



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 & Litigation

Extraterritoriality and proximate cause after *WesternGeco*

Timothy R. Holbrook (Emory University)

Yale Journal of Law & Technology (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259667

The Supreme Court's decision *WesternGeco LLC v. ION Geophysical Corp.* appeared to be a narrow case about a rather obscure patent law provision. In reality, however, it had the potential to reach into a number of trans-substantive areas, including the nature of compensatory damages, proximate cause, and extraterritoriality. Instead of painting with a broad brush, the Supreme Court opted to take a modest, narrow approach to the issue of whether lost profits for foreign activity were available to a patent holder for infringement under 35 U.S.C. § 271(f)(2). In addressing this issue, the Court utilized its two-step framework for assessing the extraterritorial reach of U.S. law adopted in *RJR Nabisco Inc. v. European Community*. The Court skipped step one, but its analysis of step two confirmed that the territorial limits of damages is tied to the corresponding liability provision. Ultimately the Court allowed the damages for the relevant foreign activity.

This decision clarified a few things about the extraterritorial application of US law. By skipping step one, the Court made it clear that the presumption against extraterritoriality is distinct from the focus analysis of step two. The Court passed on the opportunity to further elaborate on step one and to answer definitely whether the presumption applies to remedial provisions. The Court also elaborated on step two and embraced a methodology that tied extraterritorial reach of a general remedy provision to the corresponding liability provision.

The Court's decision also leaves a number of questions open. Specifically, it remains unclear whether the Federal Circuit's *Power Integrations* and *Carnegie Mellon* decisions survive *WesternGeco*. I contend that they do, in disagreement with other professors. The Court also failed to explore the important role that proximate cause may play in future patent cases, particularly those involving global theories of damages, and issue that I take up here. The Federal Circuit could – and should – embrace a narrower conception of proximate cause to limit these types of global theories of patent damages.

Grading patent remedies: dependent claims and relative infringement

Daniel Harris Brean (The University of Akron School of Law; The Webb Law Firm)

Brooklyn Law Review, Vol. 84, No. 4, 2019, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252487

Patents define an inventor's exclusive rights by reciting essential aspects of the invention in sentences called claims. The claims are drafted in varying degrees of technical specificity, such that each claim is legally distinct—some may be valid or infringed while others are not. Most commonly, this variation is accomplished by using a combination of “independent” and “dependent” claims. Independent claims stand alone, while dependent claims incorporate by reference all the features recited in the independent claims but go on to add further features or details. The result is a range of potential infringing activity that triggers liability, from the broadest, most conceptual claims to the narrowest, most concrete claims.

Yet when it comes time to remedy infringement, this range of infringement is treated as essentially meaningless. Parties rarely bother to distinguish between claims when assessing damages or injunctive relief. And courts hold, for example, that damages owed for infringing one claim is no different than the damages for infringement of any other claim in the patent. This is not consistent with the law or common sense. Not every claim is of equal technological or societal value, nor is infringement of every claim equally harmful to the patent owner. Parties and courts should start paying more attention to the relative significance of the patent claims involved.

This article focuses on dependent claims as a particularly useful vehicle for evaluating relative patent remedies between claims. Any two patent claims can be compared, though their relative scopes can be debatable when, for example, two claims are directed to alternative embodiments. But dependent claims are, by definition, narrower in scope than their base independent claims. Dependent claims also are commonly employed to expressly cover commercial products or preferred embodiments of inventions. As a result, dependent claims often encompass the core and most detailed disclosures of the patent specification, which is also often occupying the most important competitive space to the patent owner. The relative value of those claims to patent owners, infringers, and the public, should be evaluated as part of any sound patent remedies assessment.

