



# IP Literature Watch

**CRA** Charles River  
Associates

May 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

### **Bringing an End to Apple's Anti-Competitive Practices on the App Store: A Response to Völcker & Baker**

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)  
Dimitrios Katsifis (Geradin Partners)

*TILEC Discussion Paper No. DP2020-036*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3694716](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3694716)

In April 2020, we published a paper titled “The Antitrust Case Against the Apple App Store.” Prompted by the growing antitrust concerns over various practices of Apple with regard to its App Store and in particular the obligation of certain app developers to use Apple’s proprietary payment system In-App Purchase (“IAP”) to accept user payments, the purpose of this paper was to discuss whether such concerns are (at least *prima facie*) valid, and if so, how they could be addressed under EU competition law. Based on a detailed analysis of the facts, we suggested several theories of harm and a set of remedies to address the concerns identified.

Three months later, Sven Völcker and Daniel Baker published a detailed rebuttal of our initial paper, arguing there is no antitrust case against the Apple App Store and thus no need for remedies. We are grateful to Völcker and Baker for publishing their paper, as it is the first time a detailed defense of Apple’s App Store practices has seen the light of day. The fact that its authors advise Apple makes it particularly interesting as it may shed some light into on the stories told by Apple to regulators on both sides of the Atlantic. Völcker and Baker’s reply also allows us to revisit our paper to see how our arguments hold up against their criticism.

In this paper, we show that while at first sight Völcker and Baker’s paper may appear as a convincing defense of Apple’s practices, one does not need to scratch much beneath the surface to find major flaws in their reasoning. In many instances the arguments they put forward are superficial and unsupported by evidence, misleading, self-contradictory, or simply factually inaccurate. For example, the authors’ discussion of market definition is extremely weak, as it is largely predicated on the view that app developers do not multi-home among Google Play and the App Store – a view countered by data and the Commission’s findings in Google Android. Another example is how Völcker and Baker assert most categorically that IAP is the “digital checkout” without which the App Store business model would collapse, while in reality there are technical alternatives to IAP. Völcker and Baker also fail to answer a

very simple question we put forward in our first paper: if Apple charges app developers a commission for the value delivered by the App Store, then why is such commission levied only on 16% of apps in the App Store? All in all, Völcker and Baker regurgitate Apple's one-sided narrative, whereby app developers taking issue with the 30% commission are nothing more but free riders. Needless to say, there is a tension between the authors' view that app developers' sole contribution to Apple is in the form of a 30% commission, and their view that third-party apps are so crucial to Apple's device-based business model that it would never dare to exclude them.

A series of recent developments, such as the European Commission's decision to open formal proceedings against Apple, the antitrust lawsuit filed by Epic Games in the United States, and the announcement by the ACCC of its inquiry into app marketplaces, will hopefully shed more light on the issues discussed in our papers. We hope that our research on Apple's App Store practices will inform the ongoing debate.

### **The Antitrust Case Against the Apple App Store**

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)

Dimitrios Katsifis (Geradin Partners)

*TILEC Discussion Paper No. DP2020-039*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3583029](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583029)

The Apple App Store is the only channel through which app developers may distribute their apps on iOS. First launched in 2008, the App Store has evolved into a highly profitable marketplace, with overall consumer spend exceeding \$ 50 billion in 2019. However, concerns are increasingly expressed on both sides of the Atlantic that various practices of Apple with regard to the App Store may breach competition law. The purpose of this paper is to examine whether this is indeed the case and, if so, how these concerns can be addressed. With these aims in mind, the paper first introduces the reader to the app ecosystem and the Apple App Store, with a focus on the controversial 30% commission charged for in-app purchases. After engaging critically with various public statements of Apple discussing the services that the 30% commission aims to cover, the paper concludes that the 30% commission is charged for payment processing and related services and not, as Apple asserts, for distribution, since in that case it would be charged on all apps distributed on the App Store and not only on apps delivering “digital goods and services”.

