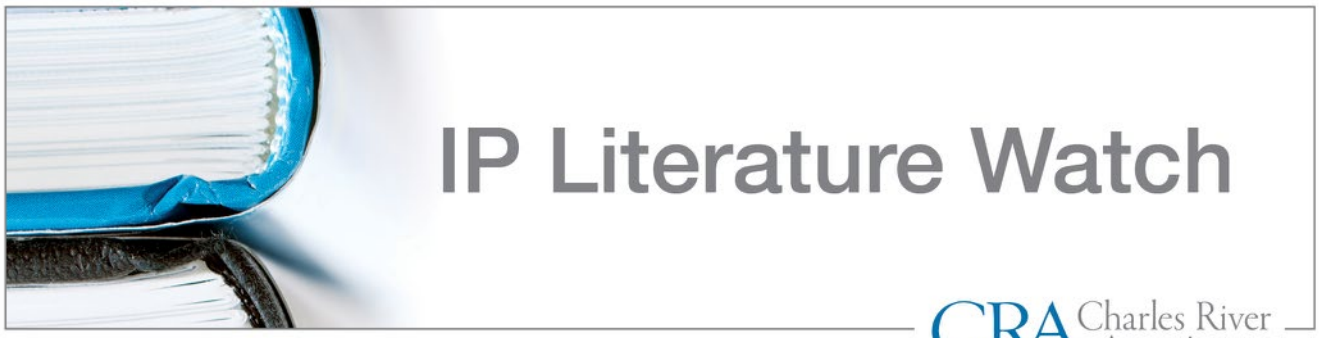

June 2021

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

The competition policy roots of intellectual property law: a reflection

Antony Scott Taubman (World Trade Organization; University of Melbourne - Melbourne Law School; University of South Australia - School of Law)
Anderson, Carvalho & Taubman (eds), Competition Policy and Intellectual Property in Today's Global Economy, Cambridge: Cambridge University Press, 2021 (forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3857825

This paper provides a brief sketch of the historical development of intellectual property (IP) law, situating its origins within the same, broader policy context that also gave rise to contemporary competition (or 'anti-trust') policy. It aims to give background and perspective to the broader endeavour, manifested in the present volume, of progressing towards a broader, better integrated and systemic understanding of the relationship between IP and competition policy, centred on a coherent approach to domestic policymaking and regulation of the market to promote social and economic welfare. In briefly reviewing some of the key features of the early development of the law in one specific legal tradition, however, it does not pretend to be a comprehensive, representative or authoritative historical account. This paper is therefore not a work of original scholarship but is rather a reflective essay. At most, therefore, it attempts to inform and stimulate discussion about the more deep-rooted policy (and sometimes, by the same token, less immediately visible) considerations that have shaped, and today continue to shape, IP and competition policy, as two complex, specialised and highly focused, but closely intertwined, legal and regulatory systems. A major limitation and shortcoming of the paper is its focus on the roots of the common law tradition, particularly English law: this should not be seen as privileging or endorsing that particular tradition, but as merely putting it forward as one illustrative case study, albeit one tradition that has been influential in the formation of the law in a number of other jurisdictions.

Reflecting on the aftermath of the French Revolution and the turn of the eighteenth century, de Tocqueville observed that 'two rivers had emerged, as from a common source: the first led men to free institutions, while the second led them to absolute power.' The roots of IP and competition policy can also be traced to political upheavals and resistance to monarchical excesses, and a tension between the exercise of power and economic freedoms. The exercise of tracing back the development of the modern laws of IP and of competition policy, in search of a possible common source, discloses a long history of tension between the impact of absolute power, in the form of royally dispensed monopolies, and the cultivation of the freedom to trade legitimately. The law and policy of IP and the regulation of competition have today been structured, and indeed channelled, into distinct legal and institutional streams, but to

venture upstream towards their historic origins may disclose far greater interaction and dynamic interplay as legal systems responded to changes in the economic, political and technological environment. In turn, reflecting on these historically distant roots may provide perspective and insights that can inform policy considerations today.

