



# IP Literature Watch

**CRA** Charles River  
Associates

August 2016

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

### **Patent licensing and bargaining with innovative complements and substitutes**

Daniel F. Spulber (Northwestern University – Kellogg School of Management)  
*Northwestern Law & Econ Research Paper No. 16-12*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2818008](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818008)

Inventors and producers bargain over royalties to license multiple patented inventions. In the first stage of the bargaining game, inventors offer licenses to producers and producers demand licenses. In the second stage of the game, inventors and producers engage in bilateral bargaining over licensing royalties. The analysis shows that there is a unique weakly dominant strategy equilibrium in license offers. The main result is that this bargaining procedure maximizes the joint profits of inventors and producers. Licensing royalties are less than bundled monopoly royalties. The efficiency of the bargaining outcome contrasts with the inefficiency of patent royalties in the Cournot model. The analysis explores the implications of the main results for antitrust policy concerns including Standard Essential Patent holdup, royalty stacking, patent thickets, the tragedy of the anticommons, and justification for patent pools. The discussion also considers how imperfect intellectual property rights affect bargaining over royalties.

### **Final report of the Berkeley Center for Law & Technology Patent Damages Workshop**

Stuart J. H. Graham (Georgia Institute of Technology – Scheller College of Business)

Peter S. Menell (University of California, Berkeley – School of Law)

Carl Shapiro (University of California, Berkeley – Haas School of Business)

Timothy Simcoe (Boston University – Questrom School of Business; NBER)

*Texas Intellectual Property Law Journal, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2823658](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823658)

The determination of patent damages lies at the heart of patent law and policy, yet it remains one of the most contentious topics in this field, particularly as regards the calculation of a reasonable royalty. In March 2016, the Berkeley Center for Law & Technology convened a workshop of leading “insiders” (in-house counsel, litigators (from both the assertion and defense sides), patent licensing professionals, and testifying expert witnesses) and academics (both law professors and economists) to clarify areas of consensus and disagreement regarding the treatment of patent damages. This report summarizes the discussion, key findings, and ramifications for patent case management.

## **Invalidity Assertion Entities and Inter Partes review: rent seeking as a tool to discourage patent trolls**

W. Michael Schuster II (Oklahoma State University)

*Wake Forest Law Review, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817450](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817450)

This Article analyzes how a new entrant to the patent landscape — the Invalidity Assertion Entity (IAE) — may discourage the much-maligned patent troll business model. IAEs are rent-seekers who demand consideration from patent owners in exchange for not attempting to invalidate their patents through an administrative action before the U.S. Patent and Trademark Office.

Self-interested IAEs will target patents and patent holders with attributes that maximize the likelihood the IAE will secure a lucrative settlement. Patent trolls exhibit these characteristics and will therefore be disproportionately targeted by IAEs. This practice raises costs and lowers income for patent trolls, which discourages future troll activity. IAEs thus — by pursuing their own profit-driven agendas — further the long-time policy goal of reducing patent troll lawsuits. This conclusion is diametrically opposed to the negative portrayals of IAEs in the media and recent legislative proposals to terminate the nascent business model.

## **IP & Innovation**

### **The impact of institutions on innovation**

Alexander Donges (University of Mannheim – Department of Economics)

Jean-Marie A. Meier (London Business School – Department of Finance)

Rui Silva (London Business School – Department of Finance)

*Working paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2815541](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815541)

This paper studies the impact of institutional reforms on innovation. We use the timing and geography of the French occupation of different regions of Germany after the French Revolution of 1789 as an exogenous shock to the institutions of those regions. Combining novel county-level data on Imperial Germany with data on patents per capita, we show that counties whose institutions are more inclusive as a result of the French occupation become more innovative. The institutional reforms that are associated with comparing a county with no occupation to a county with the longest occupation, result in a 129% increase in the number of patents per capita. This result is robust to alternative explanations, such as reverse causality, human capital and financial development. Our findings point to institutions as a first order determinant of innovation and highlight the role of innovation as a key mechanism through which institutions may lead to economic growth.

