own works.

Until the gender, racial, economic, and other gaps in IP rights are remedied, maintaining a two-tiered regime of both registered and unregistered rights for all forms of IP alongside minimizing the gaps between registered and unregistered rights offers a promising way to level the playing field for creators of protectable works. We therefore propose not only more equality in the treatment of registered and unregistered rights in copyright and trademark but also the creation of an unregistered rights regime in patent law to provide automatic rights in patentable inventions, albeit for a very short period of time and only against direct copying. These measures, in combination with other efforts to level the playing field for creators, could go a long way toward a more egalitarian distribution of benefits from innovation and creativity.

Rules to Bind You: Problems with the USPTO's PTAB Rulemaking Procedures

Jonathan Stroud (Unified Patents, LLC)
Andrew Dietrick (American University Washington College of Law)
New Mexico Law Review (Forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3737709

Despite its size and economic impact, the United States Patent and Trademark Office (USPTO) has historically been recognized as less than a full administrative agency possessing substantive rulemaking authority—unlike, say, the Food and Drug Administration, the Environmental Protection Agency, or the Securities and Exchange Commission. Following the passage of the sweeping America Invents Act (AIA) in 2011 and the Supreme Court's decisions in Cuozzo Speed Technologies, LLC v. Lee and SAS Institute, LLC v. Iancu, it is clear that the USPTO is no exception and is an agency like any other, has Congressional authority to promulgate substantive rules, and is bound to the same Administrative

Procedures Act (APA) procedural safeguards as any other arm of the administrative state. Yet the USPTO has continued to routinely issue precedential rules and take significant action with substantive effect, calling them guidance, policy documents, or administrative rulings, and it has done so without fully complying with the APA's notice and comment requirements, seeking stakeholder input, or properly noticing the business communities those rules are set to affect. That must change. Like any agency, it cannot act against the will of Congress, stakeholders, or the Courts without observing the strictures and constraints required by law.

This Article analyzes the some of the recent rules, guidance documents, policy-based administrative decisions, and rulemaking procedures used by the USPTO, and concludes that the USPTO is improperly promulgating substantive rules sub rosa via, inter alia, updates to the Trial Practice Guide (TPG), an ostensibly nonbinding document that controls many broad substantive and procedural aspects of the Patent Trial and Appeal Board (PTAB), and in doing so, avoids appellate, Congressional, or stakeholder review of such decisions. This Article will also look to the consequences of such improper substantive rulemaking and, as an example, analyze whether the 2018 TPG Update complies with the Paperwork Reduction Act of 1995 and Executive Orders 12,866 and 13,771.

Unregistered Patents

Miriam Marcowitz-Bitton (Bar-Ilan University – Faculty of Law)
Emily Michiko Morris (Penn State Dickinson Law)
Washington Law Review, Forthcoming
Bar Ilan University Faculty of Law Research Paper No. 21-02
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3731295

Although all should be treated equally under the law, patent law has long been known to favor some less than others. Patentable technology is highly heterogeneous, covering everything from minute improvements in electronics to pioneering new artificial organs, but patent protection itself is purely a one-size-fits-all system. Patents thus over-reward some while under-rewarding others. On the one hand, patents over-reward low-investment, low-value inventions by granting them the same twenty-year term of protection as those that required much higher investments and yield much higher social value. The resulting glut of low-quality patents has contributed greatly to the "patent crisis" of opportunistic "patent trolls," heightened transaction costs, and costly litigation that have ultimately stalled innovation. On the other hand, patents also under-reward in two significant ways. First, patents often fail to give some high-investment, high-value inventions enough protection. Second, many inventors are shut out from patent protection altogether if they lack the resources necessary to navigate the patent system's costly, complex, and frequently biased examination process. This latter phenomenon disproportionately affects female and minority inventors, among others, thereby creating significant distributive effects.

This Article argues that both of these effects—the overprotection of low-value inventions and the underprotection of inventions by women and minorities—could be alleviated by altering one particular but seldom-appreciated aspect of the patent system's one-size-fits-all approach: its registration-only design. Copyright and trademark law allow for both registered and unregistered rights, but the patent system grants rights only to those who register their inventions and undergo subsequent examination. If the patent system were to follow the two-tiered approach of copyright and trademark law, however, and implement a regime of automatic but very limited unregistered rights in addition to registered rights, it could help address both problems. First, as the authors of this Article have previously argued, providing a much lower-cost alternative for obtaining protection, such a two-tiered regime could, with varying degrees of aggressiveness, channel low- investment, low-value inventions away from the system-clogging overprotections of the full, twenty-year, broad rights currently granted to registered patents. Second, by providing automatic rights without having to go through the resource-intensive registration and examination process, unregistered patent protection could help women and other

disadvantaged inventors gain greater access to patent protections. Maintaining a two-tiered regime of both registered and unregistered patent rights thus offers a promising way to mitigate the inefficiencies of the current system by attenuating certain aspects of the current patent crisis while promoting a more egalitarian playing field for inventors.

