



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

Cellular Sep Royalties and 5G: What Should Competition Policy Be?

Alexander Galetovic (Universidad Adolfo Ibáñez; Stanford University - The Hoover Institution on War, Revolution and Peace; University of Padua - CRIEP)

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

Lew Zaretzki (Hamilton IPV)

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=4106938

Over the last 15 years the cellular SEP market has achieved a long-run equilibrium spanning the development, deployment and use of 2G, 3G, 4G, and now 5G technologies. Cumulative royalties have converged to market values, and the market has apportioned them according to the incremental value generated by the intellectual property. In this competitive market, cellular technologies earn Ricardian rents, which are determined by the differential value that they create over alternatives.

The same specialized technology firms that previously helped to develop 3G and 4G are developing 5G in significant part. As with previous wireless generations, standardization, patents, and licensing support vertical specialization. As with prior cellular technologies consumers, enterprises, and implementers can choose among many alternatives to 5G for various tasks. Thus, 5G continues under the conditions underlying the functioning cellular SEP licensing market.

We are therefore not aware of a prima facie argument to justify the intervention of competition authorities to regulate 5G royalties. Competition authorities should instead be watchful over the equilibrium which has existed in the market for cellular SEPs over the past decade or more, ensuring that parties do not undermine it through tactics employed in their quest to maximize their own share of economic surplus. Should parties undermine the equilibrium in this manner, the results could be tragic for the associated technology, product, and service markets.

Balance and Standardization: Implications for Competition and Antitrust Analysis

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

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

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

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4142754

Most technical standards development organizations (SDOs) have adopted internal policies embodying “due process” criteria such as openness, balance of interests, consensus decision making, and appeals. Unlike other aspects of SDO governance, relatively little scholarly research has considered the history, scope, and interpretation of SDO balance requirements. Likewise, existing case law and agency guidance offer little assistance in understanding precisely how these balance principles translate into specific antitrust requirements that apply to standards development. Given the absence of specific guidance on the meaning and implications of balance requirements for SDOs under the antitrust laws, it is necessary to review the development of the laws, regulations, and institutional norms that have shaped balance requirements and their application by different SDOs more generally. A series of recent events and disputes, however, has focused attention on this understudied area, particularly as it pertains to policies concerning intellectual property rights (IPRs). In this article, we provide an extensive survey of the evolution of SDO balance requirements. First, we describe the origins and evolution of balance requirements at the international level, leading to their inclusion in WTO and ISO/IEC instruments. We next describe how balance requirements went from a feature of SDOs to an element of rule of reason analysis under U.S. antitrust law, finding their way into related statutes as well. We then chart the parallel path of balance requirements in the EU, from national SDO features to components of EU standardization policy and eventually factors in EU competition law analysis. We conclude by exploring the different notions of balance that have evolved and their application to antitrust analysis.

IP & Licensing

Stable Coalition Structures of Patent Licensing Games

Satoshi Nakada (School of Management, Department of Business Economics, Tokyo University of Science)

Ryo Shirakawa (University of Tokyo, Graduate School of Economics, Students)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132357

This study identifies stable coalition structures in generalized patent licensing games with a specified payment scheme. In the model, each firm can agree to an exclusive contract with an external patent licensor for the patented technology on process innovation based on an ad-valorem (profit) royalty. However, each firm cannot be allowed to form any cartel in the production stage. We consider the core of induced coalition formation games for stability. We demonstrate that if we only allow deviations with the exogenously fixed payment scheme and payment rate, the coalition structures in which the number of licensee firms is at least one-half are stable. Moreover, if the payment rate for the patent holder is not too large, the converse result also holds. We discuss and compare our results with Watanabe and Muto's (2008) impossibility result, which shows that almost all coalition structures cannot be in the core if we allow any type of deviations.

