



# 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

### **Brief of International Intellectual Property Law Professors as Amici Curiae in Support of Neither Party – Ericsson v. Samsung**

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

Ann Bartow (Franklin Pierce Center for IP at UNH Law)

Michael A. Carrier (Rutgers Law School)

Joshua D. Sarnoff (DePaul University College of Law)

Peter K. Yu (Texas A&M University School of Law)

*University of Utah College of Law Research Paper No. 425*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3802235](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802235)

This brief seeks to draw to the Court's attention historical, practical, and policy matters pertaining to technical standardization and dispute resolution that bear on the arguments made on appeal by Samsung and Ericsson, including by providing context on the use of anti-suit injunctions (ASIs) and anti-anti-suit injunctions (AASIs) in litigation involving global portfolios of standards-essential patents (SEPs) that are encumbered by "fair, reasonable, and non-discriminatory" (FRAND) licensing commitments.

### **Inventor CEO and Patent litigation**

Sayla Sowat Siddiqui (The Australian National University)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3799836](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3799836)

This paper investigates the impact of the inventor CEO of the defendant firm on its exposure to the patent litigations. We find that the threat of both the patent and the non-practicing entity (NPE) litigation increases when the firm is led by an inventor CEO. The positive effect increases with the existence of the high-impact and active inventor CEOs, high patent value, CEO publicity and the firm size. The result is robust to controlling for the endogeneity of the inventor CEO and using other estimation techniques. Our results suggest that despite enhancing patent values, an inventor CEO invites threats of litigation to the company patents. It can be explained by the high cost of the patent litigation. Unless the patent is highly valued, it is not cost-efficient for the competing firms to sue it. Besides, the high level of publicity of the inventor CEO attracts the patent lawsuits. Ours is the first study to introduce the inventor CEO in

the patent litigation literature. It breaks the common perception that an inventor CEO is always beneficial to the company innovation.

### **Same Questions, Different Perspectives—A Frenemy Dialogue on Patent Litigation Strategy**

Eszter Szakács (Danubia Legal)

Alexander Haertel (Bardehle Pagenberg)

*les Nouvelles - Journal of the Licensing Executives Society, Volume LVI No. 1, March 2021*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3772995](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3772995)

When a company is asserting IP, e.g., a patent, they are following a strategy that suits their position not only as plaintiff but also the specific market and their commercial goals. The defendant must in some parts adapt to that strategy but also has the opportunity to influence the course of the proceedings in great detail. A carefully devised patent litigation strategy can put crucial cards in the hands of both the plaintiff and the defendant. Especially in the preparation of the dispute.

In this next dialogue an imaginary patentee and a potential defendant will this one time give the game away and discuss strategic possibilities and positions related to patent litigation.

## **IP & Licensing**

### **Balance Requirements for Standards Development Organizations: A Historical, Legal and Institutional Assessment**

Justus Baron (Northwestern University – Center on Law, Business, and Economics)

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

Pierre Larouche (Université de Montréal; Center on Regulation in Europe (CERRE))

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3806876](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806876)

Most technical standards-development organizations (SDOs) have adopted internal policies embodying “due process” criteria such as openness, balance of interests, consensus decision making and appeals. These requirements arise from numerous sources including antitrust law, international trade law, public procurement requirements and institutional norms. Yet balance criteria lack a generally-accepted definition and the manner in which they are implemented varies, sometimes dramatically, among SDOs. Recently, there has been a renewed interest in the principle that SDOs should ensure a balance of interests among their stakeholders, including in the development of intellectual property rights policies. This article explores the origins and meaning of the balance requirement in the U.S. and EU, and identifies distinct legal, administrative and institutional modalities in which balance requirements are imposed, as well as existing antitrust and competition law requirements surrounding SDO balance.

