



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 & Antitrust

Antitrust Interoperability Remedies

Herbert Hovenkamp (University of Pennsylvania Carey Law School; University of Pennsylvania – The Wharton School; University College London)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4035879

Compelled interoperability can be a useful remedy for dominant firms, including large digital platforms, who violate the antitrust laws. They can address competition concerns without interfering unnecessarily with the structures that make digital platforms attractive and that have contributed so much to economic growth.

Given the wide variety of structures and business models for big tech, “interoperability” must be defined broadly. It can realistically include everything from “dynamic” interoperability that requires real time sharing of data and operations, to “static” interoperability which requires portability but not necessarily real time interactions. Also included are the compelled sharing of intellectual property or other productive assets, or creation of broader and more competitive management of large digital firms.

Designing such remedies requires identification of the particular structures or practices that are making these markets less competitive than they might be. Interoperability is not the best remedy in all situations, nor even for all of those that involve digital platforms.

Antitrust and Trademark Settlements

C. Scott Hemphill (New York University School of Law)

Erik Hovenkamp (University of Southern California School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4028144

In today's digital economy, online competitive advertising plays a central role in informing consumers about low prices and other desirable product features. Accordingly, rivals have a strong incentive and opportunity to place anticompetitive limits on the flow of information. They do so by reaching collusive agreements in which the firms avoid targeting one another with ads. Ordinarily, such an arrangement might be regarded as a straightforward antitrust violation. However, these deals take the form of settlements of trademark litigation, raising the possibility that the restraints might be justified by

trademark law. There is little case law or scholarship identifying when settlements of trademark litigation run afoul of the antitrust laws.

This Article is an effort to fill that gap. We explain how the standard developed in the Supreme Court's *Actavis* decision, a watershed ruling about patent settlements, can be adapted and applied to trademark cases. We articulate how courts can identify anticompetitive settlements without having to evaluate the merits of the underlying trademark infringement claims. Settlements imposing broad restraints on competitive targeted advertising may raise significant antitrust concerns that are unlikely to arise in run-of-the-mill settlements that merely restrain what marks a firm can attach to its product. We also consider and evaluate a number of possible procompetitive justifications for restrictive trademark settlements. Our analysis uncovers substantial errors in the first appellate decision addressing these restraints.

IP & Licensing

Open Sourcing AI: Intellectual Property at the Service of Platform Leadership

Carlos Muñoz Ferrandis (Max Planck Institute for Innovation and Competition; Universidad de Alicante; Global Innovation, Policy & Law Research Group (GIPLaw-UA))

Marta Duque Lizarralde (TUM School of Management, Technical University of Munich)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018413

Artificial Intelligence - AI - is one of the most strategic technologies of our century. Consequently, tech companies are adopting intellectual property strategies to protect their investment in the field, which encompasses copyright, patents and trade secrets. While the number of AI-related patent applications is increasing, the number of open source AI projects sponsored by major AI patent holders is also on the rise. This article explores the strategic reasons behind the growing adoption of open source licensing in the AI space. More precisely, it assesses how IP rights are articulated around “openness” as a competitive factor in ecosystem competition, and how some players are using open source licensing successfully to attract a critical mass of users and build an ecosystem around their AI platforms. Moreover, this article integrates the debate on the protectability of AI features by IP rights to assess the potential implications for open source. Finally, it analyses the most used open source licences in AI projects and highlights existing and future challenges from an IP and contractual law perspective.

Patent Pools: A Practical Perspective – Part I

Julia Brito

Hector Axel Contreras (Munich Consulting Group)

les Nouvelles – Journal of the Licensing Executives Society, Volume LVI No. 4, December 2021

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3946590

In the patent law field, ‘pooling’ is defined as the practice by two or more parties to license their patents as a bundle. ‘Patent pools’ are not a new concept. Registers of them date back to the 19th century, whereas prominent pools emerged for the automobile and aircraft industries in the early 20th century. Numerous patent pools have been formed since, evolving over the years on the way they operate. Nonetheless, despite being in the market for such a long time, pools continue to be closely monitored by regulators, academia, and industry, mainly due to their potential (positive and negative) impact on competition.