Towards a Solution for the Hold-Out Problem: Restoring Balance in the Licensing of Cellular SEPs

David Teece (Institute for Business Innovation)

Kalyan Dasgupta (Berkeley Research Group, LLC)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4122255

For much of its existence, the academic and policy debate on standards essential patents (SEPs) in mobile telecommunications was driven by the theory of “hold up”—the ability of SEP owners to supposedly extract value well beyond the contribution of their technology to downstream products. This theory of hold up was never empirically validated, and even as a theory, took no account of the non-self-enforcing nature of patents, including SEPs. Injunctive relief for infringement is far from automatic, and litigation is costly and carries asymmetric risks for licensors. In reality, licensors are often able to collect payment only several years after infringement began, may sometimes end up agreeing to rates that are too low to incentivise future investment, and may often be unable to collect payment for all the period of infringement by the implementer. Thus “hold out” by licensees who wish to delay, avoid and reduce payment for their use of SEPs is a potentially greater danger than “hold up.”

If injunctions are difficult to obtain and the eventual remedy for infringement is to take a license and pay damages based on FRAND rates, there is little positive incentive for licensees to take licenses. Instead, it is attractive for licensees to delay and force licensors into litigation. The attractiveness and increasing pervasiveness of such behaviour risks disrupting the “balance” of incentives that is sought by standards development organisations such as the European Telecommunications Standards Institute (ETSI), which has been responsible for shepherding the development of mobile telecommunications standards. The long-term consequences of disrupting this balance will likely be a diminished rate of future innovation, and the potential replacement of a remarkably successful model of “open innovation” by more closed models.

This paper suggests potential correctives to the holdout problem. The correctives involve the strengthening of injunctive relief regimes, and the recognition by Courts and policy-makers (especially antitrust or competition agencies) that achieving the “balance” sought out by ETSI may require limiting or withdrawing the unlimited availability of FRAND licenses for unwilling licensors. Courts and agencies should recognise that SEP holders are only obliged to be prepared to make FRAND licenses available, but also recognise that licensors are not compelled to conclude FRAND licenses with unwilling licensees. At the very least, Courts that are often asked to determine FRAND rates based on evaluating “comparable licenses” can still take measures that avoid putting unwilling licensees on the same footing as those who willingly negotiated “comparable” licenses.

IP & Litigation

Third-Party Funding of Patent Litigation: Problems and Solutions

Korok Ray (Texas A&M University - Mays Innovation Research Center)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4125510

This paper documents the rise of third-party funding in patent litigation with a unique data set. We track the sources of funding for patent lawsuits in the United States from 2002 to 2021. The data show a dramatic increase in both the number of cases and the percentage funded by third parties. While we cannot say with certainty that third-party funding has caused this growth in patent litigation, we can

observe its high correlation. Tracing the history of the doctrine of champerty in the United States, although the doctrine was originally decriminalized to allow underresourced plaintiffs access to litigation, use of the doctrine today by patent trolls leads to distortions in the marketplace and an excessive amount of frivolous litigation.

The secondary market for patents, in which non-practicing entities (NPEs) can buy patents from innovators and litigate against defendants, has created a robust market for litigation. Fueled by the capital markets, investment funds place bets on litigation in hopes of a financial return with no interest in the underlying technology or innovation. This growth in litigation drains social welfare and creates a hidden tax on innovation, since operating companies spend costly resources to defend against patent trolls funded by Wall Street. To be certain, these problems arise because patent policy, by construction, is imperfect: It grants a government monopoly to innovators and creates an environment for rent seeking and lobbying.

Abandoning patent policy altogether would eliminate these distortions. Absent such reform, the best solution would be for courts to ask plaintiffs and defendants to disclose third-party funding arrangements as evidence in patent litigation. Courts can mandate such disclosure, but even allowing for voluntary disclosure could bring more transparency to the funding arrangements behind patent litigation. Juries could then factor these funding arrangements into their decisions to assess whether the lawsuits protect the rights of innovators, as originally intended. Disclosure has been effective in improving governance and reducing information asymmetries in the capital markets, and could have a similar positive effect in the market for litigation. Over time, unnecessary litigation could decrease, and third-party funding could resume its rightful place as a funding mechanism for under-resourced innovators.

