



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

Intellectual Property Protection Lost: The Impact on Competition and Acquisitions

Utku Acikalin (TOBB University of Economics and Technology)

Tolga Caskurlu (University of Amsterdam Business School)

Gerard Hoberg (University of Southern California - Marshall School of Business - Finance and Business Economics Department)

Gordon M. Phillips (Dartmouth College - Tuck School of Business; National Bureau of Economic Research (NBER))

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023622

We examine the impact of lost intellectual property protection on innovation, competition, mergers and acquisitions and employment agreements. We consider firms whose ability to protect intellectual property (IP) using patents is potentially invalidated following the Alice vs. CLS Bank International Supreme Court decision. This decision has impacted patents in multiple areas including business methods, software, and bioinformatics. We use state-of-the-art machine learning techniques to identify firms' patent portfolios' potential exposure to the Alice decision. While all affected firms decrease patenting post-Alice, we find unequal impact across a myriad of outcomes. Large affected firms benefit as their sales and market valuations increase, and their exposure to lawsuits through patent trolls decrease. They also acquire fewer firms post-Alice. Small affected firms lose as they face increased competition, product market encroachment, and lower profits and valuations. They also increase R&D and have their employees sign more nondisclosure and noncompete agreements. Our results show that there are both costs and benefits of IP protection.

Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets

Ruud Peters (Peters IP Consultancy B.V.)

Igor Nikolic (European University Institute)

Bowman Heiden (Tusher Center, Institute for Business Innovation, Haas School of Business, UC-Berkeley; Center for Intellectual Property - Chalmers University of Technology, University of Gothenburg, and Norwegian University of Science and Technology)

Forthcoming in 5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things (eds. Jonathan M. Barnett and Sean M. O'Connor, Cambridge University Press 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4046554

In response to concerns that inefficiencies in SEP licensing may have a negative systemic impact on the development of emerging 5G and IoT Markets, the European Commission (EC) convened an Expert

Group on Licensing and Valuation of Standards Essential Patents (SEP Expert Group), resulting in a report including seventy-nine proposals aimed at improving the SEP licensing market. A proposal formulated by an individual member of the SEP Expert Group regarding License Negotiation Groups (LNGs) has recently generated a renewed interest in the topic in the context of IoT, where a large increase in the amount of SEP licensing activity is predicted as connectivity becomes ubiquitous across most industries. While LNGs have been previously promoted to solve the perceived problems of patent holdup (i.e. seller bargaining power), the authors' have instead proposed that LNGs should be used to solve the primary concern of patent holdout, which is facilitated by the collective action problem among similar situated IoT implementers. Applying a bespoke set of legal, economic, and management principles and norms, the resulting LNG design seeks to significantly reduce transaction costs and the threat of patent holdout while at the same time curtailing potential antitrust risks, especially regarding SEP implementors in the long tail of new IoT markets.

IP & Licensing

Patent Landscaping Studies and Essentiality Checks: Rigorous (and Less Rigorous) Approaches

Haris Tsilikas (Max Planck Institute for Innovation and Competition)

les Nouvelles - Journal of the Licensing Executives Society, Volume LVII No. 1, March 2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4019630

Determining which patents are essential to a particular standard (standard essential patents or SEPs) had long been an issue preoccupying almost exclusively technical experts directly involved in essentiality assessments. Recently, however, the topic of essentiality assessment has attracted the attention of policymakers, courts, and the press. This is unsurprising considering the importance of standards for innovation, competition, consumer welfare, and commercial success and competitiveness. In particular, parties involved in essential patent licensing either are keenly interested in how many patents are essential to a specific standard and what is the share of essential intellectual property rights (IPR) owned by each patent owner.

Global Standard Essential Patent Litigation: Anti-Suit and Anti-Anti-Suit Injunctions

Igor Nikolic (European University Institute)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4046658