The paper then critically reviews several practices of Apple that appear to be at odds with competition law and in particular Article 102 TFEU. We first discuss the issue of market definition and dominance with regard to the App Store. We find that Apple is a monopolist in the market for app distribution on iOS, as it is not subject to any meaningful competitive constraint from alternative distribution channels, such as Android app stores or the web. The result is that Apple is the gateway through which app developers have to go in order to reach the valuable audience of iOS users. This bottleneck position affords Apple the power to engage in several *prima facie* anti-competitive practices. First, Apple exploits app developers by charging excessive fees for the services it provides, applying its guidelines in a capricious and discriminatory manner, and depriving them of the user data they need to improve the quality of their services and user experience. Second, based on four case studies, the paper illustrates how Apple may use its control of the App Store or iOS to engage in exclusionary behaviour to the detriment of rival apps. Third, the paper shows that Apple may have also engaged in discriminatory practices by treating some app developers more favourably. These practices should be investigated by competition authorities, as they are likely to result in considerable consumer harm, be it in the form of higher app prices, worse user experience or reduced consumer choice. The paper finally proposes a combination of concrete remedies that would address the competition concerns identified.

# IP & Licensing

## End-product vs Component-level Licensing of Standard Essential Patents in the Internet of Things Context

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)

Dimitrios Katsifis (Geradin Partners)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3848532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848532)

The appropriate level of licensing Standard Essential Patents (SEPs) in the case of a multi-tiered supply chain is among the most hotly debated issues in the SEP community and at the crux of an ongoing dispute between Nokia and Daimler. The debate centres on whether the SEP holder is (or should be) under an obligation to grant a license to any implementer, including component makers, or whether the SEP holder is (or should be) free to only license at the end-product level. After examining the various arguments raised in favour of and against each licensing model, we consider there are strong policy reasons to promote component-level licensing in the context of the Internet of Things. Component-level licensing is more likely to reduce transaction costs and spur downstream innovation of implementers, while preserving the SEP holders' incentives to innovate. At a positive level, we examine whether a SEP holder that has given a FRAND commitment to a standardization body may be under an obligation under contract law or EU competition rules to grant a license to component suppliers. We consider that, properly interpreted, ETSI's IPR Policy obliges SEP holders to license any implementer that seeks such license, regardless of the latter's position in a supply chain. Assuming that the SEP owner holds a dominant position per Article 102 TFEU, it is argued then a similar conclusion can be reached on the basis of EU competition law.

## Royalty Rate Determination in Patent Infringement Cases: The U.S. and China Compared

Bashayer Almajed (Kuwait University)

Bashar Malkawi (James E. Rogers College of Law)

*17 J. Intell. Prop. L. & Prac.* \_\_ (forthcoming 2022)

*Arizona Legal Studies Discussion Paper No. 21-08*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3844103](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3844103)

Intellectual Property is the cornerstone for a thriving economy. Indeed, intellectual property protection is a major determinant of economic growth. One important part of this legal and economic environment is patent. Licensing plays an important role in patent as it is one of the methods by which an intellectual property owner can reap the benefits of his labor.

This article will focus on determining royalty rates and damages in U.S. and China's patent cases. While the article focuses on court decisions, it also reviews the different laws to see the manner in which these laws have played in the development of methods for calculating royalty rates and damages. There are different factors that may not allow for the adherence to a one-size fits all recipes for calculation of royalty rates and damages. Each country adopts its own methods. The remainder of the article is organized as follows. Section II of this article examines the different methods employed in the U.S. legal system to facilitate royalty rate and damage calculations for patents. This section examines methods such as the 25 percent rule, Georgia-Pacific factors, reasonable royalty rate, the analytical approach, and the smallest salable practicing patent unit (SSPPU) method. Section III of this article looks at the Chinese model for damage calculations. The section explores China's shift from the traditional framework for calculating damages in cases of infringement relying on actual compensation to statutory and punitive damages and the key factors that played in this transition towards. Section IV provides a set of conclusions.

