



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 & Litigation

Financing Patent Litigation through Market Entrance

Rasmus Arler Bogetoft (Copenhagen Business School – CBS Law)
Copenhagen Business School, CBS LAW Research Paper No. 21-01
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786750

We propose a model of patent litigation where a potential competitor - the Entrant - can challenge a patent with and without entering the market before a final court decision. We study the settings (the Financing Space) where market entrance is used to finance patent litigation, i.e. where the Entrant would not have challenged the patent's validity, had she not been able to enter the market. This space increases in the Entrant's litigation costs, but decreases in the Patent Holder's litigation costs and as the court becomes better at calculating the size of damages to the Patent Holder. When the value of future access to the market increases, the size of the Financing Space decreases. And, with some constraints, the Financing Space increases with the likelihood of the patent being valid. Finally, market entrance may also finance the Patent Holder's litigation costs, such that he litigates in settings where he would not have, if the Entrant had not entered. As such, entrance can be a double edged sword.

Our insights have implications for how attorneys should advise their clients on strategy and how policy makers should amend the patent litigation system to fulfill their goals.

The Humira Patent Thicket and the Noerr-Pennington Doctrine

Ryan Knox (Yale Law School)
Gregory Curfman (American Medical Association)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3781826

Humira (adalimumab) is among the best-selling drugs in the United States and around the world. Even though the core patent for Humira expired in 2016, the manufacturer, AbbVie, has continued to increase the price to consumers year-after-year, so that the 2019 average yearly retail price was \$84,454. Another 7.5% price increase is expected in the near future. AbbVie's conduct to promote the rising price of Humira was recently challenged in *In Re: Humira® (Adalimumab) Antitrust Litigation*, No. 19-cv-1873. In March 2019, a group of indirect payers for Humira (labor unions and health and welfare funds) filed a

novel lawsuit in the U.S. District Court for the Northern District of Illinois alleging antitrust activity on the part of AbbVie in violation of Sections 1 and 2 of the Sherman Antitrust Act. The antitrust challenge, which was dismissed by the District Court on the basis of the Noerr-Pennington doctrine, is predicated on AbbVie's patent thicket that surrounds Humira and on legal settlements it has reached with six biosimilar companies to keep them out of the market until 2023. This article examines *In Re Humira* and provides a legal rationale for the conclusion that the District Court's dismissal of the case should be overturned on appeal to the United States Court of Appeals for the Seventh Circuit. The case will be heard on February 25, 2021.

IP & Licensing

Survey of Mobile Cellular 5G Essentiality Rate

David Edward Cooper (Hillebrand Consulting Engineers)

Johanna Dwyer (N/A)

Alexander Haimovich (N/A)

Forthcoming, Les Nouvelles – Journal of the Licencing Executives Society, March 2021

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752684

This paper summarizes the results and methodology of a 5G essentiality survey that estimates the total number of patent families (excluding Ericsson, which funded this study) that have a patent with at least one claim which is essential to the 5G consumer mobile smartphone as of January 2020. In total, 200 randomly selected patent families were reviewed, with 8.0% found to contain at least one claim likely essential to a 5G NR smartphone. Applying this essentiality rate to the declared 5G patents from which the 200 patent families were selected results in a total estimate of approximately 746 patent families likely essential to a 5G NR smartphone (excluding those owned by Ericsson). We understand that Ericsson funded this study to estimate the total landscape outside of Ericsson. We further understand that Ericsson prepared claim charts for its own patent families evidencing essentiality to a 5G NR smartphone. We estimate Ericsson's share of patent families likely essential to a 5G NR smartphone using the number of claim charts prepared by Ericsson and the results of this survey.

Contribution to the Debate on SEPs

Justus Baron, Damien Geradin, Sam Granata, et al.

European Commission – Internal Market, Industry, Entrepreneurship and SMEs – Industrial policy: Standard Essential Patents 2021

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778166

Report of the Expert Group of the European Commission on licensing and valuation of standard essential patents (SEPs).