The global litigation of standard essential patents (SEP) is taking a new turn with the jurisdictional battle between national courts. Some courts have started issuing anti-suit injunctions (ASI) to prohibit parallel litigation and consolidate the dispute at a single venue, while others have retaliated with anti-anti-suit injunctions (AASI), barring parties from seeking or enforcing foreign ASIs. The anti-suit injunction saga benefits no one: the parties in SEP licensing disputes are faced with legal uncertainty as to which court will hear their case; it incentivizes a race to the court to secure the most favorable jurisdiction instead of focusing on licensing negotiations; it increases litigation costs of having to pursue multiple ASIs and AAIS; and parties face fines and imprisonment of officials for non-compliance. The article examines the general conditions for the grant of ASIs and AAIS and analyses their application in SEP disputes. The article then proposes three measures that courts can take to stop the global jurisdictional race. First, courts should exercise judicial restraint and return to the originally strict criteria for the granting of ASIs. In principle, ASIs in SEP cases should not be granted as they are incompatible with international comity, fundamental rights to property and access to a court. Only anti-enforcement injunctions may exceptionally be granted, and under strict conditions. Second, a court could hold a party seeking an ASI as 'unwilling' to license, acting as a strong deterrent from seeking this type of remedy. Third, courts could encourage parties to agree on the arbitration of FRAND licensing terms by holding that an unjustified refusal to enter into arbitration is a sign of 'unwillingness' to license. Taking these principles into account would ensure that each national court is respected and would incentivize parties to focus on the resolution of the key issue behind every SEP dispute – the appropriate FRAND licensing terms.

IP & Litigation

Effectiveness of Examiner Interviews

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

14 Landslide 24 (2022)

WVU College of Law Research Paper Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4033859

Very little empirical research has been done to determine the effectiveness of interview practice on patent prosecution. Examiner interviews allow for a direct conversation between an applicant and an examiner to help reduce misunderstanding as to the scope of the prior art or claim scope as well as to help the examiner better understand the crux of the invention. In order to clarify the role of examiner interviews in the patenting process, a recent study reviewed every application filed with an interview from January 2007 to June 2020. The dataset includes approximately one million patent applications with at least one interview that subsequently issued to a patent and approximately 150,000 applications with at least one interview that were subsequently abandoned. By doing a benefit-cost ratio of the interview practice itself and comparing both overall and specific examiners' prosecution rates, the study establishes that examiner interviews dramatically reduce the number of office actions required to reach either allowance or abandonment, thereby saving time and money for both applicants and the U.S. Patent and Trademark Office (USPTO).

Most-Favored Entry Clauses in Drug Patent Litigation Settlements as a Potential Reverse Payment

Keith Drake (Greylock McKinnon Associates)

Thomas G. McGuire (Harvard University - Department of Health Care Policy)

NBER Working Paper No. w29801

<https://www.nber.org/papers/w29801>

Settlements of drug patent disputes that involve a potential payment from the brand to the generic signal a possible collusive profit split with a threat to competition, and have undergone intensive scrutiny in the literature on law and economics. A common feature of these brand-generic settlements, so-called "most-favored entry" (MFE) clauses, have not been investigated to the same extent. The expectation that brand drug companies make settlement decisions rationally implies that an otherwise unexplained brand payment above savings from expected future litigation costs derives from a delay in competition achieved by the settlement. This paper applies the condition of brand rationality to settlements with MFE clauses, with the added consideration that an MFE clause may affect two dates: the date of entry for the settling generic and the date of entry of third-party generic challengers. A brand payment from an MFE clause above future expected litigation costs implies delays in at least one and possibly two of these expected dates for competition. We find that MFE clauses can constitute a reverse payment. When a payment takes the form of an MFE clause, the pay-above-saved-litigation-cost criterion is, however, vulnerable to suggesting that a settlement is not anticompetitive, when in fact it is.

Continuation Patents and Litigation

Cesare Righi (Universitat Pompeu Fabra; Barcelona School of Economics)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4027998

Continuations allow patentees in the United States to modify the scope of previous patents, leading to concerns about patent disputes generated by changes in patent boundaries. I show that continuations are litigated more often than original patents, even after controlling for patent and invention characteristics. I also exploit the pre-grant publication of patent applications and the timing of continuation grant to show that continuation grant increases litigation. The effect is stronger when the textual distance between the claims of a continuation and those of its original patent is greater, suggesting larger changes in scope lead to more disputes.

IP & Innovation

Product Market Power and Technological Innovation

Alexander Barinov (University of California Riverside)
Hyun A. Hong (University of California, Riverside (UCR) - A. Gary Anderson Graduate School of Management)
Ji Woo Ryou (West Virginia University)
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Working Paper
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4037180

Product market power serves as a natural hedge against adverse shocks and competitive threats, thus increasing managerial risk tolerance of innovation investment. Consistent with that, we find that product market power is positively associated with firm innovation input and output. Additionally, consistent with learning from the leader's market valuation, we find that firm innovation is positively and significantly sensitive to market valuation of its product market leader, especially if the stock price of the leader/followers is more/less informative. The follower firms alter their R&D investments based on stock return around their leader's patent grant dates. The followers mimic innovation investments of their product market leader and private information in leader's prices is associated with improvement in their future profits. We find that liquidity shocks to leader's stock price hamper the following firms' learning. We conclude that product market power promotes innovation and firms learn from product market leader's market valuation.