Inter-firm patent litigation and innovation competition

Jongsub Lee (University of Florida - Warrington College of Business Administration)

Seungjoon Oh (Peking University - HSBC School of Business)

Paula Suh (University of Georgia - Terry College of Business)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3258087

Using novel hand-collected patent litigation data from 2000-2006, we show that patent litigation has significant financial and non-financial impacts on firms; defendant firms become financially constrained, reduce innovation activities, and concomitantly shift toward more exploitative and narrow-scoped innovations to reduce litigation risk. We further find that litigation effects spill over to other non-litigated firms in the same industry. A product market overlap between defendants and plaintiffs exacerbates these financial and real consequences of patent litigation, implying a significant interplay between intellectual property rights boundaries and product market dynamics. Using China's participation in Trade-Related Aspects of Intellectual Property Rights Agreement as an instrument, we show the robustness of our findings to firm-level omitted variables and reverse causality concerns.

Proportional restraints in horizontal patent settlements

Erik Hovenkamp (Harvard Law School; Yale Law School)

Jorge Lemus (University Of Illinois Urbana Champaign)

Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259249

When rivals settle a patent dispute, they prefer to preserve monopoly profits, even if the patent is very likely invalid or noninfringed. Antitrust has come to embrace a policy that requires horizontal settlements to restrain competition by no more than the expected result of counterfactual patent litigation. But this creates serious difficulties in practice, and has only been effectively applied to one type of settlement. However, we show that a settlement's design necessarily determines how "proportional" private bargaining outcomes will be: how closely their competitive effects will compare to the expected result of litigation. Using our approach, one can identify settlement designs that will always induce bargaining outcomes generating the same profits --- and greater consumer welfare --- than litigation would provide in expected value. More generally, our approach enables one to discern any settlement's proportionality (or lack thereof) without having to estimate the expected outcome of counterfactual patent litigation.

IP & Competition

Intellectual property and the economics of product differentiation

Christopher S. Yoo (University of Pennsylvania Law School)

Working Paper

https://scholarship.law.upenn.edu/faculty_scholarship/2015/

The literature applying the economics of product differentiation to intellectual property has been called the most important development in the economic analysis of IP in years. Relaxing the assumption that products are homogeneous yields new insights by explaining persistent features of IP markets that the traditional approaches cannot, challenging the extent to which IP allows rightsholders to earn monopoly profits, allowing for sources of welfare outside of price-quantity space, which in turn opens up new dimensions along which intellectual property can compete. It also allows for equilibria with different welfare characteristics, making the tendency towards systematic underproduction more contingent and suggesting a broader range of policy options for promoting optimality. This Chapter reviews the economics of product differentiation, examining both the monopolistic competition and spatial competition lines of this scholarship. It then surveys the literature applying these approaches to patent, copyright, and trademark.

IP & Standard Development

Who's pulling the strings? The influence of network structure on standard dominance

Geerten van de Kaa (Delft University of Technology - Faculty of Technology, Policy and Management)

R&D Management, Vol. 48, Issue 4, pp. 438–446, 2018

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252098

Innovative systems and infrastructures require generally accepted common compatibility standards to enable components of such systems to interoperate. In some cases, various standards are developed by competing standards organizations, often resulting in standards battles. This paper focuses on factors that affect the outcome of these standards battles, and, specifically, on the effect of the structure of the industry-wide standards networks on standard dominance. The empirical context is the consumer electronics, telecommunications, and ICT arenas. We conduct a study of 103 standards organizations from 2000 to 2011. We find support for the hypothesis that standards that are supported by standards

organizations that have a central position in the industry-wide standards network have a high chance of achieving dominance.

Global rate setting: A solution for standard-essential patents?