Fair Enough? Reconciling Unfair Competition With Competition Policy

Antony Scott Taubman (World Trade Organization; University of Melbourne - Melbourne Law School; University of South Australia - School of Law)
Anderson, Carvalho & Taubman (eds), Competition Policy and Intellectual Property in Today's Global Economy, Cambridge: Cambridge University Press, 2021 (forthcoming)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3857791

Intellectual property (IP) and competition policy are conventionally viewed as distinct fields of policy, law and regulation. Indeed, they can be perceived as standing at odds or in inherent tension with one another, potentially advancing different and divergent policy objectives and value systems, as engaging distinct policy constituencies and, at the level of values, as founded on differing conceptions of legitimacy or fairness in commerce. Yet both regulatory systems aim, ostensibly, at promoting public wellbeing, particularly through shaping and bounding commercial activity in the broader public interest, and limiting how one enterprise can inhibit or impair the legitimate commercial interests of another enterprise.

The present volume seeks to respond to the need for a broader, better integrated and systemic approach which would establish a mutually supportive relationship between IP and competition policy, in turn within a broader, more coherent framework for domestic policymaking and regulation of the market to promote social and economic welfare. This chapter addresses one specific aspect of this broader framework, and one zone of potential convergence between competition policy and IP, namely the norms against unfair competition that are located within the general field of IP.

The reference to 'unfair competition' in an IP context naturally raises questions as to its relationship with the general field of competition policy. Is the 'unfair competition' contemplated in the IP field conceptually distinct from – even in an entirely different category from – the kind of anticompetitive acts at which competition policy takes aim? Is it potentially confusing and counterproductive for policymakers, legislators and analysts to seek commonality between these two stylized notions of 'competition', or is it a contribution – even a prerequisite - for a systematic and coherent understanding of the interplay between IP and competition policy?

To address these questions, this paper considers how to situate the law and policy of the suppression of unfair competition within the broader relationship between the conceptually distinct fields of IP policy and competition policy. While respecting the formal, doctrinal, and institutional distinctions between conventional competition policy and the IP doctrine of unfair competition, the chapter identifies certain common conceptions, policy objectives and practical linkages shared by these two domains of law and policy, in the hope that this will help construct a more robust and stable platform for systematic coherence between IP and competition policy. The paper does not purport to provide a comprehensive, systematic or authoritative account of either area of law and policy, in theory or in their very diverse practice. It should be considered as, at best, a reflection on the potential interaction between the two systems at the most general level – the broad objectives they pursue, and the kind of values and normative considerations they may seek to advance.

Then, considering the underlying theme of ensuring that competitors' behavior in the marketplace promotes broader social benefit and consumer welfare, this paper explores whether a common policy foundation for the two fields may offer an additional pathway towards a more integrated and coherent understanding of the synergistic relationship between the domains of competition policy and of IP. The first part considers how the character of unfair competition has evolved in framework of international IP

law. The next part reflects on the focus of competition policy on anticompetitive practices and the notion of fairness or legitimacy in competitive behavior that lies at the heart of this system. The following part seeks to find comparisons and areas of commonality between these two areas of law, policy and regulation. The paper then considers two examples of the insights into the fields of IP and of market regulation that can follow from this broader conceptual foundation, two areas that have been the subject of considerable debate internationally and which pose significant legal and policy questions domestically. Following this, the paper considers the protection to be afforded to regulatory data in the pharmaceutical and agricultural chemical field (pivoting, as it does, on the principle of "unfair commercial use" of these data as ostensibly a form of protection against unfair competition). The next part considers the protection of traditional knowledge against illegitimate use (which centers on the legitimacy, equity and fairness of certain commercial activities making use of Indigenous and other traditional knowledge, commercial behavior that has been framed in the debate variously as inequitable conduct and misappropriation). Subsequently, the paper concludes with observations on the broader significance for an holistic approach to promoting market governance with a focus on social and economic welfare rooted in a clear conception of the forms of competitive behavior that are considered legitimate, 'fair' and ultimately beneficial for society.

IP & Licensing

The co-existence of patent-pools

Stefan Lobin (Goethe University Institute of Economics)
Uwe Walz (Goethe University Frankfurt - Institute of Economics; Center For Financial Studies (CFS), Leibniz Institute for Financial Research SAFE)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812530

Many industries, in particular high-tech industries, have experienced the (re-)emergence of patent pools that potentially co-exist with each other. In this paper, we provide a theoretical framework which allows us to understand the main determinants of co-existing patent pools. In this framework, we discuss the decision to create competing patent pools against the background of the trade-off between decreasing returns to patent pool size and a profit-reducing competition effect. We show that co-existence which allows to serve vertically segmented markets is more likely to be observed with a larger patent universe, with substantial technological dispersion as well as stronger concave patent value functions. Furthermore, we show that if the co-existence of pools emerges in equilibrium, then welfare always dominates a common pool and sometimes even in the absence of pools altogether.