### **Impact of innovation on competition law: from an outcome-oriented approach to a process-oriented approach**

Liyang Hou (Shanghai Jiao Tong University (SJTU) – KoGuan Law School)

*Working paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2817023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2817023)

Innovation was traditionally protected from its outcome under property law, in particular intellectual property law. However, this approach has gradually reached its limit when more innovation needs to be stimulated. One branch of competition law, namely antitrust law, has thus developed a process-oriented

protection in order to open up the process to more innovation, though such a new approach slightly intrudes on the exclusivity of property rights. However, less has been discussed so far on how this new approach affects the other equally important branch of competition law, namely anti-unfair competition law. Anti-unfair competition law targets conduct that dishonestly takes advantage of other competitors, thus traditionally having its core analytical framework built upon the evaluation of individual loss. While anti-unfair competition law can still fulfill most of its purpose by resting on the outcome-oriented approach, the drawbacks have been extensively revealed with the recent challenge of ad-blocking applications. At first sight, the traditional approach may be justified to hold developers of these applications liable for the revenue loss of online media operators. However, a second thinking suggests that the traditional approach may stifle innovation. Therefore, this article advances a new economic interpretation on the business model of online media operation, the target of ad-blocking applications, namely the combined sale model vis-à-vis the traditional single product model. This article finally concludes that the process-oriented approach should prevail the traditional outcome oriented approach where the combined sale model is involved.

### **Freedom to tinker**

Pamela Samuelson (University of California, Berkeley – School of Law)

*Theoretical Inquiries in Law, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2800362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2800362)

Tinkering with technologies and other human-made artifacts is a long-standing practice. Freedom to tinker has largely existed without formal legal recognition. Tinkering has typically taken place in an unregulated zone within which people were at liberty to act unobstructed by others so long as they did not harm others. The main reason why it now seems desirable to articulate some legal principles about freedom to tinker and why it needs to be preserved is because freedom to tinker is being challenged by some legal developments. This Article explains that user-innovators have traditionally had considerable freedom to tinker under trade secrecy, patent, and trademark laws. Although copyright law permits a modest degree of tinkering with existing products, it restricts freedom to tinker more than other IP laws. Copyright law and sometimes contract law place substantial constraints on user rights to tinker with and modify computer programs and other digital works. These constraints are of particular concern to tinkerers because computer programs are embedded in such a wide range of technologies these days. This Article offers suggestions about how and why the law should protect a zone of freedom to tinker for socially beneficial purposes.

## **IP & Litigation**

### **Enhanced damages for patent infringement: a normative approach**

Keith N. Hylton (Boston University – School of Law)

*Review of Litigation, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2824665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2824665)

In *Halo Electronics v. Pulse Electronics* the Supreme Court granted greater discretion to lower courts to enhance damages for patent infringement. This paper takes a normative approach to patent infringement damages. Its underlying premise is that the goal of a damages regime should be to maximize society's welfare. Patent damages should therefore balance society's interest in encouraging innovation against the need to regulate infringement incentives. Although the analysis here is mostly normative and draws heavily on the economic theory of penalties, the aim of this paper is to provide a set of practical guidelines courts can follow in explaining, justifying, and developing rules to structure the discretion that Halo has returned to them.

## **Patent injunctions on appeal: an empirical study of the Federal Circuit's application of eBay**

Ryan T. Holte (Southern Illinois University School of Law)

Christopher B. Seaman (Washington and Lee University School of Law)

*Working paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2816097](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816097)

Ten years after the U.S. Supreme Court's 2006 seminal decision in *eBay v. MercExchange*, the availability of injunctive relief in patent cases remains hotly contested. For example, in a recent decision in the long-running litigation between Apple and Samsung, members of the U.S. Court of Appeals for the Federal Circuit sharply divided regarding whether an injunction was warranted to prevent Samsung from continuing to infringe several smartphone features patented by Apple. To date, however, nearly all empirical scholarship regarding eBay has focused on trial court decisions, rather than the Federal Circuit.