IP & Litigation

Technology Changes Drive Legal Changes for Antibody Patents: What Patent Examiners Can Teach Courts About the Written Description and Enablement Requirements

S. Sean Tu (West Virginia University College of Law)

Christopher M. Holman (University of Missouri – Kansas City School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025167

Antibody patents form the basis of some of the most valuable biotechnology products on the market. In 2020 alone, the sales of the top three drugs exceed 10 billion dollars. Two of those three drugs are monoclonal antibodies (Humira and Keytruda). In the past, patent law offered broad protection for monoclonal antibodies. As time has progressed, however, courts have narrowed the scope of antibody patents. However, very little research has been done to see how patent examiners are applying the rules of patentability to these valuable antibody patents.

We examine approximately two decades worth of antibody patents to determine how the US Patent Office has dealt with antibody patents. Specifically, we examine every patent directed to an antibody composition of matter from 2001-present. We find that patent examiners have steadily increased the use of 112(a) enablement and written description rejections while slightly decreasing the use of anticipation and obviousness rejections. Accordingly, these data suggest that 112(a) plays a greater role in policing claim scope than prior art rejections, which is the most frequently used rejection type for every other technology center. Correspondingly, patent applicants have also changed the type of claims they are drafting. Claims have moved from broad claims based only on function to narrow claims based on antibody structure.

We also find that the number of antibody composition patents has dramatically increased, while the number of claims per patent has decreased. Additionally, the number of words in each independent claim has increased three-fold. These data present an interesting evolution for antibody patents that mirrors the changing nature of antibody technology and offers some insights for improving antibody patent prosecution.

Patent Forfeiture

Sean B. Seymore (Vanderbilt University – Law School)

Duke Law Journal, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4033277

Patent law doesn't look kindly on patent owners who engage in wrongdoing involving the patent. The U.S. Supreme Court and lower courts have refused to enforce patents tainted with inequitable conduct, fraud, or bad faith. This issue typically arises in patent litigation when an accused infringer asserts that the patent should be unenforceable if the patentee engaged in one of four proscribed activities: inequitable conduct (deliberate misrepresentations or omissions of material information from the Patent Office); patent misuse (anticompetitive licensing practices); unclean hands (business or litigation misconduct); or waiver/estoppel (a lack of candor before a standard-setting organization). This seems right—a patentee shouldn't be allowed to benefit from wrongdoing.

However, the use of unenforceability to remedy patentee misconduct is largely understudied and undertheorized in legal scholarship. One reason is doctrinal. Aside from the four proscribed activities, there is no clear-cut remedy for other types of patentee misconduct involving the asserted patent. For instance, should a patent for a nutritional supplement that makes affirmative misstatements about its safety and efficacy be enforceable? How about a patent that plagiarizes someone else's copyrighted work or makes intentionally misleading assertions about the invention's capabilities?

This Article seeks to answer these questions and fill the doctrinal and scholarly gap in patent unenforceability remedies. It offers a new, unclean hands-based theory of unenforceability called patent forfeiture. If a patentee engages in egregious pre- or post-issuance misconduct involving the patent and gains an inequitable benefit from it or harms a third party, the patentee may forfeit the right to enforce the patent until the misconduct has been abandoned and its ill effects dissipate. Patent forfeiture adopts the hallmarks of equity—flexibility, discretion, and individualization—but is sufficiently constrained to align with other policy objectives of the patent system. And while morality, conscience, and good faith may not play a role in obtaining a patent, patent forfeiture reaffirms the importance of these equitable principles in enforcing a patent.