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

Washington Law Review, 2019, *Forthcoming*

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3253954

The commitment to license patents that are essential to technical interoperability standards on terms that are fair, reasonable and non-discriminatory (FRAND) is a fundamental mechanism that enables standards to be developed collaboratively by groups of competitors. Yet disagreements over FRAND royalty rates continue to bedevil participants in global technology markets. Allegations of opportunistic hold-up and hold-out continue to arise, spurring competition authorities to investigate and intervene in private standard-setting. And litigation regarding compliance with FRAND commitments has led an increasing number of courts around the world to adjudicate FRAND royalty rates, often on a global basis, but using very different methodologies and doctrinal approaches. The issues affecting the FRAND licensing system can be summarized as deficiencies in transparency, consistency and comprehensiveness. Together, these issues reduce the overall fairness and accuracy of the system and result in excess administrative and transactional costs. This article, for the first time, lays out a roadmap for the establishment of an expert FRAND rate-setting tribunal that promotes the tripartite goals of transparency, consistency and comprehensiveness. This tribunal is modelled on the U.S. Copyright Royalty Board and similar rate-setting agencies, though it is envisioned not as a governmental body, but an international non-governmental organization. It is hoped that such a tribunal will bring greater predictability and stability to the technology development ecosystem while reducing inefficient litigation.

IP & Innovation

An empirical analysis of the patent troll hypothesis: evidence from publicly-traded firms

Noel Maurer (George Washington University)

Stephen Haber (Hoover Institution, Stanford University)

Hoover IP² Working Paper No. 17003

<https://hooverip2.org/working-paper/wp17003/>

Do firms that earn revenues from licensing their patent portfolios, rather than producing physical products—often referred to as patent assertion entities (PAEs)—frustrate or facilitate innovation? Based on data from the SEC filings of 26 publicly-traded firms that an expert (RPX Corporation) has categorized as PAEs, covering the period 2000 to 2016, we estimate: their spending on R&D, patent acquisition, and litigation; and their revenues, rates of return on assets, market returns, and risk-return ratios. We also estimate an upper bound of the transfer from operating companies to those 26 firms, including the cost of defending against their lawsuits. We find that the RPX-identified public PAEs spent twice as much, on average, on R&D (as a percentage of revenues) than the average for America's large high technology companies. We also find that most of the RPX-identified public PAEs lost money, both on an accounting basis and as investments for their shareholders. Finally, we find that even if we set the analysis of R&D and profitability aside, the magnitude of the transfer from operating companies to these 26 firms (plus associated legal defense costs), represents only 0.28 percent of the revenues of the U.S. high technology market. These findings are not consistent with the characterization of the PAE business model in an influential policy and academic literature.

IP Law & Policy

Amending patent claims

Greg Reilly (IIT Chicago-Kent College of Law)

Harvard Journal of Law & Technology, Vol. 32, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249589

Patent claims traditionally have been freely amendable to overcome a finding of unpatentability. For that reason, the Patent Office's restrictive approach to amendments in new post-issuance review proceedings created by the America Invents Act provoked strident criticism; generated administrative, statutory, and constitutional challenges; and fractured the Federal Circuit. This Article supplies the comprehensive evaluation of the costs and benefits of patent claim amendments, both in examination and post-issuance, surprisingly missing in the literature.

The results are mixed. Amendments in initial examination are less clearly warranted than commonly thought, with the costs – primarily problematic drafting incentives – often overlooked and the benefits often overstated given other tools to protect patentees' legitimate claim scope. Conversely, post-issuance amendments are more justified than often thought, with competitors' reliance interests overstated, patentees' reliance interests understated, and strategic behavior possible on both sides. Resolving the ambiguity in the optimality of claim amendments depends on a normative view of where to place the risk of error – hindering protection and incentives for inventors when warranted amendments are denied or hindering competition and follow-on innovation when unwarranted amendments are allowed.

This provides important policy insights. First, because claim amendments invoke the patent system's basic trade-off between innovation and competition, they offer a promising, but underutilized, tool for Congress to adjust this balance. Second, given the ambiguity in the justifications for claim amendments, the long-standing liberality towards amendments, and the Patent Office's historically-limited role, the Patent Office probably should not adopt an overly restrictive approach to post-issuance amendments without clearer direction from Congress, despite having the power to do so. Third, the best policy for post-issuance amendments may be a discretionary, case-by-case approach rather than a "one-size-fits-all" approach that is likely to generate significant errors.

Administrative oversight: Justice Gorsuch's patent opinions, the PTAB, and the antagonism toward the administrative state

Daniel Kim (American University - Washington College of Law)

Jonathan Stroud (Unified Patents Inc.)