Fighting Image Piracy or Copyright Trolling? An Empirical Study of Photography Copyright Infringement Lawsuits

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Albany Law Review, Vol. 86 (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4126676

In the last five years, there has been an explosion of lawsuits alleging the copyright infringement of a digital image. Image piracy is on the rise because digital photography and the internet have enabled users to copy a photo with a simple right-click of the mouse. One study found that in 2018, approximately 2.5 billion images were used without authorization per day on the internet. Nonetheless, many photographers do not bother to file a lawsuit when their images are taken because they do not have the resources or time to pursue litigation, and even if they win, the damages they receive may not be worth the effort. When photographers do file lawsuits, they often are met with accusations that they are copyright trolls out to extract settlements worth far more than their images.

This Article examines over 1,100 image infringement lawsuits that were filed between March 1, 2020, and March 1, 2021, and analyzes the nature of the complaints. By studying the who, what, where, why, and how of image infringement, the Article seeks to shed light on the question of whether these lawsuits are being brought by copyright trolls and amateurs out to make a quick buck or legitimately aggrieved photographers trying to protect their copyrighted works and livelihood. It also tries to devise solutions to prevent copyright infringement. This is the first article to use empirical research to analyze the nature of image copyright infringement claims, and it provides insight into the types of claims that may be filed before the Copyright Claims Board.

IP & Innovation

The Returns to Face-to-Face Interactions: Knowledge Spillovers in Silicon Valley

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NBER Working Paper No. w30147

<https://www.nber.org/papers/w30147>

The returns to face-to-face interactions are of central importance to understanding the determinants of agglomeration. However, the existing literature studying patterns of geographic proximity in patent citations or industrial co-location has struggled to disentangle the benefits of face-to-face interactions from other spatial spillovers. In this paper, we use highly granular smartphone geolocation data to measure face-to-face interactions (or meetings) between workers at different establishments in Silicon Valley. To study the degree to which knowledge flows result from such interactions, we explore the relationship between these meetings and the citations among the firms these workers belong to. As firms may organize meetings with those they wish to learn from, we isolate causal impacts of face-to-face meetings by instrumenting with the meetings between workers in adjacent firms that belong to unconnected industries. Our IV approach estimates substantial returns to face-to-face meetings with overidentification tests suggesting we are capturing the returns to serendipity that play a central role in the urban theories of Jane Jacobs.

Patent Pledgeability and Corporate Innovation

Yanke Dai (Formerly Known as Shanghai Institute of Foreign Trade)

Ting Du (Central University of Finance and Economics (CUFE) - China Academy of Public Finance and Public Policy (CAPFPP))

Huasheng Gao (Fanhai International School of Finance, Fudan University)

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132148

We identify a positive causal effect of patent pledgeability on corporate patenting. Our tests exploit the staggered city-level policy change, which allows firms to use patents as collateral for financing. We find a significant increase in patents and patent citations for firms headquartered in cities that have adopted such policies relative to firms headquartered in cities that have not. We further show that patent pledgeability increases corporate patenting through the channel of inducing firms to shift from secrecy-based innovation to patent-based innovation, rather than the channel of mitigating financial constraints.

Adapting Innovation When Facing Economic Uncertainty

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Dandan Liu (Kent State University)

Xiaoling Pu (Kent State University - Department of Finance)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119934

This study provides evidence that firms adapt to macroeconomic, real, or financial economic uncertainty by decreasing their innovation activities. The way firms adapt is related to both internal factors such as patent types (exploratory versus exploitative patents), asset re-deployability, patent assignments, and financial constraints, as well as external factors such as earnings pressure from myopic investors. The negative relationship with uncertainty is exaggerated by financial constraints and mitigated by re-

deployability while the detrimental effects of myopic investors on innovation are greatly dampened during periods of high economic uncertainty.