How Does COVID-19 Affect Digital Innovation and Transformation?

Chungeun Yoon (KDI School of Public Policy and Management - KDI School of Public Policy and Management, Students)
KDI School of Pub Policy & Management Paper Forthcoming
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4054290

I investigate how the COVID-19 crisis affects innovation activity. I measure the effect of digital resilience on innovation activity in response to the unexpected COVID-19 pandemic that caused the severe lockdown. I find that the total patent applications of industries and firms with digital resilience were not affected by the crisis. However, digital innovation measured by patents related to non-face-to-face and 'untact' significantly increased. Workforce did not change for firms with digital resilience before the crisis. Furthermore, the increase in card transactions online provides evidence on digital transformation in economies. The results are driven by small firms, suggesting that small innovative firms found opportunities in times of the crisis. Investing in digital resilience for start-up innovative firms could generate significant economic benefits during the crisis.

Development of Approaches to Innovation Transfer and Intellectual Property Management To Ensure Enterprise Competitiveness

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Eastern-European Journal of Enterprise Technologies, 6(13 (114), 94–105, 2021. doi:10.15587/1729-4061.2021.249165
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3997302

The work deals with the problems of innovation transfer and intellectual property management at enterprises. An approach reasoning the choice of innovations and the type of their transfer at an enterprise has been developed, which increases the efficiency of innovation processes. For this purpose, the essence of the category "innovation transfer" regarding the micro-level was clarified and determined according to the sources of innovations. A set-theoretic model of innovation selection based on evaluating the essence of innovations, their generators (suppliers) and implementation conditions has been developed. For such an assessment, a set of criteria has been proposed, a number of the

most essential conditions for introducing innovations at an enterprise have been identified, and an optimization model for the efficiency of the innovation development process has been developed. They allow making an informed choice of innovations in accordance with the needs of the enterprise. Evaluation criteria for the innovative potential are proposed and their essence is determined. Testing of the evaluation confirmed the possibility of using the proposed criteria. A model of innovation transfer, which presents the main processes and participants in the transfer of external and internal innovations has been developed, which allows enterprises to ensure a high level of organization and implementation of the transfer. Given the direct relationship between the transfer of innovations and intellectual property, an approach to improving intellectual property management at the enterprise is proposed. A number of principles of intellectual property management have been determined. The stages of intellectual property management at the enterprise are proposed as a set of specific actions determining all processes directly or indirectly related to such management, as well as those responsible for these processes and resource provision.

Effects of option incentive compensation on corporate innovation: Evidence from the Chinese market

Rui Cheng

Doojin Ryu (Sungkyunkwan University)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4019656

Albeit many scholars have studied the relationship between option-based incentives and corporate innovation, the results have been controversial. We divide corporate innovation into two dimensions: innovation inputs and outputs. Thereafter, we use propensity score matching and difference-in-differences methods to explore the role of option incentives in corporate innovation. Companies with high research and development (R&D) expenditures are more likely to implement option-based compensation, but there is no significant increase in R&D expenditures after companies implement option incentives. Regarding innovation output, invention patents and patent citations are significantly lower for companies that do not implement option incentives. Further analysis reveals that the contribution of option incentives to innovation output is more pronounced among non-state enterprises and high-tech companies.

IP Law & Policy

The Problem of Design Patents: Representation and Subject Matter Scope

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Texas Intellectual Property Law Journal, Vol. 30, No. 1, 2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042804

The design patent system has become incoherent. The system was created in a time when design meant “put[ting] a beautiful wrapper around the idea.” The legal system for design protection has lost sight of design’s creative power as it has been exercised throughout this past century. A fundamental shift in design thinking has moved toward solving problems, including those that are aesthetic.

One consistent theme of the current criticisms is the system’s inability to affirmatively articulate a cohesive underlying theory and doctrine governing its subject matter. Recently, one proposal suggests that such a theory could emerge from an analysis of the changes in the design field over the past century. This Article fills that gap. In addition, various proposals are offered that flow from that work to address other troubling concerns. These leverage the strengths of the patent system, including the law’s ability to require ex-ante disclosure.