Chicago-Kent Journal of Intellectual Property, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247984

In his first term, Justice Neil Gorsuch has made a surprisingly forceful impact on, of all things, patent law—and even more unlikely, the United States Patent and Trademark Office's adjudicatory arm, the Patent Trial and Appeal Board. Was there any way to predict, from his 10th Circuit opinions below, that he would author opinions in all three patent cases in his first term? Was this attention the result of deeply submerged but long-felt opinions on patent law, or rather a result of his sharp distrust of administrative overreach? We analyze 10th Circuit and Supreme Court opinions authored by Justice Gorsuch, and conclude his unforeseen interest springs from his desire to limit agency power rather than from any particular concern with patents. Still, his opinions—intentionally or by happenstance—will reverberate through our patent law for years.

Recoupment patent

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252338

The patent system aims to encourage innovation while keeping its own administrative costs to a minimum. Considering the centrality of innovation to 21st century economic activity, patent law is widely viewed as a crucial element of our legal system. And yet by any standard our patent system is broken. At present it encourages the filing of a plethora of low-quality patents that have no true innovative value, is plagued by opportunistic patent trolls, and produces endless amounts of costly litigation.

This article demonstrates how these phenomena are due to central design flaws in the current system. First, although the patent system is designed to encourage investment in innovation, it lacks a mechanism for directly examining an inventor's level of investment. This major flaw systematically ignores the single most important factor the patent system seeks to promote. Second, the current system offers one-size-fits-all protection, granting the same 20-year monopoly to any and all inventions. This inflexible legal standard is outdated and inappropriate, given the wide variety of inventions it addresses and the immense differences between them.

The core of this article proposes structural reform designed to remedy these fundamental flaws. First, we suggest that the patent system must explicitly consider the investment made in each specific invention when deciding what level of legal protection each invention merits. Second, we advocate departure from the current one-size-fits-all model in favor of a more tailored approach, offering different periods of protection for different inventions. These two elements would produce a system in which inventions are granted protection for a duration that depends on the level of investment each invention requires. We call this model a "recoupment patent" and highlight its advantages over the current system.

Under the new model, filing for patent protection will require documentation of investment in the invention, which will serve as the basis for determining duration of protection. Protection will expire once the investment is recouped and a fixed percentage of profit is earned. Filing and renewal fees will also be calculated based on documented investment. Additionally, investment will serve as a basis for calculating royalties (or damages in subsequent litigation). In either case, the patentee bears the burden of demonstrating the level of investment in the invention. This regime is more accurately tailored to incentivize innovation while avoiding the excessive protection that results from the current one-size-fits-all system. This new regime also incorporates mechanisms to prevent inventors from misstating their investment. Throughout the paper, we address the challenges created by our proposal and highlight its advantages over the existing system and over other reform proposals. We also discuss extensions and possible refinements to the basic conception outlined above.

Public policy considerations in intellectual property-related international investment arbitration

Simon Klopschinski (Rospatt Osten Pross)

Christophe Geiger (ed.), Research Handbook on Intellectual Property and Investment Law, Cheltenham (UK)/Northampton, MA (USA), Edward Elgar Publishing, 2019, Forthcoming

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269211

In the investment arbitration *Philip Morris v. Uruguay* the arbitral tribunal rejected Philip Morris' claim that Uruguay's anti-smoking legislation expropriated the tobacco company's trademarks. In its reasoning the tribunal largely deferred to Uruguay's policy decision to curtail tobacco companies' business operations for the purpose of enhancing public health. *Philip Morris v. Uruguay* raises the question if there are, apart from public health, other public policy considerations which the tribunal should have given more weight to, e.g.

the promotion of foreign investment and the protection of intellectual property (IP). The article explores the concept of 'public policy' and how IP law, WTO law as well as international investment law, i.e. the legal regimes relevant to IP-related investment arbitration, deal with public policy considerations. The article also reviews the handling of public policy considerations in the IP-related investment arbitrations Philip Morris v. Uruguay, Eli Lilly v. Canada as well as Bridgestone v. Panama.