Credit Rating Inflation and Corporate Innovation

Sean Flynn (Tulane University)

Bharadwaj Kannan (Colorado State University)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124560

Does credit rating quality affect corporate innovation? Using exogenous variation in rating quality that arises from competition among rating agencies, we show that firms with inflated ratings issue more patents, but their patent quality, as measured by scientific and economic value, declines. We provide evidence to show that managers engage in value-reducing patenting activity to exploit a compensation structure that rewards them for the number, but not the quality, of new patents. Our results are stronger in non-technology industries, which suggests that managers strategically exploit innovation when firms do not rely on patenting for value creation.

IP Law & Policy

Artificial Intelligence and Intellectual Property Law: From Diagnosis to Action

Peter Georg Picht (University of Zurich - Institute of Law; Max Planck Institute for Innovation and Competition)

Valerie Brunner (University of Zurich)

Rena Schmid (Swiss Federal Institute of Intellectual Property (IGE))

Max Planck Institute for Innovation & Competition Research Paper No. 22-08

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4122985

The use of “artificial intelligence” systems becomes ever more widespread and far-reaching. Technological and economic concepts for an AI-based future are about to be implemented. It is, hence, time for the intellectual property system to develop answers to the challenges brought about by AI. Against this background, Zurich University’s Center for Intellectual Property and Competition Law (CIPCO) has initiated a joint research project on AI/IP with the Swiss Intellectual Property Institute (IPI). A first stage of this project has evaluated the state of the legal and economic discourse. These insights form the basis for policy recommendations on how the intellectual property system ought to be adapted to AI-related developments. The present paper describes – as draft work in progress – the project setup and summarizes its results gained so far. In doing so, it addresses key AI/IP issues, including business models of AI innovation leaders, inventorship/creatorship of AI systems *de lege lata* and *de lege ferenda*, the DABUS litigation, the discussion on whether new types of IP rights are necessary to protect AI inventions, the allocation of entitlements and liability regarding such innovations, AI-related revisions in the guidelines of important patent and trademark offices, the use such offices make of AI tools, the need for new protection carve-outs (e.g. to foster text and data mining), as well as AI’s potential raising the bar-effect.

The Hypothetical Infringer? Implications of the Synthesis of Professional Patent Agency and the Anglo-American Hypothetical Person Skilled in the Art

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132519

Historical patent jurisprudence abounds with statements that the hypothetical person skilled in the art is not a lawyer. However, recent case law suggests the opposite, going so far as to state that the hypothetical person skilled in the art is expected to consult with a professional patent agent during claim construction. Beginning from the principle that the hypothetical skilled person takes her place among law's other 'reasonable people', this article conducts an analysis of Anglo-American law's other 'reasonable people' to determine what this might tell us about the hypothetical skilled person's expanding patent law knowledge base. This analysis concludes that in other areas of law, the reasonable person often consults with external legal professionals when her own legal rights and liabilities are at stake. Consulting with external legal experts is meant to guide the reasonable person's conduct to ensure that her rights are protected or to ensure that she avoids potential legal liability. Correspondingly, if patent jurisprudence posits that the hypothetical person skilled in the art is expected to consult with legal experts when reading and interpreting a patent, then the law treads close to implicitly transforming the hypothetical skilled person into a potential infringer who is reading a patent predominantly as an exercise in avoiding infringement rather than an exercise in knowledge acquisition. This article suggests that the objectives often posited in support of this transformation may be misguided.

Leave It to the Experts: A Call for Competition Expert Lay Judges in Private Enforcement of Competition Law

Lena Hornkohl (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law)

JMN EULEN WORKING PAPER SERIES (WP Series No. 26-22)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130187

This paper focuses on the procedural instrument of competition expert lay judges to ease damages calculations and private actions for damages for the violation of competition law in general. To this end, the paper analyses various forms of expert lay participation already existent in Europe. It concentrates especially on commercial and intellectual property proceedings but also delves into the few existing examples of competition expert lay judges for private enforcement of competition law. It assesses their transferability for competition damages proceedings and attempts to test EU and national competition as well as procedural law boundaries more generally. The Paper works out common grounds, advantages and disadvantages, as well as best practices. It concludes with first proposals for including competition expert lay judges in private enforcement of competition law.