IP & Innovation

Simultaneous Information Releases and Capital Market Feedback

Mustafa Ahci (Tilburg University School of Economics and Management)

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4009199

We examine whether the simultaneous release of information affects managers' ability to gather decision-relevant information from market prices. We use the plausibly exogenous timing of patent grant disclosures by the United States Patent and Trademark Office as a source of variation in the simultaneous release of value-relevant information. We find that the market's response to patent grants is more informative for managerial decisions if the firm receives fewer patent grants on the same day. This effect is more pronounced for patents that relate to relatively more risky innovative strategies for which feedback is arguably more important. Firms with more distinct information releases also produce more valuable and higher quality innovations in the future. Our results suggest that bundling the release of multiple pieces of information at once potentially impedes managers' ability to benefit from the market's feedback.

Patent Citation Generation at the Triadic Offices: Mechanisms and Implications for Analysis

Kyle Higham (Hitotsubashi University – Institute of Innovation Research)

Tohru Yoshioka-Kobayashi (Hitotsubashi University – Institute of Innovation Research)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022851

Patent citations have been used for over four decades as indicators of numerous aspects of technological progress, including knowledge flows, technological evolution, and patent impact. However, research on these topics often ignores the variable contexts in which examiners, applicants, and third parties generate these citations, and the meanings that we may infer as a result. While technological progress is becoming increasingly global in nature, differing citation practices at patent offices around the world often present a challenge to those aiming to study this progress in a comprehensive manner. To remedy this, we review the many mechanisms that give rise to citations in each of the triadic patent offices collectively responsible for generating the vast majority of readily available citation data, integrating literature from economics, management, and law to assess the biases inherent in these mechanisms. We discuss the ways in which the richness of citation data and metadata at the family level can be leveraged in empirical settings to reduce noise, improve interpretability, and access information that is impossible to uncover in data that is restricted to a single jurisdiction.

Pre-Grant Patent Disclosure and Venture Capital-Backed Innovation

Tianyang Zheng (Simon Business School, University of Rochester)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3973143

This paper examines the effect of mandatory pre-grant patent publications on the innovation of venture capital (VC)-backed companies. Using the American Inventors Protection Act (AIPA) as a shock that mandated an 18-month pre-grant publication, I find relative improvements in innovation outputs for companies whose pre-AIPA patent applications received more “revise and resubmit” decisions (rejections). Specifically, I interpret the pre-AIPA rejections as a proxy for companies’ inability to detect overlapping inventions, or in other words, uncertainty in the scope of protection companies could obtain from patents. My findings thus suggest that pre-grant patent publications generate larger benefits when they can more effectively reduce such uncertainty.

Competition and innovation in the financial sector: evidence from the rise of FinTech start-ups

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4021161

We provide new evidence on the effects of competition on incumbents’ innovative behavior by examining the rise of FinTech start-ups over the period 2000-2016. We employ machine learning techniques to classify a large global sample of patent applications into five FinTech categories. We exploit the variation in the share of FinTech patent applications by non-financial startups to incumbent financial firms to measure competitive pressures from outside the financial industry. We show that higher competitive pressures from nonfinancial start-ups increases the probability that financial incumbents innovate. Moreover, competition from start-ups results in a higher number of FinTech patent applications by financial incumbents as compared to non-financial firms, especially when the innovations of FinTech start-ups are more important, as proxied by future patent citations count.

IP Law & Policy

The Role of TRIPS in Encouraging Diffusion of Pharmaceutical Technology to Developing Countries

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3990215

One of the explicit goals of the 1995 TRIPS Agreement is promotion of technological innovation and transfer and dissemination of technologies worldwide. We statistically assess the relative impact of TRIPS on technology diffusion in the life sciences sector, using a longitudinal panel dataset that covers a wide range of developing countries for the period 1995 to 2017. We focus our examination of pharmaceutical technology diffusion on three indicators of knowledge production and transfer: scientific publications as an indicator of basic research; pharmaceutical patent applications by domestic inventors;

local activity in clinical trials; and knowledge sharing through licensing. Controlling for a variety of potential confounding factors, we find that the pharma-specific provisions in TRIPS have a positive and statistically significant association with these measures of technology diffusion: adoption of TRIPS provisions is associated with a 67% increase in basic research in life sciences; a 30% increase in commercial research; 18% greater participation in drug development; and a 53% increase in knowledge transfer through licensing. These findings suggest significant economic benefits to countries that provide stronger protection of IP for pharmaceuticals, through increased domestic investment in the pharmaceutical sector, and more rapid and extensive technology diffusion.