Copyright Law

Addressing infringement: developments in content regulation in the US and the DNS

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Forthcoming, The Oxford Handbook of Online Intermediary Liability, ed. Giancarlo Frosio

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3264879

Over the course of the last decade, in response to significant pressure from the US government and other governments, service providers have assumed private obligations to regulate online content that have no basis in public law. For US tech companies, a robust regime of "voluntary agreements" to resolve content-related disputes has grown up on the margins of the Digital Millennium Copyright Act (DMCA) and the Communications Decency Act (CDA). For the most part, this regime has been built for the benefit of intellectual property rightholders attempting to control online piracy and counterfeiting beyond the territorial limits of the United States and without recourse to judicial process.

The reach of privately ordered online content regulation is wide and deepening. It is wide in terms of the range of service providers that have already partnered with corporations and trade associations to block sites, terminate accounts, and remove content without court orders. It is deepening with reference to the Internet's protocol stack, migrating downward from the application layer into the network's technical infrastructure, specifically, the Domain Name System (DNS). While enforcement of intellectual property rights is the purpose for which these agreements exist, the site-blocking procedures they institutionalize are readily adaptable for use in censoring all kinds of disfavored content.

Recent private agreements between DNS intermediaries and intellectual property rightholders cross the Rubicon. Such agreements, which are the subject of this chapter, are cause for special concern among open Internet advocates, because they transform technical network intermediaries into content regulators in an unprecedented way. They expand the remit of domain name registrars and registry operators beyond their *raison d'être*, which is the administration of the Internet's addressing system and the maintenance of its operational security and stability. As these private, under-the-radar agreements multiply, they are taking a tangible but hard-to-measure toll on the global environment for freedom of speech and access to information online.

Tried and true: fair use tales for the telling

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Journal of Copyright in Education & Librarianship Vol. 3, Issue 1

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256427

On Thursday, March 1, 2018, the Harvard Library Office for Scholarly Communication hosted "Tried and True: Fair Use Tales for the Telling," a one-day program celebrating Harvard's Fifth Anniversary of Fair Use Week. Leading fair use scholars and practitioners shared their stories and engaged in lively discussion about the powerful and flexible fair use provision of the Copyright Act and its applications. Topics included treatment of the fair use doctrine in recent jurisprudence, conflicts over the use of visual works in remixes and mash-ups, academic work and social commentary, filmmaking, controlled digital lending practices in

libraries, software preservation, and more. This article discusses the examples and ideas presented during the program and offers resources for further study in the application of fair use.

Harmonizing cultural IP across borders: fashionable bags & Ghanaian Adinkra symbols

J. Janewa OseiTutu (Florida International University (FIU) - College of Law)

Akron Law Review, Vol. 51, No. 2, 2017

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3261324

Global copyright and trademark laws protect symbols, names, and literary and artistic works. However, when their primary significance is cultural, because they are neither individual original works nor symbols that are used as commercial identifiers, intellectual property laws do not protect these symbols or artistic works. This is true, even if these goods are protected under national laws as part of that nation's cultural heritage. Once these cultural goods cross borders, there is no international law that will enable the country from which these goods originate to assert its rights in other countries. This Article characterizes these cultural goods as trade-related cultural intellectual property and proposes that, with some revisions to existing international agreements, this gap in the law can be addressed.