This article represents the first comprehensive empirical study of permanent injunction decisions by the Federal Circuit following *eBay*. Through an original dataset of appeals in nearly 200 patent cases — representing all cases involving contested permanent injunction decisions for a 7½ year period after *eBay* — we assess the impact of the Federal Circuit on the availability of permanent injunctions. The findings from this study indicate that the Federal Circuit is generally more favorable to prevailing patentees regarding permanent injunctive relief than the district courts following *eBay*. District courts that grant an injunction after a finding of liability are highly likely to be affirmed on appeal, whereas district courts that deny an injunction have a statistically significant lower affirmance rate. This suggests the Federal Circuit is generally inclined toward a property rule rather than a liability rule as a remedy against future patent infringement. It also appears to lend support to claims by scholars and others that the Federal Circuit, as a specialized court with a large number of patent cases, is more pro-patentee than the generalist district courts. Finally, some implications of this and other empirical findings from the study are considered.

## **Photocopies, patents, and knowledge transfer: 'The Uneasy Case' of Justice Breyer's patentable subject matter jurisprudence**

Dmitry Karshtedt (George Washington University – Law School)

*69 Vanderbilt Law Review (2016 Forthcoming)*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2816201](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2816201)

The essence of Justice Stephen Breyer's discomfort with patents, as expressed in his opinion for the Supreme Court in *Mayo v. Prometheus* and his dissent from the order dismissing certiorari in *LabCorp v. Metabolite*, is strikingly similar to his critique of copyright law in *The Uneasy Case for Copyright*, a well-known article he wrote as Professor Breyer some 45 years ago. In *The Uneasy Case*, Breyer argued that the burdens on duplication of technical articles imposed by copyright law restrict the flow of information and prevent scientists from enjoying the spillover benefits of published research. His patent opinions, too, talk of diminished access to information resulting from intellectual property protection. In this Essay, I contend that the parallel that Justice Breyer implicitly draws between the harms of copyright and patent is a questionable one. In particular, Justice Breyer's opinions on patentable subject matter do not address the notion that inducement of disclosure and dissemination of information is one of the very purposes of patent law, nor the idea that there are many noninfringing uses of information contained in patents. I argue that these omissions may provide an insight into Justice Breyer's patent law jurisprudence — particularly, the recent reinvigoration of limits on patentable subject matter in his opinion for the Court in *Mayo*.

To be sure, Justice Breyer's position can be defended. For even though patent law does not generally place barriers on access to information, claims like those at issue in *Mayo* and *LabCorp* may create

narrow, subtle information-flow problems through recitation of mental steps at the point of the invention's novelty. I argue, however, that these problems can be solved by applying correspondingly narrow rules of novelty and claim construction to invalidate such patents or to limit their scope, making resort to the overbroad rule announced in *Mayo* unnecessary.

## IP Law & Policy

### **Intellectual Property, antitrust, and the rule of law: between private power and state power**

Ariel Katz (University of Toronto – Faculty of Law)

*17:2 Theoretical Inquiries in Law* 633 (2016)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2830611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830611)

This Article explores the rule of law aspects of the intersection between intellectual property and antitrust law. Contemporary discussions and debates on intellectual property (IP), antitrust, and the intersection between them are typically framed in economically oriented terms. This Article, however, shows that there is more law in law than just economics. It demonstrates how the rule of law has influenced the development of several IP doctrines, and the interface between IP and antitrust, in important, albeit not always acknowledged, ways. In particular, it addresses some limitations on IP rights, such as exhaustion and limitations on tying arrangements, are grounded in rule of law principles restricting the arbitrary exercise of legal power, rather than solely in considerations of economic efficiency.

The historical development of IP law has reflected several tensions, both economic and political, that lie at the heart of the constitutional order of the modern state: the tension between the benefits of free competition and the recognition that some restraints on competition may be beneficial and justified; the concern that power, even when conferred in the public interest, can often be abused and arbitrarily applied to advance private interests; and the tension between freedom of contract and property and freedom of trade. This Article explores how rule of law considerations have allowed courts to mediate these tensions, both in their familiar public law aspects but also in their less conspicuous private law dimensions, and how, in particular, they have shaped the development of IP doctrine and its intersection with antitrust law and the common law.