Copyright Law

Copyright & Shareability: A Contractual Solution to Embedding via Social Media

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Amanda Reid (UNC Chapel Hill)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124261

An emerging change in judicial interpretation of copyright law threatens to unsettle well-settled expectations about the permissibility of embedding Internet content. Changes to the permissibility of

embedding would inject uncertainty into a legal landscape that has proven foundational and has supported creators of all kinds. This jurisprudential shift would likely prompt social media platforms to alter the technological affordances offered to users, such as removing features that facilitate embedding. To preserve embedding affordances, this Article offers a novel solution: model contractual language that platforms can adopt in their User Agreements to license embedding and foster shareability. This Article's proposed licensing provisions would give clarity, precision, and predictability about the permissibility of embedding online, notwithstanding any change in judicial interpretations of copyright law.

Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?

Martin Senftleben (Institute for Information Law (IViR), University of Amsterdam; University of Amsterdam)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4134651

Seeking to devise an adequate regulatory framework for text and data mining (TDM), countries around the globe have adopted different approaches. While considerable room for TDM can follow from the application of fair use provisions (US) and broad statutory exemptions (Japan), countries in the EU rely on a more restrictive regulation that is based on specific copyright exceptions. The EU approach leads to considerable complexity and legal uncertainty. The invocation of available exceptions depends on individual criteria, such as use for scientific research purposes and the absence of a rights reservation by copyright owners.

Surveying this spectrum of existing approaches, lawmakers in countries seeking to devise an appropriate TDM regime may wonder whether the adoption of a restrictive approach is necessary in the light of international copyright law. In particular, they may feel obliged to ensure compliance with the three-step test laid down in Article 9(2) of the Berne Convention, Article 13 of the TRIPS Agreement and Article 10 of the WIPO Copyright Treaty. An imbalanced, restrictive interpretation of the three-step test, however, can lead to an overly cautious approach that stifles TDM and makes broad inroads into the right to research – instead of establishing a proper balance between copyright protection and the right to research that supports TDM activities.

Against this background, the analysis raises the question whether international copyright law covers TDM activities at all. TDM does not concern a traditional category of use that could have been contemplated at the diplomatic conferences leading to the current texts of the Berne Convention, the TRIPS Agreement or the WIPO Copyright Treaty. It is an automated, analytical type of use that does not affect the expressive core of literary and artistic works. Arguably, TDM falls outside the scope of international copyright harmonization altogether. From this perspective, the discussion about compliance with international copyright norms is a nonissue. International copyright law does not limit the freedom of national policymakers to devise appropriate domestic solutions to reconcile copyright protection with the right to research that underlies TDM activities.

The Comparative Analysis of ISP's Limitation of Liability Regimes in the EU and China

Li Chaoqun (Charles University in Prague - Faculty of Law)

Charles University in Prague Faculty of Law Research Paper No. 2022/II/4

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123561

In recent years, there has been a proliferation of online platforms providing access to large amounts of copyrighted works. These platforms have become a main source of access to content online. On the one hand, rights holders claim that the revenues generated from the online use of their protected works

are distributed unfairly (value gap). On the other hand, strict regulations on ISPs will stifle competition amongst online platform providers. Therefore, it is important to strike a balance between the interests of online platforms and rights holders. One approach is to grant the online platforms exemption from liability under certain circumstances. In the EU, the enforcement of European Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market introduces significant changes to copyright infringement liability for ISPs. Although many countries conditionally provide safe harbors for online platforms, the feasibility and eligibility of safe harbors vary from one to another. This essay does not address questions in which scenarios ISPs directly constitute infringement of copyright law. Instead, this essay will primarily compare 1) ISP liability exemptions under the copyright law regime between China and the EU, namely under what circumstances can ISPs be granted immunity from liability; 2) analyze the differences between liability limitations for ISPs in China and the EU; and 3) finally, propose improvements of the certainty and feasibility of the system of ISP's liability limitation.