Towards a new copyright/trademark interface – why (and how) signs with cultural significance should be kept outside trademark law

Martin Senftleben (VU University Amsterdam - Faculty of Law)

G.B. Dinwoodie/M.D. Janis (eds.), Trademark Law and Theory II: Reform of Trademark Law, Cheltenham: Edward Elgar 2019 (Forthcoming)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257086

To this day, trademark law and practice have not managed to eliminate a serious imbalance within the intellectual property system: while the functionality doctrine in trademark law can be employed to prevent overlaps between patent and trademark protection and achieve a far-reaching separation of industrial design and trademark protection, a comparably strong mechanism for policing the border between copyright and trademark protection has not evolved yet. As in the case of corresponding features of the patent and industrial design systems, however, indefinitely renewable trademark rights involve the risk of an artificial extension of the limited term of copyright protection and the impoverishment of the public domain of cultural expressions. Moreover, trademark protection may lead to free-riding on the reputation and positive image of cultural symbols, the blurring of a sign's genuine cultural meaning through the attachment of commercial connotations, and the impairment of an open communication process in the cultural domain. Against this background, the following discussion of the need to recalibrate the copyright/trademark interface will first shed light on the societal importance of preserving the genuine meaning of artworks. On this basis, the current practice of accepting simultaneous and subsequent trademark protection will be criticized before arguing for the introduction of more robust grounds for refusal that allow the categorical exclusion of signs with cultural significance from trademark protection.

Other IP Topics

The more things change: improvement patents, drug modifications, and the FDA

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Forthcoming, 104 Iowa Law Review (2019)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269908

Pharmaceutical companies often replace prescription drugs that are already on the market with modified versions that have the same active pharmaceutical ingredient. On the surface, such activity seems benign and perhaps even salutary. Nonetheless, antitrust litigation has revealed that firms sometimes modify existing drugs not because new formulations would demonstrably improve health outcomes, but principally

because so-called secondary patents covering the new version of the drug enable them to maintain some effective market power over the active ingredient for which original, primary patent protection has expired. This “product-hopping” strategy runs counter to the goal of the legislative framework for regulating branded and generic drug approvals, which is to create appropriate incentives for discoveries that raise the quality of patient care and human health by providing a period of reward for the brand followed by timely and effectual generic entry.

In this Article, I explain that the rules and institutions involved in determining the validity of patents on chemical inventions, certain features of drug regulation under the Federal Food, Drug, and Cosmetic Act, and unique market forces in the pharmaceutical sector combine to allow strategic product hopping. To address this problem, I propose a novel regulatory scheme that would empower the Food and Drug Administration (FDA) to induce pharmaceutical companies to generate comparative data indicative of therapeutic distinctiveness between related versions of drugs. I explain that the FDA is institutionally well-positioned to serve as an information intermediary that can help increase transparency with respect to drug changes, and show that the relevant information can be presented in a manner that is useful to patients, prescribers, and payers. The proposed framework would then enable these market participants to identify and reject strategic drug product changes, reducing the manufacturer’s incentive to pursue such modifications. Ultimately, the FDA’s new authority for comparative data development could lead to improvements in patient care and promote downstream clinical research based on scientific evidence gathered under the directives of the proposed scheme.

Getting patents: does the quality of patent attorney matter?

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Working Paper

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3254958

Failure to obtain a patent weakens the market position and production chain of enterprises in patent-intensive technology domains. For such enterprises, finding ways to maximise the chance to obtain patent protection is a business imperative. Using information from patent applications filed in at least two of the five largest patent offices in the world between 2000 and 2006, we find that the ability to obtain patent protection depends not only on the quality of the invention but also on the quality of the patent attorney. In some cases, the latter is surprisingly more important than the former. We also find that having a high-quality patent attorney increases the chance of getting a patent in less codified technology areas such as software and ICT.

Post-it note

Stavroula Karapapa (University of Reading; Centre for Commercial Law and Financial Regulation)

Forthcoming in: Hunter, D. and Op den Camp, C. (eds.) The History of Intellectual Property in 50 Objects (Cambridge University Press: Cambridge, 2018) 247–253.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251778

This chapter, written for the forthcoming book *A History of Intellectual Property in 50 Objects*, discusses the intellectual property law history of a popular and innovative everyday object, the “Post-it” note. Considering the Post-it note as a story of radical innovation and telling the story of dispute and litigation by reference to intellectual property rights subsisting in the Post-it note, the chapter develops an understanding of how innovation and branding can work within the legal framework and, more broadly, it demonstrates how intellectual property has developed and worked within history, culture and society.

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