### **Patent scope and enablement in rapidly developing arts**

Alan L. Durham (University of Alabama – School of Law)

*94 North Carolina Law Review* 101 (2016)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2822483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822483)

The claims of a patent and its enabling disclosure must be commensurate in scope. However, because of the open-ended nature of most patent claims, in fields of rapidly-developing technology it is almost inevitable that, before the patent has expired, the claims will read on embodiments that the specification does not teach. The current law on scope enablement is the source of much confusion. Because enablement must be judged from a filing-date perspective, some cases dismiss later advancements (e.g., a newly-discovered species within a claimed genus) as irrelevant. Other cases, in contrast, hold patent claims invalid because they exceed the scope of what could be achieved when the application was filed. A clear and balanced rule of scope enablement is essential to a patent system designed to “promote the Progress of...Useful Arts.” Claims that exceed the scope of the patent’s teachings can stand in the way of technological progress; at the same time, claims to important advancements – the advancements most susceptible to elaboration and improvement – should not be so severely limited in scope that they are all but worthless. In this Article, I propose an analytical framework designed to reconcile some of the apparent contradictions and to reward patentees in a manner that promotes technological advancement

in rapidly-developing fields. I propose that courts address patent claims that include nonenabled embodiments from the perspective of a reasonable applicant. The claims should not be held invalid (1) if the nonenabled embodiments were unforeseeable; (2) if the nonenabled embodiments are “tangential” (i.e., the nonenabled aspects of those embodiments are unrelated to the patentee’s contribution to the art); or (3) if for some other reason a reasonable applicant could not have been expected to draft claims that would have excluded the nonenabled embodiments. The model for this three-part test is the Supreme Court’s rule on prosecution history estoppel, as outlined in *Festo*. Although enablement and prosecution history estoppel are very different areas of patent law, in both cases respect for the limitations of a reasonable applicant leads to outcomes consistent with sound patent policy.

## Copyright Law

### **Discouraging frivolous copyright infringement claims: fee shifting under Rule 11 or 28 U.S.C. § 1927 as an alternative to awarding attorney’s fees under Section 505 of the Copyright Act**

David E. Shipley (University of Georgia Law School)

*Journal of Intellectual Property Law, Forthcoming*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2820302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820302)

The United States Supreme Court’s 2016 decision in *Kirtsaeng v. John Wiley & Sons* resolved a disagreement over when it is appropriate to award attorney’s fees to a prevailing defendant under section 505 of the Copyright Act, and ended a perceived venue advantage for losing plaintiffs in some jurisdictions. The Court ruled unanimously that courts are correct to give substantial weight to the question of whether the losing side had a reasonable case to fight, but that the objective reasonableness of that side’s position does not give rise to a presumption against fee shifting. It made clear that other factors should also be taken into account beyond the reasonableness of litigating positions when a court exercises its broad discretion to award fees under the Copyright Act.

However, prior to the *Kirtsaeng* decision courts were in agreement about the appropriateness of awarding fees to a prevailing defendant under section 505 when a court determined that the losing party pursued its claim in bad faith, that the losing claim was frivolous or objectively unreasonable, or that the losing party had no reasonable grounds for the position it took during the litigation. Interestingly, these reasons have been offered by many courts to explain the award of attorney’s fees to a prevailing defendant in a copyright infringement case under Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927 and under a federal court’s inherent powers. The courts making fee awards pursuant to these alternative bases for fee shifting often describe the same kind of litigation misconduct which warrants fees under section 505 of the Copyright Act. In short, in some copyright infringement cases there can be substantial overlap in the factors pertinent to Rule 11, section 1927, inherent authority and the Copyright Act’s fee shifting provision, section 505.