## **SEP Expert Group Report: A Look Into the IoT Future of SEP Licensing**

Igor Nikolic (European University Institute)

Niccolò Galli (European University Institute)

*CPI IP Columns*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3848041](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848041)

The EU Institutions have been interested in improving the predictability, reliability and transparency of the standard-essential patent licensing framework, as evidenced by several reports and communications over the recent years. In 2017, the European Commission committed to setting up an expert group (“EG”) to monitor SEP licensing markets and gather information on the internet of things industries practices. In January 2021, the EG published a Report examining the 2 challenges of SEP licensing in the IoT. The EG members failed to reach a consensus on how SEP licensing markers should evolve, and the Report contains a large number (79) of proposals with different degrees of support. As the EG noted, its main objective is to “generate ideas for a further debate.” This paper focuses on the three areas where the EG strongly recommends departing from traditional competition law prohibitions of collective coordination. After introducing the IoT SEP licensing issues that prompted the EG, the analysis of the Report notes a major shift towards greater collective industry actions – from choosing the supply chains levels for licensing SEPs, agreeing on the aggregate royalty rates for a standard for different product categories, to forming patent pools and implementer licensing platforms. Overall, these recommendations call on competition authorities to recognise the efficiency of industry-wide coordination to simplify SEP licensing. Still, as the conclusion underlines, challenges remain about their proper implementation in practice and placing the necessary safeguards to prevent cartelisation on technology sellers or users sides.

## **SEP Licensing After two Decades of Legal Wrangling: Some Issues Solved, Many Still to Address**

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)

*TILEC Discussion Paper No. DP2020-040*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3547891](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547891)

This paper explores where we stand after two decades of European Commission investigations, substantial patent litigation in national courts, and a major judgement of the Court of Justice of the European Union devoted to SEP licensing and its relationship with EU competition law. As will be seen, while consensus has been reached over several issues, a lot remains to be done. This paper is divided in four parts. Part II describes the issues that have been addressed, albeit not always satisfactorily, by competition authorities and courts over the past years. Part III discusses some of the SEP licensing issues that still largely need to be solved with a focus on six questions: (i) what is the nature of the FRAND commitment?; (iii) what is a FRAND license?; (ii) should the gaps left by the CJEU in *Huawei v. ZTE* be filled and if so how?; (iv) can a court that finds that local SEPs have been infringed force the infringer to take a global license on pain of an injunction?; (v) access for all v. license to all: What are the obligations of the SEP holder?; and (vi) how should SEP licensing adapt the IoT context? Part IV concludes.

## IP & Litigation

### **The Effect of Fee Shifting on Litigation: Evidence from a Policy Innovation in Intermediate Cost Shifting**

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Yassine Lefouili (University of Toulouse 1 – Toulouse School of Economics (TSE))

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

Luke McDonagh (LSE Law)

*American Law & Economics Review* (forthcoming 2021)

*Santa Clara Univ. Legal Studies Research Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3841084](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841084)

We study the effect of fee shifting rules on litigation. First, we build a model to study the theoretical effect of a change in cost-recovery rules on case filings, (post-filing) settlement, win rates, and plaintiffs' average litigation expenditures. We then undertake an empirical analysis of the introduction of an intermediate cost shifting rule that falls between the English and American Rules: a reform that limits the size of fee awards to successful litigants in cases decided by the Intellectual Property Enterprise Court (IPEC), one of two venues where IP cases may be filed in England and Wales. Our empirical analysis takes advantage of heterogeneity among case types and compares IPEC cases with intellectual property cases litigated at the High Court of England and Wales, which was not subject to this reform. We find that patent case filings increased following the IPEC's shift from a pure English Rule to a rule that caps costs awards. Consistent with our model's predictions, we also find evidence that smaller plaintiffs both won less often and settled more often post-reform, as well as evidence that larger plaintiffs spent less on litigation post-reform.

## IP & Innovation

### **The Battle Over Patents: History and the Politics of Innovation**

Stephen Haber (Stanford University – Hoover Institution and Political Science)

Naomi R. Lamoreaux (Yale University; National Bureau of Economic Research (NBER))

*NBER Working Paper No. w28774*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3842749](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842749)

His essay is the introduction to a book of the same title, forthcoming in summer of 2021 from Oxford University Press. The purpose is to document the ways in which patent systems are products of battles over the economic surplus from innovation. The features of these systems take shape as interests at different points in the production chain seek advantage in any way they can, and consequently, they are riven with imperfections. The interesting historical question is why US-style patent systems with all their imperfections have come to dominate other methods of encouraging inventive activity. The essays in the book suggest that the creation of a tradable but temporary property right facilitates the transfer of technological knowledge and thus fosters a highly productive decentralized ecology of inventors and firms.