### **How to License SEPs to Promote Innovation and Entrepreneurship in the IoT**

Joachim Henkel (TUM School of Management – Technical University of Munich (TUM))

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3808987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808987)

The Internet of Things (IoT) relies heavily on wireless communication technologies, which are covered by thousands of standard-essential patents (SEPs). Numerous applications of IoT technologies are being developed, frequently coming from entrepreneurial firms. The high degree of fragmentation on the side of device makers raises the question of how—i.e., on which level of the value chain—SEPs should be licensed. Device makers prefer upstream licensing, allowing them to purchase fully licensed modules, while SEP holders tend to favour licensing at the device level. I present empirical evidence

on the matter from a qualitative study comprising interviews with 18 individuals from 12 firms of different sizes and industries, including device makers and SEP licensors. The focus lies on the perspective of entrepreneurial firms. I also review and discuss arguments presented in the literature. I find that device-level licensing poses serious problems to device makers, in particular to SMEs. The main problems are: A lack of resources and pertinent legal and technical competence, precluding fair negotiations with licensors; high transaction costs due to a high degree of industry fragmentation; and uncertainty regarding cost and patent clearance. As a consequence, device-level licensing would likely have a chilling effect on innovation and entrepreneurship in the IoT. Policy makers should ensure that IoT SEP licensing is simplified. They should commission studies on the feasibility of licensing and price differentiation higher up in the value chain, and on the aggregate cost of developing the main standards. Adding to those formulated by the SEPs Expert Group, I propose two additional principles for IoT SEP licensing: Licensing at a value chain level where transaction costs are minimal; and licensing in a way that promotes downstream innovation and entrepreneurship.

### **Standard Essential Patent Licensing Antitrust and Patent Law: Crossroad or Intersection?**

Roberto Dini (Metroconsult Srl)

Garrard Beeney (N/A)

Dina Kallay (N/A)

John Paul (Finnegan, Henderson, Farabow, Garrett & Dunner LLP)

*les Nouvelles – Journal of the Licensing Executives Society, Volume LVI No. 1, March 2021*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3771487](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771487)

Standard development organizations that develop technical standards like Wi-Fi, Bluetooth, and MP3 often require patent owners to indicate whether they will grant licenses to implementers on fair, reasonable, and non-discriminatory terms. In recent years, courts have issued conflicting decisions on the rights and responsibilities of patent owners and technology implementers in negotiating licenses under standard essential patents (SEPs) and what it means to grant a license that is fair, reasonable, and non-discriminatory ( i.e., a “FRAND” license). One underlying aspect of these conflicting court decisions is whether patent law and antitrust/competition law conflict with each other, or whether these laws are aligned and complement each other.

### **The European Commission’s Expert Group Report on SEP Licensing and Valuation: What Did We Achieve? What Did We Miss?**

Damien Geradin (Tilburg Law and Economics Center (TILEC); Geradin Partners; University of East Anglia (UEA) – Centre for Competition Policy; University College London – Faculty of Laws)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3783710](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783710)

The European Commission just released its expert group Report on SEP licensing and valuation. As a member of that expert group, this short paper share some personal thoughts about the content of the Report, the way it was made, its achievements, but also its limits.

The paper is divided in four parts. Part I contains some general observations regarding the way the Report was drafted, the role played by the Commission, and the structure/content of the Report. Part III discusses some of the main themes of the Report. Part IV focuses on a small subset of issues that I consider particularly important for the future of SEP licensing in the EU. Finally, Part V contains a short conclusion.

## Regulation of Anti-Competitive IP Licensing Practices Studied in Qualcomm Case

Shiwon Ryu (Shin & Kim LLC)

*Korea University Law Review*, vol. 9

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3751286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3751286)

As a standard patent holder in CDMA mobile communications technology, Qualcomm enjoys market dominating position in the CDMA technology market. Korea Fair Trade Commission examined Qualcomm's patent licensing terms contracted with mobile phone manufacturers. The licensing terms included discriminating royalty rates and collecting post-expiration royalty, which are declared in the decision letter as violating Monopoly Regulation and Fair Trade Act. Legal grounds for the regulatory decision are analyzed and criticized in this paper. The uniqueness of the case structure and IT business makes the case more significant as a government regulation based on the law of competition law.

## IP & COVID-19

### COVID-19 as an Example of Why Genomic Sequence Data Should Remain Patent Ineligible

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

*Borris, S., de Guia, S., Gable, L., Levin, D.E., Parmet, W.E., Terry, N.P. (Eds.) (2021). COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future. Boston: Public Health Law Watch.*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3808319](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808319)

