



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

National FRAND Rate-Setting Legislation: A Cure For International Jurisdictional Competition In Standards-Essential Patent Litigation?

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

CPI Antitrust Chron., Jul. 2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4173485

Courts have increasingly been asked to adjudicate disputes over the level of fair, reasonable and nondiscriminatory (“FRAND”) royalty rates that holders of standards-essential patents (“SEPs”) are permitted to charge manufacturers of standardized products. Courts making these determinations may assess FRAND rates only as to SEPs issued in their own countries (the “national FRAND approach”) or as to all SEPs worldwide that would be included in a license had it been negotiated by the parties (the “global FRAND approach”). These competing approaches are discussed below, along with some of the international jurisdictional issues that they have raised and potential legislative solutions that could address these issues.

IP & Licensing

Licensing 2.0: How to Incentivize around the Prisoner’s Dilemma in SEP Licensing

Gustav Brismark (Kazehara AB)

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)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4174691

Licensing platforms are a clear example of a collective action problem, where groups have aligned long-term interests but misaligned short-term goals. Customized incentives can be a key way to facilitate socially desirable collective action, especially where a market or platform includes a range of different actors. Sisvel’s LIFT model for Wi-Fi 6 uses a system of deferred payments to link royalties payments to the uptake of the licensing program so as to encourage early adopters

Copyright Implications of Digitizing Cultural Heritage

Anke Moerland (Maastricht University - Department of International and European Law)

Moerland A. (2022), *Copyright Implications of Digitizing Cultural Heritage*, in: Melin, P., Schoenmaekers, S., Carrera, S. & Michielsen, Y. (eds.), *The Art of Moving Borders -Liber Amicorum Hildegard Schneider* (Maastricht Law Series, Vol. 25), Eleven Publishing, p. 475-501

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4162559

While the process of preserving cultural expressions through digitization is experienced overall as a laudable development, it has also raised several challenges. Tensions have arisen in particular between copyright holders' exclusive rights to authorize any reproduction and making available to the public of the copyright work on the one hand, and the digitization projects by cultural heritage institutions (CHI) on the other hand. In order to utilize and manage cultural resources effectively, legal certainty is required as to which activities of digitization will need authorization by the right holder and which fall outside of copyright protection.

This chapter focuses on the EU copyright framework relevant for the digitization of cultural heritage, with particular attention to Germany and the Netherlands where the national context is relevant, such as national exceptions. As diverse CHIs engage in digitization efforts, I distinguish 1) which institutions engage in 2) which types of digitization efforts and for 3) which types of works. On the basis of specific examples, the chapter presents the legal assessment of EU copyright law, how it covers digitization activities and which exceptions institutions may benefit from.

IP & Litigation

Studying Patent Infringement Litigation

Jason Rantanen (University of Iowa - College of Law)

Forthcoming RESEARCH HANDBOOK ON EMPIRICAL STUDIES IN INTELLECTUAL PROPERTY LAW, Estelle Derclaye, ed.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4194142

This chapter describes a comprehensive approach to studying patent infringement litigation that encompasses multiple layers of patent infringement litigation. It explains how to link together and analyze datasets containing information about those components. The example used in this chapter involves patent litigation, but this approach can be expanded to empirical analysis of other types of intellectual property litigation, or even legal disputes more generally. Drawing upon this approach, we find that around 6% of patent cases result in at least one appeal, but that this frequency varies substantially by district.

Shareholder Short-termism and Intellectual Property Infringement

Po-Hsuan Hsu (National Tsing Hua University - Department of Quantitative Finance)

Carl Hsin-han Shen (Macquarie University, Macquarie Business School)

Yanzhi Wang (National Taiwan University - Department of Finance)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4171952

This paper examines how corporate infringement with respect to intellectual property (IP) is associated with institutional investors' investment horizons. Using a comprehensive and unique database of IP infringement cases involving patents, trademarks, and trade secrets, we show that firms' frequency and likelihood of being sued for IP infringement increase with short-term institutional ownership but yet are unrelated to or negatively associated with other types of institutional investors. We use both a quasi-natural experiment of mergers between financial institutions and instrumental variable regressions based on fund flows to support a causal effect of shareholders' short-termism on corporate IP

infringement. The likelihood of injunctions granted by courts and the chance of being entangled in long lawsuit cases are also higher for firms with greater short-term institutional ownership. These patterns can be attributed to short-term institutional investors who urge managers to aggressively pursue new product areas, which likely leads to IP disputes. Furthermore, the effect of short-term institutional ownership increases with peer competition and with firms' exploration with respect to new products and technologies.

