



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

Taking it to the limit: Shifting US antitrust policy toward standards development

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

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3218360

In November 2017, U.S. Assistant Attorney General Makan Delrahim, chief of the Department of Justice (DOJ) Antitrust Division, gave a speech at University of Southern California provocatively entitled “Take it to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law”. In this speech, Mr. Delrahim announced a new DOJ policy approach to the antitrust analysis of collaborative standard setting and standards-development organizations (SDOs) -- the trade associations and other groups in which industry participants cooperate to develop interoperability standards such as Wi-Fi, Bluetooth, 4G and 5G, USB and the like. He explained that the DOJ had “strayed too far” in its focus on single firm conduct concerning standards, particularly the assertion of patents essential to the implementation of standards in technology products (“standards-essential patents” or “SEPs”), and that antitrust authorities should be more concerned with potential collusion by competitors within SDOs (i.e., an apparent shift in doctrinal focus from unilateral conduct under Section 2 of the Sherman Act to concerted action under Section 1 of the Sherman Act). One commentator described the DOJ policy shift announced by Mr. Delrahim as “a 180 degree turn” on SEP issues. The new policy also seems to put the enforcement priorities of the Antitrust Division at odds with those of the other principal U.S. antitrust enforcement agency, the Federal Trade Commission (FTC). This article analyzes the contours of the emerging divide among U.S. antitrust agencies, as well as reactions to the “Take it to the Limit Speech” by industry, academics and Mr. Delrahim’s subsequent public statements.

Rambus redux? – Standards, patents and non-disclosure in the pharmaceutical sector (Momenta v. Amphastar)

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

Patently-O blog, Jun. 29, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205843

Momenta Pharmaceuticals, Inc. v. Amphastar Pharmaceuticals, Inc. (D.Mass 2) involves the alleged deception of a standards-development organization (SDO) by the holder of a patent essential to a

standard relating to the manufacture of the drug enoxaparin. The SDO's rules regarding disclosure of standards-essential patents (SEPs) were found to be ambiguous, yet, as in *Qualcomm v. Broadcom* (Fed. Cir. 2008), the district court held that participant expectations created an affirmative obligation to disclose SEPs. Following the SEP holder's assertion of the undisclosed patent against a competing generic manufacturer of enoxaparin, the alleged infringer successfully raised defenses of waiver and estoppel against enforcement of the patent. The alleged infringer also brought antitrust claims against the SEP holder, alleging monopolization in violation of the Sherman Act. The case is interesting because it raises issues that were seemingly settled in the information and communication technology (ICT) sector a decade ago, but in the new setting of pharmaceuticals manufacturing. As such, it may give courts an unexpected opportunity to revisit the DC Circuit's controversial decision in *Rambus v. FTC* (D.C. Cir. 2008), which found no antitrust liability for an allegedly deceptive failure to disclose SEPs to an SDO.

Judge Douglas Ginsburg interviews Makan Delrahim on intellectual property and antitrust

Douglas H. Ginsburg (U.S. Court of Appeals for the District of Columbia Circuit; George Mason University - Antonin Scalia Law School, Faculty)

CPI Antitrust Chronicle, Vol. 1, No. 3, June 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211335

Makan Delrahim, the Assistant Attorney General for Antitrust at the U.S. Department of Justice, delivered the keynote address at the Leadership Conference on IP, Antitrust, and Innovation Policy, which was co-sponsored by Competition Policy International. Following up on that discussion, Mr. Delrahim graciously agreed to answer the following questions posed by Judge Douglas H. Ginsburg.

IP & Licensing

Rethinking post-sale confusion

Kal Raustiala (University of California, Los Angeles (UCLA) - School of Law)

Christopher Jon Sprigman (New York University School of Law)

108 Trademark Reporter 881 (2018)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205334

Are trademark owners harmed when observers on the street mistake knockoffs for the real thing? The concept of "post-sale confusion"—which has resulted in verdicts over over \$300 million—is predicated on the notion that trademarks can be harmed even if no consumer is ever confused about what they are purchasing. In this commentary, we critique the concept of post-sale confusion and unpack the logic and empirics that undergird efforts to base liability on it. We lay out the conditions under which post-sale confusion might exist. First, we explain why the real-world conditions required to generate post-sale confusion are more difficult to prove than courts and litigants have previously recognized. Those conditions are fairly limited, and the resulting path to a defensible assertion of post-sale confusion is narrow. We conclude that post-sale confusion is real, but rare. Next, we consider the type of harm that may ensue when onlookers are confused post-sale. We identify two types of possible harm: (1) harm to the senior brand's reputation for quality; and (2) harm to the ability of either the senior brand or consumers to signal status via exclusivity. We explain the circumstances under which each of these forms of harm may occur. But it is important to underscore that post-sale confusion often produces neither form of harm. Indeed, we go further. In some cases, post-sale confusion may even benefit mark owners, consumers, or both.