The researchers who determined the genomic sequence of the SARS-CoV-2 virus did not seek to patent it, but instead released it in the publicly-accessible GenBank data repository. Their release of this critical data enabled the scientific community to mobilize rapidly and conduct research on a range of diagnostic, vaccine, and therapeutic applications based on the viral RNA sequence. Had the researchers sought patent protection for their discovery, as earlier research teams had during the SARS, H1N1 and H5N1 outbreaks, global research relating to COVID-19 would have been less efficient and more costly. One of the reasons that patents are no longer sought on genomic sequences is the U.S. Supreme Court's decision in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, which established that a sequence of naturally-occurring nucleotides is an unpatentable "product of nature" (*Association for Molecular Pathology v. Myriad Genetics*, 2013). Yet, in the midst of the COVID-19 crisis, patent advocates are calling on Congress to overturn the Myriad decision and once again allow patenting of genomic sequences. This Chapter argues that the COVID-19 pandemic illustrates why the "product of nature" exclusion under patent law, which prevents the patenting of genomic sequence data, should be preserved and strengthened under U.S. law. This paper was prepared as part of the COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future, a comprehensive report published by Public Health Law Watch in partnership with the de Beaumont Foundation and the American Public Health Association.

# IP & Innovation

## **Artificial Intelligence as Inventor: Exploring the Consequences for Patent Law**

Enrico Bonadio (City University London – The City Law School)

Luke McDonagh (LSE Law)

Plamen Dinev (Goldsmiths, University of London)

*Intellectual Property Quarterly* 1 (2021) 48-66

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3798767](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3798767)

Patent law has traditionally developed with human inventors in mind. At the same time, the use of inventive AI systems raises a range of novel issues which the existing patent framework may not be able to accommodate easily. There is no consensus over whether a machine can be designated as inventor. Who would be the owner of the patent where AI has generated the invention with little or no human intervention? Who would be liable for AI-induced infringement in cases where machines act “autonomously”? Moreover, it is unclear whether the proliferation of AI-generated inventions should require us to re-evaluate core patent concepts such as inventive step and novelty in the long run. In this contribution, we have navigated through this complex relationship and explored the various issues that AI raises in the patent context in light of recent EPO and UK decisions.

## **Roadmap to Artificial Intelligence and Intellectual Property: An Introduction**

Jyh-An Lee (The Chinese University of Hong Kong (CUHK) - Faculty of Law)

Reto Hilty (Max Planck Law Network – Max Planck Institute for Innovation and Competition; University of Zurich; Ludwig Maximilian University of Munich (LMU))

Kung-Chung Liu (Renmin University of China)

*Artificial Intelligence and Intellectual Property* (Jyh-An Lee, Reto Hilty & Kung-Chung Liu eds, Oxford University Press, 2021)

*The Chinese University of Hong Kong Faculty of Law Research Paper No. 2021-13*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3802232](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3802232)

Traditionally, the “intellectual” part of “intellectual property” (IP) refers to human intellect. However, since machines have become intelligent and are increasingly capable of making creative, innovative choices based on opaque algorithms, the “intellectual” in “intellectual property” turns out to be perplexing. Existing human-centric IP regimes based on promoting incentives and avoiding disincentives may no longer be relevant – or even positively detrimental – if artificial intelligence (“AI”) comes into play. Moreover, AI has sparked new issues in IP law regarding legal subjects, scope, standards of protection, exceptions and relationships between actors.

This book proceeds in seven parts, each of which is interconnected. Part A provides the technical, business and economic foundations for the later analysis of IP issues in the AI environment in the following parts of the book. Part B examines emerging substantive patent law and policy issues associated with AI, including foundational patents in AI-related inventions, the patentability of AI inventions and how AI tools raise the standard of the inventive step. This part also illustrates how patent prosecution has evolved from material to textual to digital. Part C probes into two major copyright issues concerning AI’s involvement in creation: the copyrightability of AI-generated works and copyright exceptions for text and data mining (TDM). Parts B and C present various legal and policy concerns in patent law and copyright law, respectively. However, patent law, copyright law and trademark law occasionally share the same conundrum caused by the rapid development of AI technologies.

From Parts D to G, this book covers issues relevant to multiple categories of IP. While AI has enhanced the efficiency of IP administration and enforcement, it has generated new problems yet to be solved. Therefore, Part D explores how AI reshapes IP administration in the public sector and IP enforcement in the private sector. Part E examines copyright and patent protection for AI software, which is qualitatively

different from traditional computer programs. While AI is implemented by software, the protection for such software per se has been ignored by the mainstream IP literature. Part F discusses the protection of and access to data, which is the driving force of all AI inventions and applications. It further illustrates how IP law will interact with other fields of law, such as unfair competition law and personal data protection law, on various data-related issues. Part G provides a broader picture of AI and IP, searching for solutions to fundamental inquiries, such as IP and competition policy in the era of AI and whether an AI should be viewed as a legal person.