Patent Office Power & Discretionary Denials

Greg Reilly (IIT Chicago-Kent College of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4188185

One of the most divisive and debated issues in patent law in recent years has been the Patent Office's practice of denying petitions for inter partes review (IPR) – the Patent Office proceeding to review and cancel wrongfully issued patents – on discretionary procedural grounds, such as duplicative Patent Office proceedings or the existence of advanced parallel litigation. On the surface, the discretionary denial practice seems like an odd candidate to provoke such fierce opposition. Discretionary denials have affected a small percentage of IPR petitions without making any changes to the features that have made IPRs so effective at invalidating “bad” patents. As a normative matter, the discretionary denial practice presents a close, nuanced, and unclear trade-off between the benefits of invalidating wrongfully issued patents and the inefficiencies and burdens of duplicative proceedings. And despite frequent objections from sophisticated patent stakeholders, the one thing that is clear about the discretionary denial practice is that it is consistent with the statutory text and objectives and a lawful exercise of the enhanced power and authority granted to the Patent Office by the America Invents Act of 2011 (AIA). But below the surface, the discretionary denial controversy is more understandable. It reflects a patent system struggling to accept a shift to greater administrative authority after two-hundred years of judicial dominance of patent policymaking. Discretionary denials offer a useful case study to evaluate the patent system's changing institutional arrangements. This Article demonstrates how the AIA gave the Patent Office significant power and discretion over IPRs, authority that comfortably encompasses the discretionary denial practice. It further shows how the experience with discretionary denials confirms the benefits provided by the AIA's shift towards greater administrative patent power: expertise, flexibility, reasoned deliberation and policymaking, and accountability.

IP & Innovation

Firm Age, Proximity to the Past R&D, and Innovation

Shotaro Yamaguchi (University of Maryland - Department of Management & Organization)

Ryuji Nitta (Hitotsubashi University)

Yasushi Hara (Kobe University - Graduate School of Business Administration; Hitotsubashi University)

Hiroshi Shimizu (Waseda University)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4189512

Using the USPTO patent database, this study empirically unpacks the black box of the firm age effects on innovation. We directly measure a potential mediating variable, the extent of firms' reconfiguration of R&D portfolios (which we call firms' own R&D proximity). We find that higher R&D proximity (i.e., firms less reconfiguring their portfolios) is associated with lower invention quality while producing more inventions. The tests also support its mediating role in the firm age effects on innovation.

Battle of Patents: AUS vs US

Sasan Bakhtiari (Government of the Commonwealth of Australia - Department of Industry, Innovation and Science; Australian National University (ANU) - Crawford School of Public Policy)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4183015

Contrasting the innovation landscape in one country vis-a-vis a benchmark is instructive for targeted and effective policy. Using patent data from Australia and the United States (US), this study highlights each country's relative strengths and weaknesses. Patents in Australia are more basic, as judged by their breadth of technology classes, and more focused on material and chemical fields. In the US, the emphasis is on digital, semiconductor and wireless technologies. Innovation in both countries has moved towards digital and other frontier technologies, but the move in the US has been earlier and more drastic. The differences remain even accounting for the fact that many joint Australian--US patents are registered in the US only. There are also cross-country differences in the involvement of research institutes that have implications for the quality of patents.

Assessing the Impact of Patent Attributes on the Value of Discrete and Complex Innovations

Mohd Shadab Danish (Dr Br Ambedkar School of Economics University, Bengaluru)

Pritam Ranjan (Indian Institute of Management (IIM), Indore)

Ruchi Sharma (Indian Institute of Management (IIM), Indore)

International Journal of Innovation Management, 2022

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180469

This study assesses the degree to which the social value of patents can be connected to the private value of patents across discrete and complex innovation. The underlying theory suggests that the social value of cumulative patents is less related to the private value of patents. We use the patents applied between 1995 to 2002 and granted on or before December 2018 from the Indian Patent Office (IPO). Here the patent renewal information is utilized as a proxy for the private value of the patent. We have used a variety of logit regression model for the impact assessment analysis. The results reveal that the technology classification (i.e., discrete versus complex innovations) plays an important role in patent value assessment, and some technologies are significantly different than the others even within the two broader classifications. Moreover, the non-resident patents in India are more likely to have a higher value than the resident patents. According to the conclusions of this study, only a few technologies from the discrete and complex innovation categories have some private value. There is no evidence that patent social value indicators are less useful in complicated technical classes than in discrete ones.