## Is Organizational Innovation a Technology? Evidence From Patent Data

Valery Yakubovich (ESSEC Business School; University of Pennsylvania)

Shuping Wu (INSEAD)

*Working Paper*

[Yakubovich-Wu-OrgTech.pdf \(upenn.edu\)](#)

Organization theorists have long claimed that organizational innovations are nontechnological, in part, because they are unpatentable. The claim rests on the assumption that organizational knowledge is embodied in persons and contexts rather than in context-free practical tools. However, over the last three decades information and communication technologies gradually expanded the universe of tools for embodying organizational knowledge which, in principle, can be patented. We show that patentability is indeed a key indicator of successful embodiment. To provide the first empirical evidence regarding the patentability of organizational innovations, we construct sequentially three datasets: (1) a population of 114 organizational innovations since the early 20th century; (2) a sample of 300 US patent applications from 1970-2020, successful or not, that feature 58 of these innovations and serve as seeds for an algorithmic search for similar innovations; (3) a population of 67,240 patent applications from the same period, the output of Google's patent landscaping algorithm, which coverage extends up to 95 organizational innovations. Empirical analyses of these datasets yield two mutually reinforcing findings: (1) Organizational innovations of the 20th century prompt US patent applications in the 21st century, and more so if they propose a practical tool in addition to abstract knowledge; (2) The probability of patent allowance is higher for applications that emphasize a tool rather than knowledge. In sum, the present-day digital transformation places organizational innovations in the realm of high tech and turns the debate about organizational technologies into the challenge of designing practical organizational tools on the basis of abstract organizational knowledge. We outline an agenda for patent-based research on OrgTech as an emerging phenomenon.

## How can Innovation Screening be Improved? A Machine Learning Analysis with Economic Consequences for Firm Performance

Xiang Zheng (Boston College – Department of Finance)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3845638](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845638)

Using USPTO patent application data, I apply a machine-learning algorithm to analyze how the current patent examination process in the U.S. can be improved in terms of granting higher quality patents. I make use of the quasi-random assignment of patent applications to examiners to show that screening decisions aided by a machine learning algorithm lead to a 15.5% gain in patent generality and a 35.6% gain in patent citations. To analyze the economic consequences of current patent screening on both public and private firms, I construct an ex-ante measure of past false acceptance rate for each examiner by exploiting the disagreement in patent screening decisions between the algorithm and current patent examiner. I first show that patents granted by examiners with higher false acceptance rates have lower announcement returns around patent grant news. Moreover, these patents are more likely to expire early. Next, I find that public firms whose patents are granted by such examiners are more likely to get sued in patent litigation cases. Consequently, these firms cut R&D investments and have worse operating performance. Lastly, I find that private firms whose patents are granted by such examiners are less likely to exit successfully by an IPO or an M&A. Overall, this study suggests that the social and economic cost of an inefficient patent screening system is large and can be mitigated with the help of a machine learning algorithm.



# IP Law & Policy

## Patent Responsibility

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*17 Stanford Journal of Civil Rights and Civil Liberties* 141 (Forthcoming 2021)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3846452](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846452)

The protection of strong rights under patent law is intended to incentivize investment in innovation. Beyond this protection, should patent law also impose responsibilities upon patent holders? The COVID-19 pandemic has revealed that the power patent law confers upon technology companies far exceeds any responsibilities these companies have assumed. This asymmetry of rights and responsibilities has undermined collaborative efforts to develop testing methods, medicines, and vaccines to contain the virus.

This article presents the first comprehensive theoretical study of patent holders' responsibilities. Examining COVID-19-related innovations, it shows how the prevailing rights-focused patent law fails to reflect the social nature of invention. The article argues for reform of patent law so that it not only protects patent holders' exclusive rights but also enforces their responsibilities. Based on ethics and political theory, it proposes that patent holders be required to reciprocate public contributions, fulfill innovators' role responsibility, and confront injustices created by patent protection. To enforce these three responsibilities, the article suggests ways in which limitations on patent rights such as the disclosure requirement, experimental use defense, and compulsory licensing scheme should be reshaped, and recommends the creation of a scheme entitled the Patent Philanthropy Initiative.