### **Artificial Intelligence: Back to the Future of Patent Law**

Matthieu Dhenne (Université Panthéon-Assas (Paris II))

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3787526](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787526)

Artificial intelligence questions patent law: is it a subject or an object of patent law? This surprising question has however been at the heart of debates in recent months, since the famous DABUS affair. It is now necessary to analyze the difficulties effectively raised by the replication of AI by patent law.

### **The functions of patents in our societies: innovation, markets, and new firms**

Alfonso Gambardella (Bocconi University – Department of Management and Technology)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3789554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789554)

This article discusses the role and functions of patents in society using data and evidence from the economic and management literature. It targets competent managers and policy-makers who are not, however, scholars on this topic or the economics of innovation. The article highlights the trade-off that while patents provide private protection to appropriate the returns from inventions, they also encourage the diffusion of innovation – in particular, they provide signals about the value of new firms, disclose information about the invention, and encourage the exchange of innovations and ideas in markets for technology. It then concludes that in order to better understand the role of patents in society, Patent Agencies and stakeholders should invest to a greater extent in data collections or field experiments that nail down causal effects and mechanisms. So far most of the available data are not collected with these identification strategies in mind. Scholars then have to devise solutions from the available data, and in so doing they can only answer some questions that can be addressed with these data. Patents have many complex effects. Therefore, the question whether their overall net contribution to society is positive or negative is hard to answer and probably not testable. However, many studies that rigorously identify specific effects will provide the basis for rigorous evidence-based management and policy that optimizes this trade-off.

## **IP Law & Policy**

### **The Public's Right to Benefit from Privately Held Consumer Big Data**

Mary D. Fan (University of Washington – School of Law)

*Forthcoming, 96 N.Y.U. L. Rev. \_\_ (2021).*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3795718](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3795718)

The information that we reveal from interactions online and with electronic devices has massive value— for both private profit and public benefit such as improving health, safety, and even commute times. Who owns the lucrative big data that we generate through the everyday necessity of interacting with technology? Calls for legal regulation regarding how companies use our data have spurred laws and proposals framed by the predominant lens of individual privacy and the right to control and delete data about oneself. By focusing on individual control over droplets of personal data, the major consumer

privacy regimes overlook the important question of rights in the big data ocean. This article is the first to frame a right of the public to benefit from our consumer big data and propose a model to realize the benefits of this common resource while reducing the harms of opening access.

In the absence of an overarching theoretical and legal framework for property rights in our data, businesses are using intellectual property protections for compiled data to wall off access. The result is that while companies may use the data to find ways to get us to click or buy more, access for nonprofit public interest purposes is denied or at the discretion of companies. The article proposes a model for sharing the benefits of our pooled personal information. Drawing on insights from property theory, regulatory advances, and open innovation, the article proposes protections to permit controlled access and use for public interest purposes while protecting against privacy and related harms.

### **Interface between Competition Law and Patents Law: A Pandora Box**

Mansee Teotia (Amity University)

Manish Sanwal (Anand and Anand)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3775567](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775567)

The interface between Intellectual Property Rights and Competition Law has remained a moot point in several jurisdictions including India. There have been conflicting views regarding powers of the Competition Commission to exercise its jurisdiction over Patentee's right to exclude his/her competitors from using its patented technology. This question again came up before the Hon'ble High Court of Delhi in a recent case of Monsanto v Competition Commission of India. Though the court in the instant case tried to clarify the issue with regard to the conflict of powers between the Competition Commission of India and Power of the Controllers of the Indian Patent Office, there were various issues which were overlooked by the Court. Due to the lack of specific guidelines regarding how to deal with the interface between Competition Law and Patents Law, the issues are settled by the courts on case to case basis. Through this paper, the authors look into the issue of how this interface is dealt with in other jurisdictions such as US and EU. Unlike India, in US and EU guidelines are issued by respective governments regularly in order to solve any possible conflict between Competition Laws and Patent Laws. Through this paper the author suggests for providing such guidelines so as to allow and maintain the delicate balance between Patent Law and Competition Law.