The report provides an analysis of the current SEP licensing landscape and identifies a number of issues important to the future of SEP licensing. The report includes proposals by different experts directed to (i) increasing the transparency of the SEP landscape and SEP licensing process, (ii) supporting licensing in the value chain, (iii) determining fair, reasonable and non-discriminatory (FRAND) licensing terms and conditions, (iv) facilitating SEP licensing negotiations and the handling of SEP disputes and (v) encouraging the formation of patent pools. The group of experts was installed by the European Commission to deepen the expertise on existing and evolving industry practices related to the licensing of SEPs in the context of the digitalisation of the economy, the sound valuation of intellectual property and the assessment of FRAND licensing terms and conditions.

Efficient Infringement and the Rule of Law

Jorge L. Contreras (University of Utah – S.J. Quinney College of Law)
University of Utah College of Law Research Paper No. 414
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771052

These comments were presented at the Federalist Society's 2020 National Lawyers Convention at the panel titled "Intellectual Property Rights and the Rule of Law". They address a trending narrative that casts opposition to the demands of patent holders as a form of lawlessness. This narrative specifically takes aim at a practice that has been termed "efficient infringement" – the idea that a firm may rationally decide to infringe patents either because it will be too costly for the patent holder to enforce its rights in court, or because it is happy to take its chances in court, where an asserted patent may be invalidated and where damages eventually assessed against the infringer years later will likely be no higher than the royalties that the infringer would have paid anyway under a licensing agreement. Reasonable people can differ over optimal patent scope and policy. Likewise, the PTO and the PTAB can issue and uphold more or fewer patents, and the courts can interpret the Patent Act in ways that we like or dislike. Reasonable people can also seek change through litigation, legislation and administrative channels. All of these mechanisms are organic parts of our tripartite system of government. We will never have a situation in which all partisan interests are equally happy with the rules or the outcome of every case – this is part and parcel of an adversarial legal system. But this is no reason to question the legitimacy of the system itself. So, far from a departure from the rule of law, what we see today in the patent system is the operation of a well-functioning legal regime seeking to address the interests of competing, but largely law-abiding, stakeholders.

Classroom Experiments on Technology Licensing: Royalty Stacking, Cross-Licensing and Patent Pools

Atle Haugen (NHH Norwegian School of Economics, Department of Business and Management Science)
Steffen Juraneck (NHH Norwegian School of Economics, Department of Business and Management Science)
NHH Dept. of Business and Management Science Discussion Paper No. 2021/3
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783747

We present two classroom experiments on technology licensing. The first classroom experiment introduces the concept of royalty stacking. The students learn that non-cooperative pricing of royalties for complementary intellectual property rights leads to a double-marginalization effect. Cooperation solves the problem and is welfare improving. The second classroom experiment introduces students to cross-licensing. It shows that reciprocal royalty payments dampen competition. The classroom experiments stimulate discussions of technology licensing, intellectual property rights, different royalty structures, patent pools and technology standards. We present the experimental procedures, and suggest routes for the discussion.

IP & COVID-19

Your Money or My Life: Analyzing the Role of Patent Law in the COVID-19 Pandemic

Amarachukwu Elekwa (N/A)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783410

The abrupt nature of the COVID-19 pandemic sent the pharmaceutical industry on their heels in a race against time in procurement of a vaccine for the novel corona virus. Consequently, it has sparked off several issues and debates as to whether the research conducted by pharmaceuticals should enjoy patent rights or if it should be handed over to the public domain on grounds of it being unethical to hoard

medical knowledge in a crucial time like this. While some are of the opinion that lives should come over profits, there are still some nations who uphold the capitalist structure intellectual property law seeks to protect. This paper sets out to analyze the different views, as well as give an opinion on how a consensus can be met.

Drug Prices, Patents and Access to Life-Saving Medicines: Changes Are Urgently Needed in the COVID-19 Era

Olga Gurgula (Brunel University London – Brunel Law School; University of Oxford – Oxford Martin School)

Forthcoming in the European Intellectual Property Review (EIPR)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780630

When patented life-saving drugs are inaccessible to patients due to high prices it is evident that the system does not perform its intended function and urgently requires reforming. The paper discusses the evidence recently revealed by the US House Committee on Oversight and Reform that directly contradicts pharmaceutical companies' traditional argument justifying strong patent protection as a vehicle for recouping their R&D investments. It further suggests that structural and comprehensive changes are necessary, including a rigorous investigation into pharmaceutical pricing and patenting practices, ensuring adequate access to the drugs developed with public funds, and assuming the responsibility for public health by governments.