IP & Trademarks

Trademarks, certification marks and technical standards

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

Cambridge Handbook of Technical Standardization Law, Vol. 2: Administrative Law, Trade, Privacy, Tort, Copyright and Trademark (Jorge L. Contreras, ed., Cambridge Univ. Press 2019, Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209855

The names of many technical standards such as Wi-Fi, Bluetooth and DVD have become household terms known throughout the developed world. This chapter describes different approaches that have been taken with respect to the naming and legal protection of technical standards, ranging from those that are wholly unregulated to those that are administered under strict certification and compliance regimes. It concludes by questioning the need for aggressive protection of marks that exist largely to inform consumers about technical product features rather than the source of standards themselves.

Packaging-related measures for alcohol and unhealthy food and their impact on trademarks – The perspective of Article 17(2) CFRE

Leonid Shmatenko (Heinrich Heine University Dusseldorf, Faculty of Law; Lalive Lawyers, Geneva)

David Shaverdov (Heinrich Heine University Dusseldorf - Faculty of Law)

ZLR 3/2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202088

Many packaging-related measures are discussed or even applied yet to prevent or reduce the excessive consumption of alcoholic drinks or food regarded as unhealthy because of high amounts of fat, saturated fatty acids, sugar or salt. Model for them are measures partially regulated for tobacco products like, e.g., health warnings or plain packaging. They have an impact on the value and usability of trademarks. The authors examine the compatibility of such measures for foodstuffs with the right to (intellectual) property of Art 17 CFRE.

IP & Innovation

Standardization, open source, and innovation: Sketching the effect of IPR policies

Martin Husovec (Tilburg Law and Economics Center (TILEC); Tilburg University - Tilburg Institute for Law, Technology, and Society (TILT); Stanford University - Stanford Law School Center for Internet and Society)

Forthcoming in Jorge Contreras (eds.) Cambridge Handbook of Technical Standardization Law (CUP 2019)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215769

Open Source and standardization can be described as two 'stewards of innovation' (Kapos 2017). Although practically two different ecosystems with a diverging set of rules and objectives, they, however, meet in their purpose to push the frontier of innovation. The latest technological developments are increasingly incentivizing firms and individuals participating in these ecosystems to work more closely together. However, under whose rules? And with what consequences for the innovation ecosystem? In this contribution, I try to sketch answers to these and related questions with the focus on IPR policies of two ecosystems.

Based on the outlined trade-offs, a number of specific points are offered. First of all, patent and copyright royalties may discourage use of standards within Open Source projects. For patent royalties, these effects can be also addressed outside of the standardization process by means of defensive and

licensing patent pools or aggregated individual commitments. It depends on the cost and benefits of a particular project whether such solutions should be in-built ex-ante or created externally ex-post. Second, Open Source licenses with royalty-free patent grants might accelerate diffusion of specifications, especially if done within the reference implementations of SDOs, and encourage a new set of innovators to join the process. At the same time, it might discourage a set of pure R&D firms which heavily rely on royalties to recoup the investment. SDOs steering the process might want to consider the likely pool of innovators on both sides when launching a project. Third, given that we observe that both royalty-free and royalty-bearing layers are able to sustain innovation investments in the ICT, none of two approaches seems inherently superior. However, the choice can influence the make-up of innovators and technological trajectories. From this perspective, they both have their place in the innovation ecosystem. SDOs should, therefore, promote a choice between them on a project basis.

IP & Litigation

Reining in a 'renegade' court: TC Heartland and the Eastern District of Texas

Jonas Anderson (American University - Washington College of Law)

Cardozo Law Review, Vol. 39, No. 1569, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205075

In *TC Heartland v. Kraft Foods Group Brands*, the Supreme Court tightened the venue requirement for patent cases, making it more difficult for a plaintiff to demonstrate that a district court has venue over a defendant. Many commentators, however, view *TC Heartland* as merely a “reshuffling” of the district courts that receive patent cases. Whereas before the case, a large percentage of patent cases were filed in the Eastern District of Texas, now, after *TC Heartland*, various other U.S. district courts (principally, the District of Delaware) have experienced an increase in patent infringement filings. Some commentators are unconvinced that this flow of patent cases out of the Eastern District of Texas and into the District of Delaware will benefit the patent system.