### **Unclean Patents**

Sean B. Seymore (Vanderbilt University – Law School)

*Boston University Law Review, Forthcoming*

*Vanderbilt Law Research Paper No. 21-16*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3789286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3789286)

The doctrine of unclean hands is perhaps the most storied affirmative defense. It allows a court to dismiss a lawsuit without reaching the merits if the plaintiff engaged in misconduct related to the claim being asserted. In patent law, the Supreme Court has stated that the doctrine is of "paramount interest" given the nature of the patent bargain between the inventor in the public. Nonetheless, unclean hands has been a relatively dormant defense in patent cases, other than in the specific context of patent procurement at the Patent Office (where it has evolved into the doctrine of inequitable conduct). It's also been mostly limited to cases involving litigation misconduct where the dismissal rendered the patent unenforceable against the accused infringer. But recently the defense was successfully asserted against a defendant for pre-litigation business misconduct. This holding raised eyebrows because it resurrected the doctrine and applied it more broadly than prior cases.

Resurrecting unclean hands in patent law makes sense from a normative perspective. Allowing patentees to take advantage of their own misconduct contravenes the public interest, jeopardizes the legitimacy of the courts, and ultimately undermines the integrity of the patent system. But this insight raises three important normative questions: first, what types of misconduct should trigger the defense; second, what nexus in time, causation, and logical linkage should exist between the alleged misconduct and the patent in-suit; and third, does resurrecting the doctrine align with current patent policy and other goals of the patent system?

I answer these questions in this Article by offering a new theory of unclean hands in patent law. I argue that misconduct during the acquisition of the patent right (other than at the Patent Office) should render the patent permanently unenforceable against any potential defendant if a sufficient nexus is shown. After exploring the types of misconduct that would or would not trigger the doctrine, I describe how the proposed approach aligns with normative justifications for unclean hands and broader goals of the patent system. I also offer a set of principles to limit and guide a court's discretion in applying the doctrine in patent suits.

## Churn

Peter Lee (University of California, Davis – School of Law)

*99 Wash. U. L. Rev. (forthcoming 2021)*

*UC Davis Legal Studies Research Paper Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3797330](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3797330)

From biopharmaceuticals to information technology, patents play a powerful role in the birth, death, and renewal of innovative industries. While patent scholarship has fruitfully explored the impact of exclusive rights on individual acts of invention, this Article explores patent law's underappreciated contributions to evolutionary economic change. Drawing parallels to the theory of creative destruction, it argues that patents promote churn – a continual process in which new innovations and firms challenge incumbents, which must constantly innovate or face displacement. It contends that the availability of an exclusive, time-limited right to technology promotes a baseline level of churn by both spurring the entry of new firms and disciplining patentees that stop innovating. At the “front end,” patents aid the formation and entry of new technological firms that compete against incumbents. At the “back end,” impending patent expirations compel patentees to continuously innovate or risk extinction. This Article further argues that beyond these baseline functions, patent law accelerates churn in more powerful ways. At the front end, patent law subsidizes patent acquisition by small entities, which empirical studies show are disproportionately innovative. These patent subsidies help facilitate a steady stream of highly innovative entrants to challenge incumbents. At the back end, dynamic doctrines such as patent misuse and the equitable standard for granting injunctions prevent patentees from asserting exclusive rights in overreaching or strategic ways. These pressures come together to encourage innovation in both insurgent and incumbent firms, thus driving churn. Having explored how the patent system promotes churn, this Article suggests ways of improving patent law's contributions to industrial evolution. It advocates orienting the patent system toward stimulating new entry by small entities, and it proposes a framework for subsidizing patent acquisition by such entities based on the innovation dynamics of particular industries. It also argues for shoring up the patent misuse doctrine and denials of injunctive relief to discipline overreaching by existing patentees.



# Copyright Law

## **Streaming & Screaming: Intellectual Property Rights' Survival in a 21st Century Music Industry**

Kyle Pettine (University of San Diego, School of Law, Students)

*San Diego Legal Studies Paper Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3790071](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790071)

It's difficult to understand how in 2018, artists took home only about 11.6% of the total industry revenue; the same industry that could not exist without them. This article explores the current state of the music industry and where it will go. It also aims to shed light on the issues plaguing musicians in the 21st century music industry, and how to help those being taken advantage of. Part I of this paper will explore the history of music distribution, to understand how the industry has changed over the years. This includes the transition from physical to digital medium distribution, and the leading figures throughout the music industry. Part II will look at copyright law's effect on revenues and innovation from the perspective of different actors in the industry: Record Labels, Streaming Companies, and Producers. It will examine recent industry data to show how much and where the revenue is going, as well as who it is going to. Part III offers possible remedies and suggestions to the thriving, yet unfair and inequitable industry. These include producer-centered actions such as a public rights awareness campaign, lobbying, and more.