Inventorless Inventions? The Constitutional Conundrum of AI-Produced Inventions

David L. Schwartz (Northwestern University – Pritzker School of Law)

Max Rogers

Harvard Journal of Law & Technology, Vol. 35, 2022 (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025434

The U.S. Patent & Trademark Office recently held that inventions created by artificial intelligence (AI) are not patentable in the name of the AI system. This decision has weighty implications and reveals major underlying problems with the patent laws.

This Article's primary contribution is to address whether, under the Intellectual Property Clause of the Constitution, Congress has the authority to issue patents on AI-produced inventions. In answering this question, this Article analyzes the Intellectual Property Clause in light of the multiple modalities of constitutional argument. Textual analysis suggests that the original constitutional meaning of "Inventors" supports a broad conception of "Inventors" that is compatible with patenting AI-produced inventions. The history is consistent with this understanding, based in part on the English practice of granting "patents of importation." Ultimately, the Article concludes that, although an AI cannot be an inventor for constitutional purposes, the constitutional scope of inventorship is not limited solely to the literal creator of a claimed invention. Rather, Congress possesses broad authority under the Intellectual Property Clause to define "Inventors" for purposes of patent law. Consequently, Congress can authorize the issuance of patents on AI-produced inventions to various natural persons bearing some relationship to the AI system, even when those individuals have little-to-no role in the AI's inventive process.

Balancing Innovation, 'Ordre Public' and Morality in Human Germline Editing: A Call for More Nuanced Approaches in Patent Law

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Timo Minssen (University of Copenhagen – Centre for Advanced Studies in Biomedical Innovation Law (CeBIL) – Faculty of Law)

Ana Nordberg (Faculty of Law, Lund University, Sweden)

Queen Mary Law Research Paper No. 379/2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4036406

This article analyses the role that 'ordre public' and morality exceptions can play in the granting of patents on inventions in the field of human germline editing and the consequences of this policy option. In order to provide the context for such an analysis, the article will, first, provide an overview of the current patent landscape for relevant genome editing technologies, drawing attention to recent patent disputes and, second, examine 'ordre public' and morality exceptions under patent law in international, national and regional law, and the implications for innovation and access to novel treatments. The article argues that patent exceptions should not be used as a blunt policy instrument, nor interpreted in a way that is contrary to the patent system's overall objectives. The 'ordre public' and morality based exceptions in the context of human germline editing should not be interpreted and applied in a way which results in outcomes counterproductive to the goal of balancing innovation with the protection of societal higher normative values. Instead, the application of the exception should be based on a sound understanding of both the underlying science as well as the broader ethical, social, and legal implications, thus enabling case-by-case decisions that provide the basis for patent claim amendments

and nuanced purpose-bound protection. Further analysis and debate as to the role that such flexibilities can play in the context of genome editing technologies is therefore both necessary and desirable, and can be facilitated in the ways set out in this article.

World First: An Australian Court Opens the Door to Inventor Recognition for Artificial Intelligence Systems

Amanda-Jane George (CQUniversity)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4016939