The Open COVID Pledge: Design, Implementation and Preliminary Assessment of an Intellectual Property Commons

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

Utah Law Review, Forthcoming

University of Utah College of Law Research Paper No. 416

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780850

Early during the COVID-19 pandemic, a number of widely-publicized incidents gave rise to concerns that holders of patents and other intellectual property (IP) rights could hinder the development, manufacture and distribution of essential medical devices, protective equipment and biomedical products. The global response to these concerns was swift and included the issuance of compulsory licensing orders by several national governments, as well as the proposal of a technology pool by the World Health Organization (WHO). Alongside these efforts, a group of scientific, engineering and legal experts created a lightweight, open framework under which IP holders could voluntarily pledge not to assert their rights against those responding to the COVID-19 pandemic. This effort – known as the Open COVID Pledge (OCP) – attracted significant participation from some of the world's largest IP holders, with nearly 500,000 patents and patent applications, as well as significant copyrighted material, pledged to date. The OCP has also been adopted as part of the framework of the WHO's COVID Technology Access Pool (C-TAP), a multinational initiative to make particular biomedical innovations more accessible around the world. This article describes the development of the OCP, including the design choices that shaped its legal structure and implementation. It also assesses the adoption of the OCP across market sectors including biopharmaceuticals, diagnostics, medical devices, protective equipment and digital innovations. It finds that while pledges in the biopharmaceutical sector have been infrequent, many other critical technologies in the fight against COVID-19 have been made broadly available to users through this and related pledging mechanisms, creating a favorable environment for open innovation, new market entry and equitable access to technology. As such, the OCP may both help to address the current pandemic and serve as a useful model for IP sharing platforms to address future public health emergencies.

WTO Waiver from Intellectual Property Protection for COVID-19 Vaccines and Treatments: A Critical Review

Bryan Mercurio (Chinese University of Hong Kong – Faculty of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789820

In view of the increasing concern over global efforts to ensure equitable access to affordable COVID-19 vaccines, India and South Africa presented a proposal to the World Trade Organization (WTO) in October 2020 seeking a waiver of intellectual property rights (IPRs) in order to increase access to vaccines or other COVID-19 related technologies. The proposal seeks to waive not only patent rights but also other IPRs such as copyright and trademark that could relate to and impact the “prevention, containment or treatment of COVID-19 ... until widespread vaccination is in place globally, and the majority of the world’s population has developed an immunity.” While the proposal has attracted support from some WTO Members and non-governmental organizations (NGOs), it has also proven to be contentious and has not been endorsed by all WTO Members. This article reviews the justifications put forward for the proposal before presenting counterarguments that the waiver is unnecessary, would not alleviate the burden of access to effective and affordable medicines and vaccines and could potentially hamper R&D and innovation in the pharmaceutical sector.

IP & Innovation

Intellectual Property, Innovation and New Space Technology

Melissa de Zwart (University of Adelaide – School of Law)

U. of Adelaide Law Research Paper No. 2020-02

De Zwart, M. (2020). Intellectual Property, Innovation and New Space Technology. In G. Austin, A. Christie, A. Kenyon, & M. Richardson (Eds.), Across Intellectual Property: Essays in Honour of Sam Ricketson (Cambridge Intellectual Property and Information Law, pp. 144-157). Cambridge: Cambridge Univ

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783539

The disruptions caused by technological innovation have now moved into the space industry, with the emergence of private, commercial operators (‘New Space’). This chapter considers one of the unique challenges that the New Space industry encounters with its rapid development: the interaction of intellectual property with national security concerns, safety and financial risks, export controls and international law relating to cooperation in space.