Further, this Article also explores the semiotics of design patent images, which have an unappreciated impact on their substantive power. Design patents generally use reductive, static figures that show the design’s structural outlines, emphasizing line and edge. Text is minimized. The system’s default rules

allow claims that are represented in their broadest forms and supported with minimal information. This is contrary to the treatment of utility patents, which are purported to be governed by the same rules. Perhaps most troubling, these sparse disclosures have likely impacted the legal system's collective understanding of the possible definitions of design. Although designers have expanded their work to create multisensory experiences, design law has not evolved to consider such aspects as available for protection.

Laws should evolve to serve their primary statutory purpose. By expanding the available formats and appearance of submissions for design patent applications to the PTO, the system can begin a decision-making process that considers the potential range of protection that considers both visual and multisensory forms of design.

Tea and Donuts

Derek E. Bambauer (University of Arizona - James E. Rogers College of Law)

Robert Woods (University of Arizona - James E. Rogers College of Law)

107 Minnesota Law Review __ (Forthcoming 2022)

Arizona Legal Studies Discussion Paper No. 22-05

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4048245

U.S. trademark law often permits simultaneous use of the same brand by multiple entities. Its approach to deciding when and how this concurrent use is permissible has become antiquated, rooted in outdated assumptions about trade and telecommunications. By using the physical location of mark users as a proxy for consumer confusion, trademark law creates doctrinal inconsistencies, undercuts trademark law's notice function, and can cause the confusion it seeks to prevent. In theory, someone who registers their mark with the U.S. Patent and Trademark Office obtains nationwide rights; in practice, those rights remain limited to the places where the registrant actually conducts business. This Article argues for ending this place-based methodology for evaluating simultaneous use. It marshals empirical and theoretical evidence to demonstrate that problems with concurrent use are steadily worsening, driven by changes to the economy and information distribution that upend long-held assumptions about consumer confusion. The Article describes the tortuous evolution and current morass of case law interpreting how geography affects consumer confusion. It articulates a set of interventions to remedy these failings, ranging from the modest (altering the defenses available for infringing an incontestable mark) through the moderate (folding geography into the standard infringement analysis) to the controversial (abolishing unregistered marks and stripping federal courts of jurisdiction over state claims involving such marks). Finally, the Article advocates for adopting its more sweeping reforms based on doctrinal coherence, improved notice, and welfare gains for both consumers and producers.

Embedding Permission Culture: A New Approach to the Server Test Quandary

Michael Goodyear

75 Okla. L. Rev. __ (2022 Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042401

The practice of embedding—inserting code that displays content located elsewhere on the Internet—is ubiquitous online. Millions of users insert or encounter embeds daily. As a core type of link, embedding has helped disseminate information far and wide, furthering the goals of both copyright law and the Internet. For over a decade, embedding has been considered lawful under copyright law, guaranteed by a Ninth Circuit doctrine known as the server test, which holds that a person only displays a work when he or she hosts and serves it. This rule, which has greatly influenced the growth of the modern Internet, has recently come under siege, with two decisions from the U.S. District Court for the Southern District of New York threatening the harmony of the server test and the future of the practice of embedding.

This article enters the growing debate about the server test for two reasons. First, it offers legal and policy justifications for the server test, demonstrating that the preservation of the server test is desirable. Second, it considers alternative theories for permitting embedding. Finding that the alternative theories that have generally been proposed would be poor defenses for embedding, this article instead identifies a private ordering theory of permission-driven embedding that grants greater choices to content creators

while preserving copyright and the Internet's balance between exclusive rights and the spread of knowledge. As this article explains, permission-driven embedding is already here, with major online platforms already adopting it in part. Therefore, notwithstanding the server test's prognosis, permission-driven embedding is part of the future of online content distribution.

Copyright Law

Four Theories in Search of an A(I)uthor

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

in Handbook of Artificial Intelligence and Intellectual Property (Ryan Abbott ed, Edward Elgar, Forthcoming 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4004138

This chapter discusses the question of AI as an A(I)uthor. The increasing use of machines in creating music, literature and art challenges conventional notions of copyright protection and authorship. In particular, protectability of AI-generated works under the current copyright framework is hotly debated. First, this Chapter examines whether AI meets the traditional copyrights standards of legal personhood, authorship and originality. Second, the chapter considers multiple approaches to AI-generated works from a policy perspective. They can be given public domain status, authorship can be granted to humans or the machine, the work can be given *sui generis* protection or rights can be granted to publishers and disseminators. Finally, this chapter considers the road ahead by assessing justifications for these policy options from different theoretical perspectives, such as fairness, personality, utilitarian/incentive, and cultural theories of intellectual property.