This article analyzes many of the Rule 11, section 1927, and inherent authority decisions in which attorney’s fees were awarded in copyright infringement actions, and provides guidance on what constitutes a frivolous claim, an objectively unreasonable claim, or a claim inconsistent with the purpose of the Copyright Act. Most importantly, the article explains when a prevailing defendant might seek sanctions under Rule 11, section 1927 or inherent power in lieu of, or in addition to, seeking fees under section 505 of the Copyright Act. The article acknowledges that the facts in many cases in which attorney’s fees are awarded under section 505 would not support an award of fees under Rule 11, section 1927 or inherent authority. However, in those instances in which a court can conclude that a plaintiff’s copyright claim is frivolous or objectively unreasonable in order to justify a fee award under section 505, there often will be significant overlap with the standard justifications for awarding fees under



Rule 11 and/or section 1927, and sometimes under inherent authority. In these ‘overlap’ cases, if the prevailing party and the court want to punish and deter opposing counsel instead of visiting his or her sins on the plaintiff, then it would be appropriate to turn to Rule 11 and its provisions on sanctions, or to 28 U.S.C. § 1927, to justify the fee award instead of relying on section 505 of the Copyright Act. Moreover, if the misconduct is serious enough the court might be able to turn to Rule 11, section 1927 or inherent powers along with section 505 to hold the losing counsel and his or her client jointly and severally liable for attorney’s fees and costs.

### **A reimagined approach to copyright enforcement from a regulator's perspective**

Kimberlee G. Weatherall (University of Sydney – Faculty of Law)

*What if we Could Reimagine Copyright?*, R. Giblin, K. Weatherall, eds, ANU Press, Australia, Forthcoming

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2821345](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821345)

This paper is part of an international collaborative project led by Rebecca Giblin & Kimberlee Weatherall. The premise of the project is this: what if we could start with a blank slate, and write ourselves a brand new copyright system? If we could design a law, from scratch, to encourage creativity, remunerate and support creators, and ensure broad access to new knowledge and culture, in short, if we could draw up a new copyright law that genuinely furthered the public interest, what might it look like? Would we opt for radical overhaul? Or would we keep our current fundamentals? What parts of the system would we jettison? What would we keep? The book will be published open access via ANU Press in 2016.

This paper – a subpart of the broader project – explores some ideas for breaking away from current unproductive thinking on enforcement, drawing on regulatory theory and research in psychology around the factors that motivate compliance with the law. At its heart lies a thought experiment: what if we created a public copyright regulator, tasked with using a fixed pool of public resources to attempt to secure widespread observance of copyright principles? How would such a regulator approach their task, and what tools would they need? Perhaps the insights of regulatory theory can help us break out of a cycle of deterrence failure and escalation, and move towards a positive vision where enforcement contributes to both creators’ and society’s goals.

## **IP & Asia**

### **FRAND in India**

Koren W. Wong-Ervin (George Mason University School of Law – Global Antitrust Institute)

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

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*George Mason Law & Economics Research Paper No. 16-32*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2821344](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2821344)

In the last several years, India has raised several novel and controversial concerns regarding standard-essential patents (SEPs). For example, in 2013 and 2014, the Competition Commission of India (CCI) issued investigation orders against Ericsson, alleging that the company violated its commitments to license on fair, reasonable, and nondiscriminatory (FRAND) terms by imposing discriminatory and “excessive” royalty rates and using Non-Disclosure Agreements (NDAs). In its investigation orders, the CCI stated that “forcing a party to execute [an] NDA” and “imposing excessive and unfair royalty rates” constitutes “prima facie” abuse of dominance and violation of section 4 of the Indian Competition Act, as does “[i]mposing a jurisdiction clause debarring [the licensee] from getting disputes adjudicated in the

country where both parties were in business.” Most recently, India’s Department of Industrial Policy and Promotion (DIPP) issued a Discussion Paper on SEPs, which, among other things, expresses concerns about holdup by patent holders while omitting any concerns about holdup and holdout by implementers.

This article analyzes these developments, providing guidance based upon the approach taken by the United States and the Europe Commission. We offer policy recommendations concerning the availability of injunctive relief; the advisability of a one-size-fits all template for standard-development or standard-setting organizations (SDOs or SSOs); the imposition of royalty caps or competition sanctions for “excessive pricing”; the use of NDAs and the “Non Discriminatory” element of FRAND; balancing desires for transparency with needs for confidentiality in licensing; and the use of international arbitration on a portfolio basis as likely the most efficient and realistic means of resolving FRAND disputes.