## Biotechnology Patent Law Top Ten of 2019: Secret Sales, Denied Appeals, and the Promise of Coronavirus Cures

Kevin Noonan (McDonnell Boehnen Hulbert & Berghoff)

Andrew W. Torrance (University of Kansas – School of Law)

*University of New Hampshire Law Review*, Vol. 19, No. 2, 2021

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3835886](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835886)

In the rarified realm of biotechnology patent law, 2019 was one of stasis, change, reaction, and challenges to practitioners, patentees, those discontented with patents, and the judiciary itself. The year saw a comeback of sorts for the doctrine of equivalents, which has been a quiet area of the law since the Supreme Court's last word in *Festo v. Shoketsu Kinzoku Kogyo Kabushiki Co.* in 2002. In 2019 there were no fewer than seven cases decided by the Federal Circuit involving the doctrine, and its primary antithesis, the doctrine of prosecution history estoppel. The perennial issue of subject matter eligibility remained uncertain, with the Federal Circuit deciding that method of treatment claims were patent-eligible as being an application of a natural law (and the Supreme Court taking the Solicitor General's advice and not granting certiorari to review the wisdom of this dichotomy). Diagnostic method claims were another matter, with the Federal Circuit maintaining its jurisprudence that claims to such methods are almost per se patent-ineligible. In doing so, however, its *Athena Diagnostics, Inc. v. Mayo Collaborative Services LLC* decision illustrated a court in frank internal disagreement (if not disarray) in denying patentee's petition for rehearing en banc. The Supreme Court weighed in on the extent to which the Leahy-Smith America Invents Act changed the scope of novelty-destroying prior art (saying it didn't, despite an amicus brief to the contrary by the Act's co-author, Rep. Lamar Smith), and Section 112(a) came under scrutiny on both written description and enablement issues. Finally, as a fixed constant in an otherwise changing universe, the interference over CRISPR technology between the Broad Institute and its colleagues and the University of California, Berkeley and its collaborators maintained its

measured pace to a determination of who was first to invent CRISPR, and, accordingly, who owns this important technology. Admittedly, choosing the top ten judicial decisions suffers from an inevitable degree of subjectivity. However, we believe these decisions are among the most important decisions of the year in biotechnology patent law even if others might prefer to substitute a case or two for those on our list. All of the decisions discussed in this article were delivered during the 2019 calendar year.

## Copyright Law

### **Too Small to Matter? On the Copyright Directive's bias in favour of big right-holders**

Martin Husovec (London School of Economics – Law Department; Stanford University – Stanford Law School Center for Internet and Society)

João Quintais (University of Amsterdam – Institute for Information Law (IViR))

*in Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights, Tuomas Mylly and Jonathan Griffiths (Eds.), Oxford University Press (2021)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3835930](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835930)

Copyright law is about recognising the author's material and non-material interests and setting the incentives for creativity right. The legislative changes in this area increasingly look as if simple linearity governs the world: what we take away from some, we automatically give away in equal part to others. The idea of redistribution is noticeable in recent legislative developments. Art. 17 of the Copyright in the Digital Single Market Directive (DSM Directive) is the latest policy intervention to prove this point. According to its logic, imposing stricter liability on some online gatekeepers will automatically improve the position and revenues for all right-holders. This chapter explores the flaws in such an approach by highlighting how the excessive focus of Art. 17 on big right-holders neglects and harms smaller creators.

EU copyright law often uses a technical term of 'right-holders' to refer to a wide range of players with legal entitlements in the copyright ecosystem: authors, performers, phonogram producers, film producers, broadcasting organisations and (most recently) press publishers. Obviously, not all right-holders are created equal nor do their legal entitlements flow from identical normative justifications. We argue in this chapter that even the use of this seemingly neutral term can, due to the design of underlying legal solutions, lead to stark inequality between right-holders. Our broader goal is to demonstrate that maximising enforcement by means of Art. 17 of the DSM Directive does not simply maximise the position of every right-holder at the expense of platforms but does so disproportionately for big right-holders. Besides, we show that blind use of 'right-holder' and 'user' distinction harms the very creators that provision is supposed to protect.