Should We Worry about Color Depletion? — An Empirical Study of USPTO Single Color Registrations

Xiaoren Wang (University of Glasgow)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011677

Both the EU law and the US law allow registering single colors as trademarks. However, some judges and scholars have pointed out that this law would exhaust available colors, called "color depletion". The theory believes that trademarking single colors are problematic because first, it develops market entry barriers. Second, color depletion increases consumer search costs. When more single colors are claimed, the distances between colors shrink and the boundaries between color trademarks will be blurred. Thereby consumers are more likely confused by similar color trademarks. Despite many theoretical studies on color depletion, there are no empirical studies to test whether, in practice, color depletion is severe or ignorable. This project fills this gap by measuring the color depletion situation through thousands of single-color trademarks recorded in the United States Patent and Trademark Office (USPTO). This project will report (1) the overall color depletion and the depletion speed per year, (2) color depletion per product/service class and per color category, and (3) color congestion within the same product/service class, measured by how many new color applications are rejected by already-registered colors due to the similarity. Based on this data analysis, the project will evaluate whether the color depletion in the US is severe or ignorable, further suggesting trademark offices, courts, and policymakers on adjusting the threshold of trademarking single colors.

GM! Time to Wake Up and Address Copyright and Other Legal Issues Impacting Visual Art NFTs

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Columbia Journal of Law & the Arts, Vol. 45, No. 4, 2022 (forthcoming, May 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4028116

Regarding visual art NFTs, art world stakeholders currently appear to be of two camps: some curious and diving in, and others feeling skeptical. What is it about NFTs that make certain art world stakeholders wish they were a passing fad? What is the legal landscape for this fast-growing portion of the metaverse? And how can artists and purchasers protect themselves using pre-existing legal concepts and frameworks? After covering the basics of what constitutes visual art NFTs, and the application of the pre-existing U.S. copyright framework to the NFT format, the authors elucidate considerations and issues that artists face when they decide to mint their work and sell NFTs, as well as concerns that purchasers of NFTs may face. Because the environment is fast-paced and a single set of standards or guidelines has not yet been adopted, the authors discuss certain types of terms and conditions that currently govern the sale and use of NFTs. In sharing case studies of recent examples, contracts and projects, the authors hope to provide a snapshot – if fleeting – of the dynamic world of NFTs, as of the end of 2021.

Why Visual Art Requires Its Own Standard Under Copyright Fair Use

Carter Babaz (University of Mississippi School of Law; University of Georgia Terry College of Business)
Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4018012

Artists have always used the work of others as building blocks in their own work. From this practice, appropriation art has emerged as an important artistic movement. Appropriation art describes the practice of copying works of others to create new pieces of art. With this movement, the inspiration for the modern artist has shifted with the new digital age. Artists now incorporate the images of others into their work easily with simple copy and paste functions.

While the art world has embraced these new practices, copyright law has not. The copyright fair use defense has become a complicated, inconsistent analysis when applied to visual art. Because of the inherent differences between visual art and other mediums that enjoy copyright protection, the current fair use standard does not work for visual art.

A new standard should be developed considering the factors that make visual art unique. Because literature was the original medium copyright law and fair use were designed to protect, these legal standards lend themselves to applications to works of literature. For these reasons, the inherent differences between literature and visual art can inform the necessary considerations for a new copyright fair use standard for visual art. This comment compiles these key differences and presents them in a summary table. Any new fair use standard for visual art should consider these factors to address the unique complexities of the medium.

IP & Trade

Extraterritoriality: Intellectual Property

Timothy R. Holbrook (Emory University)

Elgar Research Handbook on Extraterritoriality and International Law (Edward Elgar, forthcoming 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4017887

Intellectual property rights, particularly patents, copyrights, and trademarks, have been the subject of international treaties for quite some time. Those treaties all treat intellectual property rights as national in nature, with attendant territorial limits. The Agreement on Trade Related Aspects of Intellectual Property

(TRIPS) established minimum standards for intellectual property. Even under TRIPS, intellectual property at the international level remains a system of national rights.