### **Exploring the new dimension of China's invention economy**

Patrick Terroir (SciencesPo – Department of Economics)

Qinghong Xu (SciencesPo; Lung Tin Intellectual Property Agent Ltd.)

*les Nouvelles - Journal of the Licensing Executives Society, Volume LI No. 3, September 2016*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2822298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2822298)

While acknowledgement of intellectual property rights in China can be traced back as far as the Tang Dynasty (618-907 AD), the first patent-specific law in China was enacted in 1889. The onset of the Cultural Revolution in the mid-1960's, however, brought an end to even a modest recognition of intellectual property. China began to revisit intellectual property in the early 1980's and resulted in the Patent Law of the People's Republic of China. The Patent Law was amended most recently in 2001 in an effort to bring it in line with the relevant provisions of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Innovation and economy, have now been the focus of Chinese Government development policy for many years. The article discusses the trends in patent filings in China relative to the rest of the world.

## Other IP Topics

### **Regulatory property: the new IP**

Robin Feldman (University of California Hastings College of the Law)

*Working paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2815667](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2815667)

For thirty years, a new form of intellectual property has grown up quietly beneath the surface of societal observation. It is a set of government-granted rights that have the quintessential characteristic of intellectual property and other forms of property — that is, the right to exclude others from the territory.

The impact of this form of IP on the US health care system, in particular, is enormous. In 2014, more than 40% of all new drugs approved by the FDA came through just one of these portals, with the companies collecting regulatory property rights along the way.

Some forms of this regulatory property are quasi-patent. Other forms are quasi-trade secret. Finally, some forms of this regulatory property are more like pure personal property, in that these benefits can be sold or traded on the open market. Sprawling and incremental, the system has grown by accretion as various groups have succeeded in making good arguments that they, too, should have a benefit. When accidental property combines with a system that is largely hidden from view, the danger is great.



Treating regulatory property in its rightful place among the pantheon of intellectual property rights allows appropriate analysis of the interactions among these powerful forces. It isn't just a matter of labelling these phenomena as forms of property. It is a matter of understanding and making sense out of them as a coherent whole, as well as making sense of how they interact with other types of rights to exclude, such as patent and trade secret.

### **Patented electric guitar pickups and the creation of modern music genres**

Sean M. O'Connor (University of Washington – School of Law)

*George Mason Law Review*, Vol. 23, No. 4, 2016

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2823821](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823821)

This Essay provides an overview of how patents played a core role in developing world-changing musical genres. This may be surprising, as normally copyright law is associated with incentivizing advances in the creative arts. But as this Conference's theme and presentations emphasize, the whole range of intellectual property ("IP"), especially when viewed as a platform, supports innovation across the spectrum of human ingenuity and creativity. This Essay is also intended to be read in conjunction with a viewing of the live-music demonstration of how pickups transformed popular music, delivered at the Conference and available at the Center for Protection of Intellectual Property's YouTube channel.

### **Intellectual property and the prisoner's dilemma: a game theory justification of copyrights, patents, and trade secrets**

Adam D. Moore (University of Washington – The Information School)

*Working paper*

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2825252](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2825252)

Setting aside various foundational moral entanglements, I will offer an argument for the protection of intellectual property based on individual self-interest and prudence. In large part, this argument will parallel considerations that arise in a prisoner's dilemma game. After sketching the salient features of a prisoner's dilemma, I will briefly examine the nature of intellectual property and how one can view content creation, exclusion, and access as a prisoner's dilemma. In brief, allowing content to be unprotected in terms of free access leads to a sub-optimal outcome where creation and innovation are suppressed. Finally, I will argue that adopting the institutions of copyright, patent, and trade secret is one way we can avoid these sub-optimal results.

#### **About the editor**

**Dr. Anne Layne-Farrar** is a vice president in the Antitrust & Competition Economics Practice of CRA. She specializes in antitrust and intellectual property matters, especially where the two issues are combined. She advises clients on competition, intellectual property, regulation, and policy issues across a broad range of industries with a particular focus on high-tech and has worked with some of the largest information technology, communications, and pharmaceuticals companies in the world.

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