## **Withholding Injunctions in Copyright Cases: The Impact of eBay**

Pamela Samuelson (University of California, Berkeley – School of Law)

*William & Mary Law Review, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3801254](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801254)

Before the Supreme Court's 2006 decision in *eBay, Inc. v. MercExchange, LLC*, which ruled that courts should exercise equitable discretion when considering whether to issue permanent injunctions in patent infringement cases, courts routinely granted injunctions in copyright cases when plaintiffs proved that defendants had infringed or had likely infringed copyrights. Such findings triggered presumptions of irreparable harm, which were almost never rebutted. Only rarely would courts consider a balancing of hardships or effects of injunctions on public interests.

In the first several years after *eBay*, commentators reported that *eBay* had had little impact on the availability of injunctive relief in copyright cases. However, after a key Second Circuit ruling in 2010 concluded that *eBay* requires plaintiffs to prove all four factors and that *eBay* had overturned presumptions of irreparable harm, courts have dutifully followed the dictates of *eBay* and have more frequently denied injunctions in four types of cases: 1) when copyright owners failed to offer persuasive evidence of irreparable harm and/or inadequacy of legal remedies, 2) when a balance of hardships favored defendants, 3) when public interests would be better served by denying the requested injunctions, and 4) when the plaintiff was seeking to vindicate non-copyright interests. While injunctions are still quite common in simple piracy cases, *eBay* has radically changed the injunctive relief calculus for copyright plaintiffs.

Although numerous private law scholars have criticized *eBay* for its departures from traditional principles of equity, this Article explains why the post-*eBay* copyright rulings comport with those principles. It concludes that the *eBay* four-factor test has had, by and large, salutary effects on the exercise of equitable discretion in considering injunctions in copyright infringement cases. *eBay* notwithstanding, there are numerous reasons why courts in copyright cases continue to be reluctant to grant damage-only awards. After *eBay* courts have eschewed categorical pro-injunction rules and induced them to carefully tailor copyright infringement remedies.

## Weaponizing Copyright

Cathay Smith (The University of Montana Alexander Blewett III School of Law)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3806015](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3806015)

Copyright grants authors exclusive rights in their works in order to encourage creation and dissemination of socially valuable works. It permits copyright owners to assert their copyright against violations of those rights when necessary to protect their market exclusivity and economic interests. Increasingly, however, copyright is being used by individuals to achieve other objectives. This Article examines the increasingly widespread phenomenon of individuals using copyright to vindicate noncopyright interests, which this Article refers to as “weaponizing copyright.” In some cases, copyright is weaponized to silence criticism and legitimate speech. In other instances, the objective is to erase facts and make information disappear. Some assertions of copyright are intended to punish or retaliate for some perceived wrongdoing. Other assertions of copyright involve attempts to protect the reputation and dignity of copyright owners. Another objective is to protect privacy in personal and intimate information. In none of these scenarios are copyright owners seeking to protect their legitimate market or economic interests in their copyrighted works, the intended purpose of copyright.

Through exploring recent and high-profile instances of copyright weaponization involving Harvey Weinstein and Ronan Farrow, Pepe the Frog and InfoWars, Success Kid and Steve King, Navy SEALs and the Associate Press, PewDiePie, Dr. Dew, the McCloskeys, Netflix Films, Jehovah’s Witnesses, and others, this Article exposes the increasingly widespread practice of copyright weaponization. It explains how copyright became the weapon par excellence for individuals to punish, erase, suppress, protect, and vindicate noncopyright interests, and why individuals choose to weaponize copyright instead of pursuing claims under other laws. It also pushes back on the frequently accepted presumption that weaponizing copyright is always harmful and must be discouraged by exploring the power dynamics and blurry lines between weaponization by aggressors to punish, erase, suppress, and weaponization by the vulnerable to protect, preserve, and defend. Ultimately, this Article attempts to resolve two important questions: whether copyright should serve to protect some noncopyright interests but not others, and whether there is a fair and just way to manage the increasingly pervasive practice of copyright weaponization.

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