IP & Trade

Forecasting Countries' Gross Domestic Product from Patent Data

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Chaos, Solitons & Fractals

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121239

Recent strides in economic complexity have shown that the future economic development of nations can be predicted with a single “economic fitness” variable, which captures countries’ competitiveness in international trade. The predictions by this low-dimensional approach could match or even outperform predictions based on much more sophisticated methods, such as those by the International Monetary Fund (IMF). However, all prior works in economic complexity aimed to quantify countries’ fitness from World Trade export data, without considering the possibility to infer countries’ potential for growth from alternative sources of data.

Here, motivated by the long-standing relationship between technological development and economic growth, we aim to forecast countries’ growth from patent data. Specifically, we construct a citation network between countries from the European Patent Office (EPO) dataset. Initial results suggest that the H-index centrality in this network is a potential candidate to gauge national economic performance. To validate this conjecture, we construct a two-dimensional plane defined by the H-index and GDP per capita, and use a forecasting method based on dynamical systems to test the predicting accuracy of the H-index. We find that the predictions based on the H-index-GDP plane outperform the predictions by IMF by approximately 35%, and they marginally outperform those by the economic fitness extracted from trade data. Our results could inspire further attempts to identify predictors of national growth from different sources of data related to scientific and technological innovation.

Patent Harmonization in Africa: What Potential Roles for AfCFTA Intellectual Property Protocol?

Chimdessa Fekadu Tsega (CUHK Law)

44 (6) *European Intellectual Property Review* 2022, 368-376

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4123065

As multilateral rule-based systems are being challenged with proliferation of protectionist national movements, Africa is moving toward deeper economic integration. The adoption of the Agreement Establishing AfCFTA and negotiations on AfCFTA IP Protocol are evidence of the continent's commitment toward deeper integration. A sine qua non to successful integration is legal harmonization. Legal harmonization, however, is a multifaceted project that takes different forms of transposition and application. Available research takes legal harmonization for granted without evaluating its normative claims. With respect to patents in particular, legal harmonization is often examined through the lens of advanced economies without considering the peculiarities of less developed countries. This article provides an evaluation of harmonization claims. It assesses patent harmonization initiatives in African. It concludes by submitting that while AfCFTA IP Protocol can serve as a patent harmonizing tool, its potential triumph will depend on balancing space for domestic policy making with supranational rulemaking.

Other Topics

Nonobvious Design

Mark Bartholomew (SUNY Buffalo Law School)

Iowa Law Review, Vol. 108 (Forthcoming)

University at Buffalo School of Law Legal Studies Research Paper No. 2021-012

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4121728

To earn patent protection, a claimed product design must be “nonobvious.” Yet while nonobviousness has been described as “the heart” and “cornerstone” of the utility patent system, in the design patent context, the term has become next to useless. Instead of actually policing nonobviousness in design, modern courts grant patent rights to any work that is not an exact replica of another. The problem, judges maintain, is that comparing one visual design against another demands the use of aesthetic judgment and aesthetic judgment is an instinctual, subjective process incapable of legal definition. Recent neuroscientific studies of aesthetic judgment dispel some of the mystery surrounding perception of industrial design. These studies show, contrary to longstanding judicial assumptions, that design innovation tends to reduce visual enjoyment. We prefer the “aesthetic middle”: the range of designs comprised of not the avant-garde or the tried and true, but something in between. New insight into the functioning of the aesthetic middle shows the need for a reevaluation of the nonobviousness standard and offers guidance for returning the standard to its former place as a meaningful limit on design patent protection.

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