Rapid development and use of artificial intelligence ('AI') is creating significant regulatory challenges in many domains. In the intellectual property sphere, Stephen Thaler's Artificial Inventor Project ('AIP') is challenging traditional concepts of who – and what – can be an 'inventor' for patent registration. With the filing of patent applications across multiple jurisdictions, managing inventor status of AI systems while ensuring innovation incentivisation is preserved is the question before patent offices, courts and legislatures globally. The AIP's aim is to clarify, if not advance, AI 'inventor' eligibility. Thaler, the AI engineer behind the Project, has sought inventor status for his 'sentient' machine DABUS, in order to patent inventions 'autonomously' made by it. Australia's 2021 Federal Court decision affirming machine inventors constitutes a world first – with other jurisdictions that have substantively considered the matter denying status. This article analyses the respective judgments and arguments raised, concluding the Australian decision to be out of step internationally, and with High Court authority and classic statutory interpretation. It nevertheless argues the need for focused dialogue around the intersection of AI and intellectual property, directions forward, and, as with other regulatory fields, the need for this intersection to remain the purview of legislative bodies rather than courts.

Copyright Law

Investigating Design

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031989

Design is ascendant. Steve Jobs's legendary obsession with design was widely regarded as Apple's comparative advantage, and that lesson has not been lost on its competitors. Design thinking is a growth industry, in business and at universities, and design professionals continue to take on increasingly significant roles within firms. The increasing economic significance of design has been reflected in an explosion of design patent applications and increasing amount of design litigation.

Despite design's growing economic and legal importance, relatively little is known by legal scholars and policymakers about designers or the design process. This paper addresses that gap and is drawn from original data collected over several years interviewing and observing designers where they work. Our interviews provide a rich background on the design field(s), the nature and value of design, and designers' goals and values.

Studying designers and the practice of design is not only economically and culturally relevant, but significant as a matter of legal policy because design has been an enduring puzzle in intellectual property law. Design is not archetypal subject matter for any of the IP systems. Indeed, Congress created the design patent system in 1842 precisely because it didn't believe design fit any of the then-existing regimes. But design patent, like copyright and trademark (which have since expanded to accommodate at least some design) has always struggled with design's hybrid nature. More specifically, each of those systems has attempted to separate out the functional aspects of design in order to channel protection for those features to utility patent law. Our data suggest that this challenge might be insurmountable. While

there are good reasons for IP doctrines to attempt to channel protection, separation of functional features runs counter to modern designers' interdisciplinarity and explicit goals of coherence and integration.

IP & Trade

The Place of International Economic Law in Constitutional Interpretation

David Schneiderman (University of Toronto – Faculty of Law)

Research Handbook on Constitutional Interpretation edited by Carlos Bernal, Sujit Choudhry and Kate O'Regan (OUP Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015757

Does international economic law influence constitutional interpretation undertaken by national courts? Do judges approve, accommodate, or resist, the impact of international legal disciplines? The degree to which the judiciary is attentive to these pressures and accordingly adjust constitutional interpretation, is the principal concern of this chapter. It takes up a triptych of instances where apex courts have addressed interactions between international economic law and constitutional rights and obligations. First, the Novartis case before the Madras High Court is taken up, answering in the negative the question of whether the Constitution of India incorporates protections for intellectual property that are to be found in TRIPs. Instead, limits on renewing intellectual property protections discharge the constitutional 'obligation of providing good health care to its [India's] citizens.' Second, in a constitutional ruling of the Philippines Supreme Court, we learn that WTO rules outlawing preferences for local labor, producers, service providers, and traders is not a sufficiently grave violation of the country's "pro-people, pro-poor" constitution. Finally, we examine the Colombian Constitutional Court's decision concerning the validity of a bilateral investment treaty (BIT) between Colombia and France. Judicial review occasioned multiple declarations of 'conditional constitutionality,' forcing the two states back to the negotiating table. Even then, controversial elements incorporated in the BIT, such as granting preferential treatment to foreign investors over nationals, were constitutionally endorsed by the Court. By scrutinizing the dissonance between constitutional and international commitments, courts can be expected to look for ways to both flex their judicial review muscles in line with constitutional particulars whilst smoothing over constitutional misalignment with paths to economic success preferred by the political branches.