New Innovation Models in Medical AI

W. Nicholson Price II (University of Michigan Law School)

Rachel Sachs (Washington University in Saint Louis – School of Law)

Rebecca S. Eisenberg (University of Michigan Law School)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783879

In recent years, scientists and researchers have devoted considerable resources to developing medical artificial intelligence (AI) technologies. Many of these technologies—particularly those which resemble traditional medical devices in their functions—have received substantial attention in the legal and policy literature. But other types of novel AI technologies, such as those that relate to quality improvement and optimizing use of scarce facilities, have been largely absent from the discussion thus far. These AI innovations have the potential to shed light on important aspects of health innovation policy. First, these AI innovations interact less with the legal regimes that scholars traditionally conceive of as shaping medical innovation: patent law, FDA regulation, and health insurance reimbursement. Second, and

perhaps related, a different set of innovation stakeholders, including health systems and insurers, are conducting their own research and development in these areas without waiting for commercial product developers to innovate for them. Third and finally, the activities of these innovators have implications for health innovation policy and scholarship. Perhaps most notably, data possession and control play a larger role in determining capacity to innovate in this space, while ability to satisfy the quality standards of regulators and payers plays a smaller role, relative to more familiar biomedical innovations such as new drugs and devices.

Copyright Law

Taking Access Seriously

BJ Ard (University of Wisconsin Law School)

BJ Ard, Taking Access Seriously, 8 Tex. A&M L. Rev. 225 (2021)

Univ. of Wisconsin Legal Studies Research Paper No. 1687

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785260

Copyright is conventionally understood as serving the dual purposes of providing incentives for the creation of new works and access to the resulting works. In most analysis of copyright, however, creation takes priority. When access is considered, it is often in the context of how access relates back to the creation of new works. Largely missing is an account of the value of access on its own terms. So what is the place of access in copyright law and policy? A set of cases dealing with copyright owners' attempts to enjoin the markets created by new playback and distribution technologies is instructive. These decisions—where the courts refused to enforce copyright where the owners attempted to shut down a market rather than participate in it—have been criticized for their unclear policy guidance and lack of doctrinal grounding. We can reconcile these cases with copyright policy by focusing on access. These cases provide rich examples showing how expanded access advances copyright's higher-order goals of promoting a more democratic and participatory culture.

Focusing on access also provides a means for bringing doctrinal coherence to these cases through the fair-use defense. The courts permitted the use of copyrighted works in new markets despite the copyright owners' objections because these markets could expand public access without diminishing the copyright industries' creative incentives. Indeed, copyright owners often found the markets profitable after being forced to enter them. Copyright owners' market refusal in these scenarios is a distinct type of market failure, and fairuse doctrine allows courts to correct it.

Propertizing Fair Use

Abraham Bell (Bar Ilan University – Faculty of Law; University of San Diego School of Law)

Gideon Parchomovsky (Hebrew University of Jerusalem – Faculty of Law)

Virginia Law Review, Forthcoming

U of Penn, Inst for Law & Econ Research Paper No. 21-07

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3782545

In its current form, fair use doctrine provides a personal defense that applies narrowly to the specific use by the specific user. The landmark case of *Google v. Oracle*, currently pending before the Supreme Court, illustrates why this is problematic. Even if the Court were to rule that Google's use of Oracle's Java API's was fair, the ruling would not protect the numerous parties that developed Java applications for the Android operating system; it would only shelter Google and Google's particular use. This is not an isolated problem; the per use/per user rule cuts across fair uses of copyrighted works, and it always leaves follow-on users in the cold. Authors, musicians, documentary filmmakers and media outlets who win fair use cases cannot freely market their works that incorporate fair use content since their victories do not carry over to other users. Fair use under extant law is a very limited privilege.

This Article proposes a far-reaching reform not only of copyright law as applied to software, but of the fair use doctrine itself. Our proposal consists of three interlocking elements. First, we call for the introduction of a new in rem conception of fair use, under which a fair use ruling would serve as a property remedy that shelters all subsequent users of works that fairly incorporate preexisting materials. Under this new conception, a finding of fair use would run with that new work like an easement to all other distributors, broadcasters, publishers, performers and others who use it. The introduction of this new type of in rem fair use would result in the division of fair use into two conceptions—one in rem and one in personam—that would co-exist alongside one another. Second, we would grant judges discretion to decide which fair use conception, if any, should be granted in any particular case. Judges would be able to employ the traditional in personam rule that the fair use avails only the specific defendant before it, or they could adopt an in rem fair use ruling, creating a property entitlement that runs with the work embodying the fairly incorporated content. Third, we propose two default rules to assist judges in making their decisions. Specifically, we propose that the default setting of fair use would depend on the type of use being examined. Where the claimed fair use consists of incorporating the protected copyrighted material in a new copyrighted work—such as the Android operating system—the default fair use would be of the in rem variety. However, in all other cases of claimed fair use, the traditional, familiar in personam conception would be the default setting. This approach would create clarity about the status of follow-on fair uses, but permit judges to tailor their rulings case by case.