Directors Networks and Innovation Herding

Felipe Cabezon (Virginia Polytechnic Institute & State University - Pamplin College of Business)

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

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4158977

This paper examines the role of overlapping director networks on firm innovation, competition, and performance. First, we document that, despite potential legal challenges, overlapping directors are surprisingly most prevalent among direct competitor firm-pairs. Using panel data regressions with rigid controls and plausibly exogenous shocks, we find that competing firms in markets with dense director overlaps engage in innovation herding, experience losses in product differentiation, and ultimately perform poorly. Novel network propagation tests of individual technologies show that intellectual property leakage plays a role as firms with overlapping directors experience faster propagation of technologies to their competitors. Our results are most consistent with an agency conflict that is new to the literature, as directors can realize better career outcomes by leaking sensitive information across boards, even though a consequence can be value destruction for shareholders.

IP Law & Policy

Can Controls Curb Political Capture? Evidence from Patenting

Christine Cuny (New York University (NYU) - Leonard N. Stern School of Business)

Mihir N. Mehta (University of Michigan, Stephen M. Ross School of Business)

Wanli Zhao (Bocconi University - Department of Accounting)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4170209

Theories of congressional dominance contend that regulatory agencies can be captured by the politicians that oversee them. We examine whether control systems and transparency constrain such capture. Using the United States Patent and Trademark Office (USPTO) as a setting, we begin by providing causal evidence of political capture. Patent applications are more likely to be approved when submitted by firms with powerful congressional representation, even though the granted patents are of lower quality. We then document that limits on congressional authority over the USPTO's financing, via the America Invents Act of 2011, mitigates political capture. We also exploit patent examiner departures (and the reassignment of patent applications to a new examiner) to show that public transparency about the identity of a patent examiner constrains political capture. Our study provides novel insights about mechanisms that can constrain distortions in the regulatory process.

Thank You for Not Publishing (Unexamined Patent Applications)

Lidiya Mishchenko (Duke University School of Law)

47 BYU L. REV. 1563 (2022)

Duke Law School Public Law & Legal Theory Series No. 2022-42

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161169

Since 2000, the U.S. Patent & Trademark Office ("PTO") has published nearly all patent applications as they are submitted by applicants. Scholars and practitioners have praised this practice for providing timely notice of the potential legal rights the application may eventually cover. But maximizing timeliness and transparency in this way can also create significant costs, which may chill innovation and deter the development and funding of new research areas. This Article explores these often-unrecognized costs of publishing unexamined patent applications and proposes solutions that balance the benefits of early notice with the costs of patent system uncertainty.

Published patent applications are essentially an initial guess of what the applicant hopes will become the boundaries of his intangible private property and a speculative attempt at demonstrating its possession. Even if they are never granted, these published applications occupy the patent idea space and can lead to examination and third-party search errors. Published applications can thus contribute to costly unpredictability in the patent system more broadly by preventing others from getting a patent and by creating a temporary cloud of uncertainty around what constitutes excludable private property.

Fortunately, there are solutions. Shifting some of the public notice costs to the applicant can be used to potentially increase the quality of information in patent applications, and to reduce the number of lower quality filings. Alternatively, reform efforts can focus on providing the applicant and the PTO with more information in the early stages of examination, enabling them to make an informed choice about whether an application (or a portion thereof) is valuable enough to be published.

Rule of Law Enhancement, Innovation Incentives, and Business Performance: Evidence from China

Hao Wang (Wuhan University)

Chengkui Liu (Wuhan University)

Yue Yu (Wuhan University)

Xiaodan Lin (Wuhan University)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4196438

Using the policy of establishing specialized intellectual property courts (IPC), this paper explores how judicial protection of intellectual property rights (IPR) affects business performance. We find that establishing IPCs has led to a 14.4% improvement in the business performance of local firms. The mechanism analysis shows that IPR judicial protection contributes to both the quality and quantity of corporate innovation, but only quality-oriented innovation drives growth in business performance. Specifically, the policy effect is more evident among firms with low innovation capacity, stronger external financial dependence, larger spillover effects, and domestic capital. Further, the corporate centralization and management structure have a moderating effect on policy effects. IPR protection significantly impacts business management decisions by compressing management's social structure and increasing equity financing.

Copyright Law

The Folklore of Copyright Procedure

Shani Shisha (Harvard Law School)

Harvard Journal of Law & Technology, Forthcoming 2023

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181755

Ours is an era of instant authorship. Authors today need not take any affirmative steps to claim copyright protection. Instead, copyright attaches to an original work of authorship the moment it is fixed in some tangible form. But this system of unconditional propertization bears little resemblance to copyright's original statutory scheme. Historically, copyright protection was conditioned on compliance with certain procedural formalities, such as registration, deposit, and notice. Early courts, in turn, demanded scrupulous compliance with these formalities; even minor departures from the requisite procedure led to copyright forfeiture. This familiar story of draconian formalities and unforgiving courts is a longstanding staple of the copyright canon.