As this Article demonstrates, however, there are reasons to think that this “reshuffling” may be beneficial to the patent system. The District of Delaware, unlike the Eastern District of Texas, has incentives to maintain an even-handed approach to patent law. If the district came to be seen as overly patentee-friendly, the state would risk innovative companies choosing to incorporate elsewhere. Ultimately, the District of Delaware is much less likely than the Eastern District of Texas to create plaintiff-friendly procedural rules and administrative practices.

TC Heartland also speaks to the Supreme Court's recent interest in patent cases. *TC Heartland* continued the recent trend of the Supreme Court granting certiorari in patent cases that concern issues of patent adjudication while avoiding tricky questions of core patent doctrine. This pattern likely points to a Supreme Court that is concerned about the patent system, yet is acutely aware of its own relative lack of expertise concerning patent doctrine. Thus, it may be said that in patent law, the Supreme Court acts as a “release valve,” changing patent law only when the Federal Circuit and Congress are incapable of changing the law.

IP Law & Policy

Developing a common patent system – Lessons to be learnt from the European experience

Reto Hilty (Max Planck Institute for Innovation and Competition; University of Zurich; Ludwig Maximilian University of Munich)

Roberto Romandini (Max Planck Institute for Innovation and Competition)

pp. 254-290, in E. Siew-Kuan Ng, G. W. Austin (eds), International Intellectual Property and the ASEAN Way. Pathways to Interoperability, Cambridge University Press 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202081

The article analyses reasons for establishing a regional patent system and ways of achieving this aim. Based on proposals elaborated in Europe since 1949, it differentiates models for pooling together the power to grant and protect patents according to their purpose and effect on national sovereignty. The article suggests that where the states of a particular region are not ready to accept a fully unified patent system, as is apparently the case with the members of ASEAN, the establishment of a regional patent office can still be a viable option. On the one hand, regional offices allow the participating states to create economies of scale without limiting significantly their freedom in pursuing national policies. On the other hand, regional offices can provide the infrastructure and the expertise required to develop an independent examination practice and standard of patentability in the region concerned.

The non-doctrine of redundancy

Saurabh Vishnubhakat (Texas A&M University School of Law; Duke University School of Law)

Berkeley Technology Law Journal, Vol. 33, No. 3, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3200781

This Article explores and evaluates a controversial practice that the Patent Office undertook beginning early in the post-AIA regime, the practice of denying otherwise meritorious requests for review because of what the Office termed “redundant” grounds. The controversy over redundancy-based rejections had several sources. One was that making such rejections required the Patent Office to decide petitions piecemeal—and, indeed, the agency claimed that power for itself—even though it was not clear that this power lay within the statute. Another source was that the Patent Office persistently declined to explain what, in the agency’s view, did or did not constitute redundancy. Still another was that the Patent Office resisted Federal Circuit oversight of this practice by claiming unreviewable discretion as part of a larger campaign of self-immunization. This confluence of problematic agency choices has generated other, related controversies with AIA review as well, with a mixed record of success for the Patent Office. Yet while redundancy-based rejection now seems to be ebbing as a matter of agency policy, the underlying structural conditions that gave rise to the practice still persist and repay closer analytical and doctrinal scrutiny. This Article offers that scrutiny and discusses ways forward for AIA review.

Intellectual property and the risks of fragmentation

Julian Rotenberg (University of Buenos Aires (UBA))

Society of International Economic Law (SIEL), Sixth Biennial Global Conference

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3209859

The article analyzes the regulation of intellectual property rights in current trade negotiations, particularly the protection of Geographical Indications (GIs) in Free Trade Agreements, within the context of the fragmentation of international economic law. The recognition of foreign GIs through Free Trade Agreements presents a set of conflicts between the protected GIs and other rights. Although Free Trade Agreements provide solutions to these conflicts within their texts, this situation may generate conflicts between GI protections and rights protected under other rules of international economic law. As a result, to the extent that there exist available remedies and dispute settlement

mechanisms to claim breaches of those other rights, negotiating States are exposed to the risk of litigation in multiple jurisdictions brought by parties whose economic interests may be affected by the protection of foreign GIs. The existence of conflicts between rules from different areas of international economic law and the potential for contradictory decisions on the lawfulness of a State measure regarding foreign GIs are outcomes that deepen the fragmentation of international law and question the overall coherence of this regime.

Copyright Law

Fair use and its global paradigm evolution

Peter K. Yu (Texas A&M University School of Law)

University of Illinois Law Review, Vol. 2019, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3206464

Legal paradigms change in response to political, economic, social, cultural and technological conditions. While these paradigms have moved from developed to developing countries, they rarely move in the opposite direction. Nevertheless, some transplants from developed countries do involve legal paradigms that align well with the needs, interests, conditions and priorities of developing countries. A case in point is the transplant of the fair use model in U.S. copyright law, which has attracted considerable debate, research and policy attention in the past few decades.