### **Functionality's Role In Oracle Copyright Ruling Isn't So Novel**

Andrew C. Michaels (University of Houston Law Center)

*Law360*, 2021

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3842052](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842052)

There has been a common perception in copyright law that the second fair use factor, "the nature of the copyrighted work" is rather unimportant. But the Supreme Court's recent decision in *Google v. Oracle* paints a very different picture, treating the second factor as the most important factor in the case. Because Oracle's declaring code was highly functional in nature, far from the creative core of what copyright protects, this factor weighed strongly in favor of Google's fair use defense.

Even before this recent case, a minority of courts and commentators had recognized the heightened importance of the second factor in technological contexts such as software. So don't call it a comeback;



though it may have been given new life in *Google v. Oracle*, the second fair use factor has been here for years.

### **Rise of the Copyleft Trolls: When Photographers Sue After Creative Commons Licenses Go Awry**

Daxton Stewart (Texas Christian University)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3844180](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3844180)

Creative Commons licenses typically signal that a photograph uploaded to the web may be used for limited purposes, such as noncommercial uses or with attribution. Some photographers are monetizing this, uploading photos with little commercial value, searching the web for uses with improper attribution, then demanding payment and engaging in high-volume litigation. This study examines more than 30 cases involving photographers suing after a Creative Commons license terminated, finding that courts are showing a willingness to accept users' arguments of fair use based on transformative purposes and lack of economic harm, as well as general distaste for the arguments of photographers engaging in this kind of litigation.

## **IP & Trade**

### **The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to end the COVID-19 Pandemic**

Siva Thambisetty (London School of Economics and Political Science)

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

Luke McDonagh (LSE Law)

Hyo Yoon Kang (Kent Law School, University of Kent)

Graham Dutfield (University of Leeds)

*LSE Legal Studies Working Paper (2021, Forthcoming)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3851737](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851737)

The structure of global intellectual property law as incorporated in the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is implicated in the current lack of COVID-19 vaccines, medical equipment, medicines and diagnostics (hereafter, 'health-technologies'), which are needed to combat the pandemic. Although equitable access to vaccines is in the moral, political and economic interests of the global public and requires global solidarity, the phenomenon of COVID-19 'vaccine nationalism' has brought into sharp relief the misalignment of current legal and financial incentives to produce and distribute vaccines equitably. The crisis further demonstrates the failure of high-income countries (HICs) to realise the promise they made at the time of the TRIPS negotiations in 1994, that by agreeing to the terms of TRIPS, lower and middle-income countries (LMICs) would benefit from technology transfer and the building of productive capacity. As such, the current crisis is revealing not only of inadequacies of how to deal with global emergencies, but also of deficiencies within the international 'patent bargain' itself.

This paper elucidates the legal issues surrounding the 'TRIPS waiver' proposal initially put forward by India and South Africa in October 2020, which, as of May 2021, is supported by more than 60 states, and which has received statements of support from the World Health Organisation (WHO). We analyse the different intellectual property rights relevant to the proposal – focusing primarily on patent rights and trade secrets – which are most relevant to the present COVID-19 vaccine context. We explain why the

existing TRIPS flexibilities around compulsory licensing are incapable of addressing the present pandemic context adequately, both in terms of procedure and legal substance.

The extent of the current health crisis posed by COVID-19 is as undeniable as the current global response is untenable. Given the ongoing absence of sufficient engagement by the pharmaceutical industry with proposed global mechanisms to share intellectual property rights, data and know-how to address the pandemic, we argue that mandatory mechanisms are needed. The TRIPS waiver is an essential legal instrument in this context for enabling a radical increase in manufacturing capacity, and hence supply, of COVID-19 vaccines, creating a pathway to achieve global equitable access.