FRAND declaration to license and patent-infringement indemnifications -FTC v. Qualcomm Case No. 19-16122 (9th Cir. 2020)

Kazuto Kobayashi (Tokyo Institute of Technology)
Kousei Torihiki No.844, p.26-32 (2021) (in Japanese)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866466

Qualcomm has long dominated the modem chip and handset industry with its research and development capabilities in mobile communications modem chips and its robust patent portfolio. The U.S. FTC alleged that Qualcomm's series of business practices of selling modem chips and licensing patents under its "no-license, no-chips" policy was anticompetitive against competing chipmakers and handset manufacturers. The district court ruled in favor of the FTC's claims, Qualcomm appealed.

A panel of the Ninth Circuit Court of Appeals restated the issue, focused on the impact of Qualcomm's business practices in the modem chip market, "the area of effective competition." The court held that

Qualcomm's business practices were hypercompetitive, but not anticompetitive, because Qualcomm had no obligation under the FRAND declaration or antitrust law to license essential patents to chipmakers competing in the modem chip market, and reversed the district court's decision as erroneous.

Based on my review of these cases, I will discuss the obligations under the FRAND declaration and antitrust law to license competing chip makers, including the relationship between FRAND declaration to license and patent-infringement indemnifications;

IP & Litigation

Post-Grant Adjudication of Drug Patents: Agency And/Or Court

Arti K. Rai (Duke University School of Law; Duke Innovation & Entrepreneurship Initiative)
Saurabh Vishnubhakat (Texas A&M University School of Law; Duke University School of Law)
Jorge Lemus (University Of Illinois Urbana Champaign)
Erik Hovenkamp (University of Southern California School of Law)
Berkeley Technology Law Journal, Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3865804

The America Invents Act of 2011 (“AIA”) created a robust administrative system—the Patent Trial and Appeal Board (“PTAB”)—for challenging the validity of granted patents. Congress determined that administrative correction of errors made in initial patent grants could be cheaper and more scientifically accurate than district court litigation over patent validity.

In terms of private economic value per patent, few areas of technology can match the biopharmaceutical industry. Particularly for small molecule drugs, a billion-dollar drug monopoly may be protected from competition by a relatively small number of patents. Accordingly, the social cost of invalid patents—and, by extension, the potential benefit of PTAB review—is particularly acute in the biopharmaceutical industry. Conversely, to the extent that PTAB is overly assertive and improperly targets high-quality patents, the decrease in innovation incentives may be quite problematic.

To investigate the issue empirically, our paper uses several novel datasets (made publicly available via the posting of this article) to study the respective roles of the PTAB and the district courts. Our empirical findings indicate that the PTAB’s role in adjudicating small molecule patents has been quite modest, substantially more modest than its role for other types of patents. Moreover, we do not find any evidence that the PTAB targets categories of small molecule patents that are generally considered high quality. To the contrary, the PTAB does not appear to differentially target even categories of small molecule patents that are generally considered to exhibit lower quality. We also find no evidence that the PTAB is targeting small molecule patents held by small entities. We conclude by discussing paths policymakers could take if they were interested in a more active role for the PTAB in policing the validity of small molecule drug patents.

IP & Innovation

(When) Does Patent Protection Spur Cumulative Research within Firms?

Ashish Arora (Duke University - Fuqua School of Business; National Bureau of Economics Research; Duke Innovation & Entrepreneurship Initiative)
Sharon Belenzon (Duke University; NBER; Duke Innovation & Entrepreneurship Initiative)
Matt Marx (Cornell University)
Dror Shvadron (Duke University - Fuqua School of Business)
NBER Working Paper No. w28880
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861409

We estimate the effect of patent protection on follow-on investments in corporate scientific research. We exploit a new method for identifying an exogenous reduction in the protection a granted patent provides. Using data on public, research-active firms between 1990 and 2015, we find that firms decrease follow-on research after a reduction in patent protection, as measured by a drop in internal citations to an associated scientific article. This effect is stronger for smaller firms and in industries where patents are traded less frequently. Our findings are consistent with a stylized model whereby patent protection is a strategic substitute for commercialization capability. Our results imply that stronger patents encourage follow-on research, but also shift the locus of research from big firms toward smaller firms and startups. As patent protection has strengthened since the mid-1980s, our results help explain why the American innovation ecosystem has undergone a growing division of innovative labor, where startups become primary sources of new ideas.