It is also critically incomplete. Drawing on an exhaustive analysis of nineteenth-century case law, this Article uncovers copyright's long-lost history of procedural pragmatism—a decidedly flexible approach to copyright formalities. This strain of pragmatism dawned at a time when authors struggled to keep up with copyright's procedural framework: while publishers usually took steps to comply with copyright formalities, many authors failed to do so. And courts, in their zeal to prevent forfeiture, crafted a number of legal fictions to wrest copyrights out of the hands of noncompliant authors. When an author failed to clear formalities, these courts found that someone else—typically, a publisher—was the formal copyright proprietor. That was the only way, courts intuited, to prevent forfeiture at the hands of a noncompliant author. Based on these findings, this Article excavates copyright's forgotten history of procedural flexibility, explores its origins, and considers its implications for modern doctrine.

Based On a True Story: Life Story Rights, Modularity and Ownership of the Self

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

Dave Fagundes (University of Houston Law Center)

University of Utah College of Law Research Paper No. 506

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4166215

From Richard III (1594) to King Richard (2021), dramatic productions over the centuries have depicted real-life people and events. And since the early days of Hollywood, producers have paid top dollar to secure “life story rights” from the subjects of these works. There’s only one problem: Life story rights don’t exist. Despite popular misconceptions, neither copyright, trademark, privacy nor the right of publicity give individuals the exclusive right to exploit facts concerning their lives. On the contrary: in the United States, First Amendment considerations severely limit any legal constraint on expressive speech, including dramatic depictions. So why do production companies pay amounts that are sometimes in the millions to acquire these “rights”? Drawing on interviews with practitioners across the entertainment industry, we solve this puzzle by identifying the three principal components of life story rights: the subject’s waiver of defamation, privacy and other legal claims (waiver), guaranteed access to the subject and associated materials (access), and the subject’s agreement not to work on any related project (exclusivity). The modularization of these distinct jural relations under the rubric “life story rights” is the result of successful private ordering within a fast-moving and highly competitive industry. This analysis yields a series of insights: it illustrates the prevalence of norm-based regulation; exemplifies the modularization of distinct jural relations to enhance transactional efficiency (i.e., through reduced information costs, signaling and litigation avoidance); and ratifies the lay intuition that people own facts about their lives. Finally, we argue that while the emergence of life rights deals reduces transaction costs and creates some efficiencies, the distributed costs of extralegal expansion of private control over intangibles creates unappreciated costs to the public that warrant caution.

Software’s Legal Future

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4168223

The software industry’s history is also its future. Its history has been defined by both abundance and scarcity, and its future will be, too. In the 1970s and 80s, perceived software scarcity led U.S. legislators to formally grant intellectual property protections to software creators. Later, a different kind of scarcity—a lack of access to source code—led the founders of the free and open source software movement to flip intellectual property protections on their head in an effort to better promote abundance. That movement proved wildly successful, with today’s software industry based on vast amounts of freely available open source software resources that both organizations and individuals collaboratively build.

Abundance and scarcity will also define software’s future, but in different ways. The abundance that the open source software movement spawned is in the midst of a significant commercial phase. That sometimes means that commercial competitors bring to the table a scarcity mindset that conflicts with the norms that made that movement so successful. Intellectual property concerns at times derail what may otherwise be even greater software abundance. And because so much software is moving into the Cloud, trade secrecy may become the software industry’s most important form of intellectual property to the extent the industry abandons open models of innovation.

The software industry’s growing dependence on artificial intelligence (AI) is likely to contribute to these trends. The software industry is increasingly becoming synonymous with the AI industry, as more and more software companies either rely on AI in running their services or provide AI products to the public. As with all software, these AI technologies are increasingly provided from the Cloud, where trade secrecy is not only possible, but often preferable. But trade secrecy may be even more likely in the AI context because much of the magic in implementing AI systems lies in the know-how to piece them together from available open source software resources, decades-old AI techniques, and data. Hence,

to the extent that software and AI technologists spurn open innovation in favor of a scarcity mindset, trade secrecy is likely to become its dominant form of legal protection. The advent of web3 technologies may eventually change some of these trends. But for now, increasing secrecy seems the most likely outcome. I conclude by arguing that this shift to secrecy is likely preferable to other forms of intellectual property.