Various international agreements have created processes to allow parties to obtain collections of national rights, such as the Patent Cooperation Treaty, Madrid Agreement, and the Madrid Protocol. But these processes reflect an important concession: intellectual property rights are viewed differently in different countries in terms of purpose and substance. Some countries view IP rights from a strong utilitarian viewpoint that treats them akin to property rights. Others view these rights as market interventions by the state that can be leveraged—and limited—due to other competing policy concerns.

Intellectual property rights, therefore, are pregnant with concerns of sovereignty. Intellectual property disputes frequently involve more than simply an infringement assessment. Instead, they involve a determination of whether the relevant IP right is valid at all. For example, some countries may permit the patenting of genetically altered mice, and others will not. The assessment of what inventions and creations should be protected in a country necessarily implicates the political choices of the sovereign.

For extraterritoriality, that means that the use of one nation's intellectual property to leverage control over the acts and markets of another have significant implications for sovereignty. These concerns could be vindicated through a robust use of conflicts of law in extraterritorial jurisprudence. The role of conflicts has been, at best, unclear in U.S. law. This chapter suggests, however, that when the conflict is one over the validity within the foreign country, conflict concerns should be at their apex. In other words, why should one jurisdiction allow an IP right holder to leverage a right into a country that would find that right invalid? This dynamic goes beyond merely holding someone liable for acts in a foreign country; it directly undermines the political choices of that sovereign in a far more significant way.

Other Topics

Labor Share Decline and Intellectual Property Products Capital: A Different Measurement Perspective

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Maria Ogneva (University of Southern California - Marshall School of Business)
Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4056576

Koh et al. (2020, *Econometrica*) attribute the decline in the labor share over the last 90 years to the capitalization of intellectual property in the national income and product accounts. We document that these findings are limited to the Gross labor share; the Net labor share trend is unrelated to the capitalization of intellectual property. This distinction is important because Net labor share is a more direct measure of income distribution between labor and capital. In addition, over the past four decades, both Gross and Net labor shares for the corporate sector exhibit a declining trend irrespective of the accounting treatment of intellectual property. These findings extend to international settings. In sum, the capitalization of intellectual property has little effect on the inferences about the shift in income distribution between capital and labor.

A Social Justice Perspective on IP Protection for Artificial Intelligence Programs

Steven D. Jamar (Howard University School of Law; IIPSJ)
A Social Justice Perspective on IP Protection for Artificial Intelligence Programs, Cambridge Handbook on Intellectual Property and Social Justice (Steven D. Jamar and Lateef Mtima, editors, Cambridge University Press 2022 Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964972

We are just at the beginning of the AI revolution and already it is transforming human society. In history only four other technologies have transformed human life as profoundly as AI will: steam power that powered the industrial revolution; electricity that transformed everything; the development of antibiotics

and medical understanding and treatment generally; and computers and pre-AI software creating the information age. As we move into the AI world, we face significant challenges with respect to shaping our world. A significant part of that shaping will be determined by how we collectively choose to reward and regulate AI implementations. And a part of that shaping will depend upon how we address intellectual property issues connected to artificial intelligence applications. This chapter sketches some of the concerns and suggests a path forward that directly responds to the challenge posed by Buckminster Fuller in this chapter's framing epigraph.

Intellectual Property and Artificial Intelligence: Emerging Prospects and Challenges

Lawrence Oguama

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4046151

The 20th century is remarkably characterized by an increase in inventiveness due to more breakthroughs in science and technology and the emergence of Artificial Intelligence (AI) systems. Recent records show that AI systems, in addition to being an aid in the inventive process, are now capable of making independent inventions using data and instructions inputted by their programmers. Meanwhile, Intellectual property law (IP) ensures that one's intellectual outputs (labor) is not exploited or annexed by another without one's consent and approval. However, because AI is not a person and is in fact man's brainchild, a growing debate in the field of IP and AI has been whether AI can, under IP law, obtain or be granted authorship/inventorship rights over its works and inventions. It is against this backdrop that this paper, while highlighting the milestone achieved by AI, its importance and prospects, evaluates what this challenge means for AI under extant IP laws. The paper concludes by making certain recommendations that would allow for the accommodation of AI within the law.

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When **antitrust and IP** issues converge, the interplay between the two areas will significantly impact your liability and damages arguments. In addition to our consulting in **competition** and **intellectual property**, experts across the firm frequently advise on IP-related matters, including in **auctions and competitive bidding, e-discovery, energy, forensics, life sciences, and transfer pricing**. For more information, visit crai.com.



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