Because legal literature has thus far underanalyzed the transplant of the U.S. fair use model, this article devotes its analysis to fair use transplants. It begins by reviewing the literature concerning paradigm shift, in particular Thomas Kuhn's seminal work. The article then documents a growing trend toward the worldwide adoption of the U.S. fair use model and a countertrend toward the retention of the status quo. The juxtaposition of these two trends explain why jurisdictions that set out to transplant the U.S. fair use model ended up adopting a hybrid system.

The second half of this article interrogates the different primary causes behind such a paradigm evolution. While many possible factors exist within and outside the legal system, the discussion focuses on those relating to intellectual property law, international and comparative law, and the legislative process. The article concludes with recommendations concerning future efforts to broaden copyright limitations and exceptions in the United States and across the world. Specifically, it outlines six courses of actions that seek to improve these reform efforts. It further identifies three modalities of evolution that can help tailor the transplanted fair use paradigm to local needs, interests, conditions and priorities.

Copyright lost

Glynn S. Lunney, Jr. (Texas A&M University School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198147

In this essay, I revisit my 2001 article, *The Death of Copyright*, for the Franklin Pierce Center for Intellectual Property's Redux Conference. In *The Death of Copyright*, I worried that copyright, as a law that serves "to promote the Progress of Science," had died. Instead, with the enactment of the Digital Millennium Copyright Act, I feared that copyright had returned to a system of guild privileges that served only to maximize the rents of copyright owners. At the time I wrote the article, file sharing had just begun. Yet, the content industries were already proclaiming that the sky was falling. In their view, file sharing would destroy the incentives necessary to author and distribute high quality works of authorship. In *The Death of Copyright*, I carefully explained why that was not true. Although file sharing might reduce revenue, I argued that it would not reduce creative output. In revisiting that article today, I am proud to say that I was right. Using evidence from the U.S. recording industry that I have gathered

and presented in my recently published book, *Copyright's Excess: Money and Music in the U.S. Recording Industry*, I show that in the recording industry over the last fifty years, more money for copyright owners has meant less music. Rather than provide an incentive for more works at the margins, a strong and effective sound recording copyright overpaid our non-marginal superstars. It overpaid them to such an extent that they worked less. As a result, strong and effective copyright did not increase creative output. It reduced it. Copyright, in the sense of a law that serves a public, rather than merely a private, interest has been lost.

Other IP Topics

Prophetic patents

Janet Freilich (Fordham University School of Law)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202493

In most contexts, making up data is forbidden - considered fraudulent, even immoral. Not so in patents. Patents often contain experimental data, and it is perfectly acceptable for these experiments to be entirely fictional. These so-called “prophetic examples” are not only explicitly permitted by both the Patent Office and federal courts, but are considered equivalent to factual data in patent doctrine. Though prophetic examples are thought to be common, there are no in-depth studies of the practice, nor any explanation for why fictional data are allowed in patents.

Here, I provide the first historical, theoretical, and empirical analysis of prophetic examples. I collect and analyze a novel dataset of over 2 million U.S. patents and applications from the biology and chemistry industries. I find that at least 17% of experiments in this population are fictional. Through both empirical and theoretical analyses, I weigh the potential costs and benefits of prophetic examples and find that the costs prevail. Prophetic examples could be beneficial if they help patentees; but I find little evidence that they do so, even in the specific situations in which they should be the most useful. Instead, prophetic examples likely hinder innovation because they prevent others from conducting their own experiments – even after the patent has expired and even if the prophetic example is incorrect. Prophetic examples also hopelessly confuse scientists – a shocking 99% of scientific articles incorrectly cite prophetic examples as if they contained factual information – which means that made-up results from patents contaminate the scientific literature.

Given these harms, I argue for a shift from prophecies to more clearly delimited hypotheses – roadmaps for future research, but nothing more – preserving what value there is in speculation while mitigating the clear harms of the practice. Beyond these concrete policy recommendations, my findings also have rich implications for theoretical debates about the physicality of invention, when and to whom patents should be granted, how patents transmit information, and, ultimately, how best to incentivize innovation.

Does intellectual property need human rights?