Copyright Law

Negotiated Content Dissemination Under Copyright Law

Nandita Saikia (N/A)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3732182

Copyright does not function in isolation. It is supported by contract law, and it is but one of the laws which governs content, its ownership, use, and dissemination. Focusing on broadcasts, whilst recognising that the processes applicable to them also apply to other forms of dissemination in modified form, this text describes, in broad strokes, the field in which negotiated grants of copyright function from a statutory point of view, describes what goes into attempting to ensure that content per se is ready for legal dissemination, and discusses how relationships between the various stakeholders are structured to facilitate such dissemination.

The Other Side of the Ledger: Blockchain Makes a New Entry in the Historical Record of Copyright Law and Technology

Aaron M. Lane (RMIT University)
Christina Platz (RMIT University)
European Intellectual Property Review, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3720331

Copyright law continues to be in crisis due to its historical relationship with technology. Taking an Australian focus and a “ledger centric” view of the economy, the authors propose that copyright law has been challenged by technology in two distinct ways. First, advances in production technologies allow for new forms of creative expression – leading to legislative changes to enhance copyright coverage. Second, advances in information and communications technologies enable new types of storage and wider distribution of copyright material – leading to legislative changes to overcome enforcement issues. Blockchain technology does not have an obvious historical parallel as it is not a production or information and communications technology. Specifically, blockchain is an institutional technology that reveals new possibilities for governing copyright rights. The authors conclude by discussing the implications of blockchain technology’s new entry into the historical record of copyright law and technology.

Copyright in Films and Plagiarism

Sakshi Sinha (KIIT Deemed to be University, School of Law, Students
Aishwarya Hariharan (N/A)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3727191

We aim to identify how movie films and cinemas are being protected from being copied and duplicated. The act of infringing the existing copyright is understood to be a civil wrong but it also does contains the elements of a criminal wrong as well. The word plagiarism and copyright infringements are two different poles and no way similar to one another. The concepts are used interchangeably but are gravely misunderstood and wrongly used. The uniformity is found within the legislation of copyright fundamentally. The conceptual clarity of the terms is mentioned in vivid and expressive methods.

Emphasis on the concept of how infringement has a wider reach than plagiarism is also covered. Without this comparative study, the purpose of the submission would have not been met. The paper further talks about how the copyright issues persist and crop up and its infringement are being done while the creation of other optical videotaping and audiotape creation. There is a list of the documents which are crucial and of grave importance. The submission also answers questions such as whether permission is always required to use another film in the creation of a new film. The paragraphs of the submission deal with this kind of question to male it widely clear as to why they use of the copyright is prominent. Also questions concerning the orphan's work and whether the title of a film is subjected to be registered is also addressed. A lengthy case analysis is also included for reference purposes. The case was set on appeal till the Supreme Court and this case is considered to be one of the most prominent landmark judgments of copyright law in India. A mention of plagiarism and movies is mentioned toward the end of the submission as well.

Other IP Topics

Intellectual Property, Global Inequality and Subnational Policy Variations

Peter K. Yu (Texas A&M University School of Law)
INTELLECTUAL PROPERTY, INNOVATION AND GLOBAL INEQUALITY, Daniel Benoliel, Francis Gurry, Keun Lee and Peter K. Yu, eds., Cambridge University Press, 2021, Forthcoming
Texas A&M University School of Law Legal Studies Research Paper No. 21-04
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3760413

The subject of global inequality is at the center of the North-South debate on intellectual property law and policy. While developed countries in the global North complain about the lack of adequate protection and enforcement of intellectual property rights in developing countries, the global South laments the unfair distribution of benefits provided by the current international intellectual property regime. Developing countries are also frustrated that they continue to bear the blunt of globalization and the detrimental effects of high standards of intellectual property protection and enforcement.

The arrival of middle-income countries, in particular those with considerable and ever-growing strengths in the intellectual property area, has shown that the international intellectual property debate has been less simplistic that what a binary North-South debate suggests. Indeed, fast-growing emerging countries such as Brazil, China and India have acquired newfound success in competing with developed countries in the international trade and intellectual property arenas. If this trend continues, the picture about intellectual property and global inequality will only become more complex.

This chapter begins by revisiting the North-South debate on intellectual property, innovation and global inequality. It explores where middle-income countries fit in this debate. The chapter then moves from the frequently documented inequality among countries to the underexplored inequality within countries—a topic that has received growing attention from trade and development economists but insufficient coverage in intellectual property literature. Focusing on middle-income countries, the discussion of national inequality highlights the considerable variations in economic and technological conditions at the subnational level. The chapter concludes by outlining three sets of responses that intellectual property policymakers could put in place to address national inequality: (1) international norm-setting; (2) national policymaking; and (3) academic and policy research.

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