We make two arguments to this effect: first, the TRIPS waiver is a necessary and proportionate legal measure for clearing intellectual property (IP) barriers in a direct, consistent and efficient fashion, enabling the freedom to operate for more companies to produce COVID-19 vaccines and other health technologies without the fear of infringing another party's IP rights and the attendant threat of litigation; and second, the TRIPS waiver acts as an important political, moral and economic lever towards encouraging solutions aimed at global equitable access to vaccines, which is in the wider interest of the global public.

### **The COVID-19 Vaccine Patent Waiver: The Wrong Tool for the Right Goal**

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

Julia Barnes-Weise (The Global Health Innovation Alliance Accelerator: GHIAA)

*Bill of Health* (2021)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3840486](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3840486)

As the toll of COVID-19 continues to increase in many countries in the Global South, there has been a renewed push to address the problem of vaccine scarcity through a waiver of patent rights. In this piece, we explain the mechanics of patent waivers and argue that waivers alone are the wrong policy tool in the context of the COVID-19 pandemic. We agree with supporters of the waivers in their ultimate goal – that of scaling up the manufacturing of COVID-19 vaccines, and then distributing them according to more equitable models than the ones adopted thus far. However, we doubt that the particular types of goods at stake here can be easily replicated and produced in substantially larger quantities simply through a waiver of intellectual property rights.

## **Other Topics**

### **The Patent Medium: Toward a Network Paradigm of the Patent System**

Or Cohen-Sasson (Tel Aviv University – Buchmann Faculty of Law)

*Working Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3838221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3838221)

The modern patent system is conceived of as an information platform. The notion of patents as facilitating dissemination of information is evident in the common description of the patent system as a quid-pro-quo bargain: Society grants exclusive rights in exchange for information published by a patentee. But is there more to the patent system than merely informing others? Does the patent system also serve as a communication (and not only information) platform, namely, as a medium? Based on analysis of the patent system's structure and features through the lenses of communication studies, this Article suggests that it does. The patent medium is characterized by specific features, enabling players to use the patent system for various ends, much beyond the trivial goal of incentivizing innovation or

disseminating legal and technological knowledge. The Article strives to characterize the patent medium, as well as to examine the implications of portraying the patent space as a medium.

By closely observing the patent system, the Article reveals an existing, somewhat implicit communication paradigm of the patent system as a medium. Although tacit and unofficial, this paradigm is evident through a critical reading of patent scholarship and case law. The extant, unspoken communication paradigm resembles that of a bulletin board: it is a linear, straightforward, and public channel, focusing on the informative value of communication. However, this bulletin-board paradigm does not reflect the actual nature of the communication that transpires within the patent medium. After rethinking the patent space—the rules, structure, participants, and practices within the patent system—the Article offers an alternative, more comprehensive paradigm of the patent medium—the network paradigm. A network, as opposed to a bulletin board, is a connected, multi-directional, multi-player platform, which allows both public and private communication, for various ends (including, but not limited to, informing). Instead of a static view of the patent medium as a whereabouts of informative announcements, the network paradigm suggests a dynamic perspective, considering the patent medium to be enabling a discourse.

Beyond its theoretical contribution, the network paradigm serves as a powerful explanatory tool, offering profound implications for patent law. Approaching the patent space through the network paradigm prism resolves current oddities in the patent system. For instance, the network paradigm provides new understandings regarding phenomena such as patent pledging, early publication, and the first-to-file rule—incidents commonly considered enigmatic or only partially understood.

### **The Functions of Patents in Our Societies: Innovation, Markets, and New Firms**

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

*CEPR Discussion Paper No. DP16045*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3846132](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3846132)

His article provides a review of the role and functions of patents in society using data and evidence from the economic and management literature. While patents provide private protection to appropriate the returns from inventions, they also encourage their diffusion? in particular, they provide signals about the value of new firms, disclose information about the invention, and encourage the exchange of inventions and ideas in markets for technology. In order to better understand this trade-off, Patent Agencies and stakeholders should invest to a greater extent in data collections or in creating the conditions for research designs and experiments that nail down causal effects and mechanisms. Most available data are not created with these identification strategies in mind, which limits the questions that scholars can ask. Systematic studies that identify different effects of patents can provide the basis for rigorous evidence-based management and policy about patents.

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