Implementation of our proposal would yield several significant improvements to the current fair use doctrine. It would permit judges to take account of the potential for future uses of the fair use work, without handcuffing them to a single approach. Moreover, it would increase certainty with respect to the use of copyrighted work by lowering transaction and litigation costs for creators of new works. Finally, the version of fair use we advocate would enhance the use of copyrighted content.

Restatements of Statutory Law: The Curious Case of the Restatement of Copyright

Shyamkrishna Balganesh (Columbia University – Law School)

Peter S. Menell (University of California, Berkeley – School of Law)

Columbia Journal of Law & the Arts, Vol. 45, Forthcoming 2021

Columbia Public Law Research Paper No. 14-687

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3769553

For nearly a century, the American Law Institute's (ALI) Restatements of the Law have played an important role as sources of law in the American legal system. And in all of this time, they refrained from restating areas of law dominated by a uniform statute despite the proliferation and growing importance of such statutes, especially at the federal level. This omission was deliberate and in recognition of the fundamentally different nature of the judicial role and of lawmaking in areas governed by detailed statutes. Then in 2015, without much deliberation, the ALI embarked on the task of restating U.S. copyright law, an area dominated by a detailed federal statute. In so doing, the ALI ignored not just calls to revisit the form and method of its traditional Restatements but also the extensive history of the deep mismatch between the Restatements and statutory domains that has informed the working of the enterprise over the course of the last century.

This Article explores the analytical and historical foundations of that mismatch and shows how the Restatement of Copyright reinforces the need to tailor a methodological template and perspective that is sensitive to the nature of statutory interpretation. It explains why perfunctory extension of the common law Restatement model to copyright law produces incoherent, misleading, and seemingly biased results that risks undermining the legitimacy of the eventual product. Finally, the Article explains how the mismatch between the two is capable of being remedied by a series of modest—yet significant—changes, which could allow the project to serve as a template for future statutory Restatements. These include: emphasizing the centrality of the statutory text and relevant interpretive sources, adopting

crucial perspectival differences between incremental lawmaking and statutory interpretation, and highlighting the unique legislative process through which the statute was developed.

International Instrument on Permitted Uses in Copyright Law and Explanatory Notes

Reto Hilty, Kaya Köklü, Valentina Moscon, et al.

Max Planck Institute for Innovation & Competition Research Paper No. 21-06

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771241

The “International Instrument on Permitted Uses in Copyright Law” (the Instrument) is the result of a research project for a balanced reconciliation of interests in copyright law. The project was coordinated by the Max Planck Institute for Innovation and Competition and resulted in a legal instrument designed in the form of an international treaty establishing a core of minimum permitted uses of works. This core of permitted uses is intended to be mandatory for prospective Contracting Parties, who remain free, however, to go beyond the minimum set of permitted uses provided for in the Instrument. The approach undertaken on the basis of “minimum permitted uses” counterbalances the traditional “minimum protection” approach of international copyright law. Among other things, this approach supports Contracting Parties in addressing the political pressure that notoriously exists in international negotiations, especially in the context of bilateral or regional agreements.

The Instrument is composed of three parts (A. Permitted uses; B. General principles of implementation; C. Competition; Abuse) and is accompanied by explanatory notes that clarify the purpose and meaning of the Instrument and its provisions.

Other IP Topics

The Distributive Effects of IP Registration

Miriam Marcowitz-Biton (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, registering 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.

Introduction to Intellectual Property – Cases and Questions

Jason Rantanen (University of Iowa – College of Law)

U Iowa Legal Studies Research Paper No. 2021-04

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3764808

This open source textbook for a survey course on intellectual property law contains 28 chapters, each with introductory material, learning outcomes, and one or two judicial opinions. Each opinion is accompanied by a set of questions to focus the reading and guide further discussion. This set of materials is designed for instructors who want to have a discussion on one or two cases per class session, supplemented by lectures and active-learning activities.

Contact

For more information about this issue of *IP Literature Watch*, please contact the editor:

Anne Layne-Farrar

Vice President

Chicago

+1-312-377-9238

alayne-farrar@crai.com

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