IP Law & Policy

Patent Law: An Open-Access Casebook

Sarah Burstein (The University of Oklahoma College of Law)
Sarah R. Wasserman Rajec (William & Mary Law School)
Andres Sawicki (University of Miami - School of Law)
Patent Law: An Open-Access Casebook, 2021
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3866658

Patent Law: An Open-Access Casebook is a comprehensive casebook covering all the fundamentals of the United States patent system. It is designed to be used as the primary text in a 3-credit or 4-credit patent law course. Any portion of the casebook may also, of course, be used separately.

Intellectual Property Rights (IPR): An Overview

Sreeragi R. G. (Velu Thampi Memorial Nair Service Society College (VTM NSS College))
Emperor International Journal of Library and Information Technology Research 2021
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3859231

All tangible and intangible creations of human mind and intellect can be considered as the assets of humanity. These manifestations come under the category of Intellectual Property Rights (IPR). Research and scientific activities trigger the production of intellectual properties in many ways and impetus as a catalyst of the industrial and economic growth of the nation itself. These creations are being protected by law over a significant timeframe. The creation of wide assortment of products is legitimately ensured with the makers themselves. Additionally, it offers opportunity to share and distribute knowledge for the prosperity of the society. To maintain equilibrium, these rights are conceded for a specific period of time. Patents, copyright, trademarks, geographical indicators, *etc.* are altogether coming under the umbrella term IPR. In order to get privilege over the innovations, it ought to be filed for granting rights as per the laws exist in the country. The present study enquires the

different categories of intellectual properties and the duration up to which the inventions will be legally secured once registered.

Copyright Law

Copyright Fair Use from 1841 to 2021: What It Means for Copyright Protections Versus Free Speech Exceptions

Sara Gold (Eastman IP)
Sara Gold, Copyright Fair Use from 1841 to 2021: What it Means for Copyright Protections Versus Fair Use Exceptions, THE FEDERAL LAWYER, May/June 2021
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3856694

This article, published in the May/June 2021 edition of *The Federal Lawyer*, examines the jurisprudential and legislative history of copyright fair use in relation to its current status in American copyright law as an "affirmative defense." Fair use as an affirmative defense is relatively ingrained into modern U.S. copyright law, even though the Copyright Act does not use this label. Because fair use is treated as an affirmative defense, defendants wholly bear the burdens of production and persuasion on all four fair-use factors articulated in Section 107 of the Copyright Act.

However, this full allocation to the defendant may reflect an imbalance between the rights of copyright holders and the rights of the public. These considerations are especially evident when it comes to summary judgment, which already places the onus on the defendant to eliminate issues of fact, and when it comes to the market harm factor, which requires the defendant to prove the absence of harm to markets that not it, but the plaintiff, owns.

The Copyright Act's lack of specificity as to the procedural posture of fair use could support a currently untapped judicial flexibility when it comes to approaching fair use from this standpoint. As this article concludes, a procedural approach that takes into account the parties' relative access to evidence and information could bring copyright protection and copyright exception into better balance, furthering the goal of copyright law to foster creativity.

Partially Engaging: Copyright Royalties in Semi-Interactive Streaming Services

Zachary Shufro (NYU School of Law)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3857262

This paper examines the current system governing sound recording royalty rates, and suggests reforms to help the digital music economy adapt to the Internet age and the advent of a wide variety of music streaming services. First, it summarizes the current copyright royalty system for music streaming services, and describes the existing oversight for copyright streaming royalty rates and the statutory treatments of different streaming services. Next, it considers how certain statutory royalty rates are assessed under the Canadian equivalent of the American system, and proposes two options for reform that would help shape the law to foster the evolving market in music streaming services: the introduction of a mid-tier class of semi-interactive streaming services, and/or the replacement of the voluntary licensing deals for interactive services with a statutory license akin to that applicable for the noninteractive market. While significant barriers in the market stand in the way of such reforms, they are not as drastic as they initially appear, and in fact, Canada has adopted both reforms in its domestic system. Ultimately, the disparity between the statutory framework and the realities of the digital music economy will continue to diverge until reform is made; to reject proposed reforms on the grounds of some market opposition, or to insist on holding out for a flawless, idealized option for reform to emerge, would merely make the perfect the enemy of the good.