IP & Trade

The Impact of Intangible Assets' Mobility on Intangibles Location and Income Shifting: Trademarks vs. Patents

Cinthia Valle Ruiz (Catholic University of Lille - IESEG School of Management)

Johannes Voget (University of Mannheim - Accounting and Taxation)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4188135

Despite OECD efforts to combat profit shifting, recent literature shows that firms with higher ratios of intangible assets have increased income shifting activities. Intellectual property is used more than other forms of capital by MNCs to shift income from high to low tax jurisdictions. Although these insights are important, they have not shown which type of intangible assets are most important to firms' income shifting strategies. We estimate a mixed logit model to investigate firms' location choices for different types of intellectual property and how these choices facilitate income-shifting. By directly comparing decisions about patent and trademark locations, we show that trademarks exhibit a particularly high sensitivity to tax differentials. This finding aligns with theory that trademarks can be more mobile than patents, which can be sticky due to agglomeration effects. Despite the focus in prior literature on patents, we find that trademarks are more important than patents to explain firm's income-shifting.

From the Early Days of Harmonization to the DSM Directive 2019/790: Continuity and Complexity of the EU Copyright Framework

Eleonora Rosati (Stockholm University, Faculty of Law)

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4187759

Since the signing of the Treaty of Rome in 1957, the process of European integration has been linked to the creation of an internal market, where a number of basic freedoms – including freedom of movement of goods and services – would be guaranteed. Throughout the 1980s, it became apparent that also harmonization of intellectual property ('IP') laws would be necessary to achieve this goal. During the following decades, the harmonization discourse has touched upon all the main IP rights: besides copyright, also trademarks, design rights, geographic indications, trade secrets and patents have been subjected to approximation initiatives. For some of them (though not copyright), this process has led to the introduction of EU-wide rights that subsist in parallel to and independently of national forms of protection.

Today, the EU copyright *acquis* consists of thirteen directives and two regulations harmonizing a range of issues within the field of copyright and related rights. Overall, the process of approximation of national copyright laws has been supported by a variety of justifications, the primary one being the building of an internal market for copyright content and copyright-based services. Such a rationale has been nonetheless accompanied by the emergence of further objectives and justifications for EU initiatives.

In parallel to legislative initiatives, the Court of Justice of the European Union ('CJEU') has also played a substantial – if not truly foundational – role. Through the system of referrals for a preliminary ruling, the Court has oftentimes not limited itself to interpreting copyright legislation: it has also pushed the boundaries of harmonization further, in some instances even beyond the letter of the law.

It is precisely within this rich (and complex) environment that the DSM Directive came to be and finds its place.

Other Topics

The Impact of Corporate Climate Action on Financial Markets: Evidence from Climate-Related Patents

Ulrich Hege (Toulouse School of Economics; European Corporate Governance Institute (ECGI))

Sebastien Pouget (Toulouse School of Economics)

Yifei Zhang (Peking University, HSBC Business School)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4170774

We study the impact of climate-related patent approvals on financial markets. We exploit the quasi-random assignment of patent examiners as an exogenous shock in patent approvals to seek for causal interpretations. We find that innovative firms with lucky draws in the patent examiner lottery (involving climate-related patent applications) subsequently display positive and higher cumulative abnormal stock returns (both long-term and short-term), receive better environmental ratings, enjoy a lower cost of capital, and attract more responsible institutional investors, compared with similarly innovative but unlucky firms. We also document that firms developing more climate-related technologies reduce more CO2 emissions, improve energy efficiency, and are more likely to announce new green products.

Valuation of Patents in Emerging Economies: A Renewal Model-Based Study of Indian Patents

Mohd Shadab Danish (Dr Br Ambedkar School of Economics University, Bengaluru)

Pritam Ranjan (Indian Institute of Management (IIM), Indore)

Ruchi Sharma (Indian Institute of Management (IIM), Indore)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4180481

This study uses patent renewal information to estimate private value of patents by technology and ownership status. Patent value refers to the economic reward that the inventor extracts from the patent by making, using or selling an invention. Thus, we measure the value of patent right (private value of patent) from the patentee perspective. Our empirical analysis comprises of 555 patents with application year during 1999 to 2002. The term of these patents either ended in 2018 or lapsed due to non-payment of renewal fee. We model renewal decision of patentee as ordered probit where patent renewal fee increases with the age of patent. Variables such as patent family size, technological scope, number of inventors and grant lag are used as explanatory variables in the corresponding regression. Hence, this paper combines the patentee's renewal decision along with patents' characteristics and renewal cost schedule to estimate the initial rent distribution. We find that a large number of patents expire at an early stage leaving few patents with high value corroborating the results of studies using European, American and Chinese data. As expected, certain technology class patents enjoy high valuation.

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