Ruth Okediji (Harvard Law School)

New York University Journal of International Law and Politics (JILP), Vol. 50, No. 1, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202478

The impassioned contest over the nature, scope, and implications of the intellectual property and human rights interface has important consequences for the way nations understand and comply with their obligations in each field. It significantly affects the methods and substance of international assistance offered to developing countries by international organizations, non-governmental organizations, and the extensive network of private experts deployed to facilitate competing outcomes in domestic legislation. The result has been a highly politicized environment for intellectual property

norm-setting at all levels of global, regional, and national governance, resulting in a persistent state of norm conflict that weighs heavily on the already complex relations among domestic and international actors involved with intellectual property policymaking.

This article provides a critical review of the contemporary construction of the intellectual property/human rights interface. On the whole, it advances a view of the human rights frame as problematic for the liberty aspirations and development interests of populations in the global South. Human rights law – both in its ideological orientation towards western liberal political traditions and in its pragmatic reliance on external constituencies for expertise and guidance - tends to stymie the necessary national debate that is a precursor for the cultivation of sophisticated local actors who can more ably challenge the structural challenges imposed by international intellectual property norms. In addition, the international human rights norm-setting process is heavily influenced by justifications for intellectual property. These design features of the relevant human rights institutions create significant challenges for the promise of a redemptive effect of human rights arguments on local intellectual property reform initiatives.

The business of intellectual property: A literature review of IP management research

Marcus Holgersson (Chalmers University of Technology)

Sarah van Santen (Chalmers University of Technology)

Stockholm Intellectual Property Law Review, Vol. 1, No. 1, pp. 44-63

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202847

Today intellectual property (IP) comprises an increasing share of firms' resources and IP rights (IPRs) are important sources of competitiveness. Consequently, there is an increasing interest in how to properly manage IP. IP lawyers need to better understand business decisions and business managers need to better understand IP law. These needs are addressed by a growing area of research on IP management in the intersection between IP law and management. This article presents a literature review of the broad field of IP management research, with the aim to provide IP law practitioners, managers, and academics with an overview of what we know about IP management, to guide readers in how/where to learn more, and how to move forward in both research and practice. A general conclusion is that the research is rich and quickly growing, but has too little focus and data on strategic IP management issues. Both research and practice need to adopt a more holistic perspective on IP, including different rights and integrating with strategic decision-making.

Lack of integrity? Rebutting the myth that US commercial sports leagues have an intellectual property right to sports gambling proceeds

Marc Edelman (City University of New York - Baruch College, Zicklin School of Business; Fordham University School of Law)

115 NYU Journal of Law & Business ____ (2018)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3203879

On May 14, 2018, the U.S. Supreme Court held in *Murphy v. National Collegiate Athletic Association* that the Professional and Amateur Sports Protection Act ("PASPA") violated the Tenth Amendment of the U.S. Constitution, and thus the U.S. government may not use PASPA to prevent states from legalizing commercial sports gambling. In anticipation of this ruling, four U.S. states have already passed new laws to legalize and regulate sports gambling. Meanwhile, fifteen states currently have sports gambling bills that are pending before their state legislatures.

In many instances, these new sports gambling laws would include the payment of a "tax" or "royalty" that transfers some gambling-related revenues from the newly licensed sports-gambling operators to U.S. commercial sports leagues. These payments, which have sometimes been described as "integrity fees," are explained by state legislators as arising from the purported use of commercial sports leagues' intellectual property rights in state-sponsored sports gambling. Nevertheless, the claim that state-

sponsored sports gambling would infringe upon commercial sports leagues' intellectual property rights is, in earnest, dubious.

This article explains that state-sponsored sports gambling is unlikely to infringe upon the intellectual property rights of U.S. commercial sports leagues, and thus there is no bona fide reason for state legislatures to mandate the payment of "integrity fees" from state-licensed sports-gambling operators to the U.S. commercial sports leagues. Part I of this article explores how federal intellectual property laws (patent, copyright and trademark) apply, if at all, in the context of state-sponsored sports gambling. Part II then looks at how two additional state intellectual property laws (the "right of publicity" and the "hot news" doctrine) would apply, if at all, in this same context.

Traditional knowledge and the public domain

Ruth Okediji (Harvard Law School)

Centre for International Governance Innovation Papers No. 176

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202976

Legal protection for traditional knowledge raises difficult questions at the intersection of innovation policy and knowledge governance, with important implications for Indigenous peoples' rights. A significant source of tension has been the difficulty in delineating entitlement interests in traditional knowledge consistent with prevailing doctrinal limits to intellectual property rights, such as the public domain. This paper advances the idea that, properly applied, the public domain does not constitute a barrier to the effective protection of traditional knowledge, and that a thoughtfully designed, custom-built public domain for traditional knowledge would align traditional knowledge protection with the overall architecture of the global innovation framework.

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