IP & Trade

The Waiving of Intellectual Property: A Poor Response to a Real Problem

Christop Ann, *et al*. (Technische Universität München (TUM) - TUM School of Management)
De Boufflers Position Paper, May 2021
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850550

Since it was announced on 5 May 2021 that the Biden/Harris administration supported the proposition to wave intellectual property rights (i.e. the so-called “TRIPS waiver”) linked to COVID-19 initiated by India and South Africa in front of the WTO, the subject of the patent waiver has come to the forefront of public debate. We would like to shed some light on this debate.

Network Effects of the International Intellectual Property System

Alexander Peukert (Goethe University Frankfurt - Faculty of Law)
Forthcoming, 24 Tulane Journal of Technology & Intellectual Property (2022)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3864875

This article provides a novel explanation for the global intellectual property (IP) paradox, i.e. the consistent growth of the multilateral IP system in spite of mounting evidence that its effects are at best neutral if not disadvantageous for low-income and most middle-income countries and thus the majority of contracting states. It demonstrates that the multilateral IP system is deliberately structured as a virtual network that exhibits network effects similar to a social media platform, for example. The more members an IP treaty has, the more IP protection acceding states can secure for their nationals. Conversely, every accession enlarges the territory in which nationals of previous members can enjoy protection. Due to these increasing returns to adoption, signing up to and remaining part of the global IP network is attractive, irrespective of the immediate effects of a treaty.

Other Topics

The Pecuniary Interests of PTAB Judges - Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials

Ron D. Katznelson (Bi-Level Technologies)
Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871108

Unlike Administrative Law Judges presiding over adjudications in administrative tribunals operated by other Federal agencies, Administrative Patent Judges (APJs) at the Patent Trial and Appeals Board (PTAB) of the U.S. Patent Office receive bonus awards of up to 20% of their base salary. This article details the features of the PTAB bonus plan and reports on an empirical analysis of the relationship between the annual bonus awards of individual APJs and the type of decisions they made in the year. The study found that in fiscal year 2016, APJs appeared to have earned an average bonus of $255 per decision when granting institution, but only an average of $208 per decision when denying institution. They also appeared to have earned an average bonus award of $314 per Final Written Decision when canceling patent claims, but only an average of $2 per Final Written Decision when upholding all patent claims. It is shown that this resulted in an annual average APJ pecuniary bias totaling $5,760 out of an average annual APJ bonus of $21,166. An analysis of expanded panel decisions (decisions of panels with 4 or more APJs) revealed that on average, the select few APJs that participated in expanded panel decisions appeared to have been remunerated for decisions made in expanded panels with a “premium” of more than $64 per decision above the bonus they received for just making the decision. This article reveals for the first time in public the existence of a secret extra-panel review committee of the PTAB called the AIA Review Committee (ARC). The ARC receives for review Final Written Decision drafts

prior to issuance, reviews and supplies comments to the APJ panel through ex-parte communications that are concealed from the parties. Finally this article discusses the due process concerns surrounding the various findings of the study.

A Research Framework on Intellectual Property and Morality

Christine Haight Farley (American University - Washington College of Law)
Approaches and Methodologies in Intellectual Property Research (Irene Calboli & Lilla' Montagnani, eds., Oxford University Press 2021)
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3862059

This chapter surveys the scholarship that investigates the intersection of IP and morality and addresses to what extent, if any, IP law does or should reflect moral judgments. Scholars disagree about whether morality has a place in IP law. Some scholars look at IP through the lens of morality; some see only a disconnect between IP law and morality. For some, morality serves as a basis for IP rights, while others find law and morality to be so conceptually distinct as to be irreconcilable. Some see a danger in IP laws being in conflict with morality, while others view the introduction of morality as a danger. The complexity of IP scholars' relationship to morality is matched only by the complexity of morality itself as a concern of law. The chapter organizes this area of scholarship according to the position it takes on the appropriateness of the juxtaposition, that is, are the authors moral realists or moral sceptics? Within this divide, the chapter organizes the work by the various approaches, themes, and questions that are common to these scholars.

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