Other Topics

Cross Border Enforcement of Intellectual Property Rights in the EU

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Giancarlo Frosio (Queen's University Belfast – School of Law; Stanford University – Stanford Law School Center for Internet and Society; Université de Strasbourg – CEIPI)

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Centre for International Intellectual Property Studies (CEIPI) Research Paper Forthcoming

Study for the Committee on Legal Affairs (JURI) of the European Parliament doi: 10.2861/255094

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4022170

This study, requested by the Committee on Legal Affairs (JURI) of the European Parliament, aims to provide an overview of cross-border enforcement of intellectual property rights in the EU with a particular emphasis on copyright and related rights in the online environment.

The study provides a detailed analysis of the current situation of cross-border enforcement of intellectual property rights and formulates various policy recommendations to improve current intellectual property rights enforcement options among Member States.

The Cost Approach to Intellectual Property Analysis – Methodology and Principles

Robert Reilly (Willamette Management Associates)

les Nouvelles – Journal of the Licensing Executives Society, Volume LVI No. 4, December 2021

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3946613

Licensing executives often prepare various types of economic analyses for intellectual property owners and operators. For purposes of this discussion, the term intellectual property includes patents, copyrights, trademarks, and trade secrets. And, for purposes of this discussion, intellectual property owner/operators include developers/inventors, fee simple interest owners, licensors and licensees, joint venture partners, and contract counterparties. Licensing executives prepare these economic analyses for owners/operators in matters related to pricing and structuring of sale or license transactions, financing and securitization transactions, taxation planning and compliance activities, strategic planning and commercialization decisions, fair value measurements and financial accounting issuers, tort-related and contract-related litigation claims, and other matters.

Early American Federal Trademark Law and the Law of Nations

Zvi S. Rosen (Southern Illinois University School of Law)

Unformatted draft of book chapter adapted for Intellectual Property and the Law of Nations, 1860–1920 (P. Sean Morris, Ed., Brill 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4035692

From 1869 to 1879, many European nations rushed to conclude bilateral treaties for trademark protection with the United States, either with the expectation of a federal law or under the first federal trademark law passed in 1870. However, in 1879 the US Supreme Court held the 1870 Act unconstitutional, throwing that system into disarray. This piece will explore these early trademark treaties, situate them in the context of developments in the law and society during this period, and explore how the Supreme Court's 1879 decision in the Trade-Mark Cases affected the course of international trademark law. This piece adapts the author's earlier scholarship on this era of U.S. trademark law to greater engage the transatlantic development of trademark law.

“Just” Sharing: The Virtues of Digital Sequence Information Benefit-Sharing for the Common Good

Margo A. Bagley (Emory University School of Law)

Harvard International Law Journal, Vol. 63, No. 3, 2022

Emory Legal Studies Research Paper Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3985083

Genome sequence information is being used to develop improvements in diverse product areas from agriculture to therapeutics. In fact, the rapid development of COVID-19 vaccines required access to the genome sequence of the virus. Beyond the COVID-19 context, however, vast amounts of what is being called digital sequence information (DSI) are being used, and patented, without permission from the countries that own the genetic resources from which the sequences are derived. This issue is stymieing negotiations in several international fora, including the UN Convention on Biological Diversity (CBD) and its Nagoya Protocol. These treaties obligate users of genetic resources to share the benefits of resource utilization with the resource providers. But parties disagree profoundly on whether these obligations extend to DSI. And as DSI often obviates the need for access to tangible material, monetary benefits are likely to decline even further.

This Article identifies challenges to and opportunities for achieving “just” sharing outcomes on DSI under the CBD and Nagoya Protocol and argues for the development of a global multilateral benefit sharing mechanism as a more just and efficient vehicle for compliance with benefit-sharing obligations while retaining open access to sequence information. The prime benefit-sharing beneficiaries are intended to be the indigenous peoples and local communities who conserve and safeguard global biodiversity, yet who often are the most socioeconomically deprived among us. As such, this Article also situates the DSI

benefit-sharing controversy within the larger societal moments focused on justice for the vulnerable and climate change mitigation.

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The editor would like to acknowledge the contributions of Arun Maganti.

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