



# IP Literature Watch

**CRA** Charles River  
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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

### **Disciplining standard-setting: which approach to choose (if any)?**

Olia Kanevskaia (Tilburg University, Tilburg Law and Economics Center (TILEC), Students)  
*TILEC Discussion Paper No. 2017-036*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044287](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044287)

In the world of continuous globalization, standards play a crucial role in transnational economic development. Being the drivers of harmonization and innovation, standards do not only facilitate production and exchange in goods and services, but also carry significant policy implications and create value for society. Against this background, the processes of standards development deserve special attention. The interests of various actors, together with a sheer abundance of standards development fora and a scarce knowledge and understanding of their procedures, renders standard-setting a rather unexplored area in legal scholarship, especially when it comes to the field of ICT and telecommunications. This paper seeks to take a first step into procedural analysis of international standard-setting by shedding light on the concept of 'due process' applicable to the formulation and adoption of standards within formal Standards Development Organizations and informal consortia. It attempts to examine different approaches to due process, namely those adopted by WTO law, competition law and global administrative law. This paper suggests that, whereas the first two approaches strive to ensure that standards do not constitute unnecessary trade barriers and that standardization activities do not become a vehicle of collusion, global administrative law also addresses the governance of standard-setting groups and organizations and thence offers a more holistic approach to international standardization, but lacks enforce-ability; it further questions whether increased procedural scrutiny will be able to adequately respond to the challenges of modern standardization, or whether a different approach is desirable.

## **Innovative antitrust and the patent system**

Gregory Day (Oklahoma State University – Stillwater – Spears School of Business)

*Nebraska Law Review, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3051371](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051371)

There are conflicting hypotheses about whether antitrust law promotes innovation. According to the Federal Trade Commission (FTC), the Department of Justice Antitrust Division (DOJ), and many scholars, a firm has little reason to innovate new goods and methods unless its market share is threatened by competition. It follows that, since antitrust law stimulates competition, it should also incentivize innovation. This theory implies complementary roles for antitrust and patent laws in cultivating innovation.

But other commentators and courts view antitrust law as interfering with patent rights to the detriment of invention and discovery. The patent system supports innovation by granting inventors a limited right to charge monopoly prices and exclude competition without incurring antitrust liability. But if firms may become subject to antitrust scrutiny upon exercising monopoly power or excluding competition, then their incentives to innovate could diminish.

Remarkably, the link between antitrust and innovation is not only understudied, but there are few, if any, quantitative analyses that have sought to determine whether antitrust law increases, decreases, or otherwise influences the rate of innovation.

Using an original dataset, quantitative methods, and case studies, this Article explores antitrust's puzzling relationships with patent law and innovation by probing a number of related questions, including: 1) does antitrust foster incentives to innovate, 2) are certain types of actions—i.e., merger challenges or restraint of trade lawsuits—better equipped to support innovation than others, and, 3) has the rate of invention increased since the DOJ and FTC made innovation an express goal of governmental antitrust policy? Based upon the results, this Article proposes a number of legal and policy reforms intended to improve antitrust and patent law's capacity to incentivize innovation without the current harms and costs.

## **Patent 'trespass' and the royalty gap: exploring the nature and impact of patent holdout**

Bowman Heiden (Center for Intellectual Property – Chalmers University of Technology, University of Gothenburg, and Norwegian University of Science and Technology)

Nicolas Petit (University of Liege – School of Law; International Center for Law & Economics (ICLE); University of South Australia – School of Law)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2981577](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2981577)

This paper studies the problem of patent holdout. Part I reviews the economic theory of holdout, with a specific emphasis on patents. It shows that the ordinary concept of holdout refers to the non-transacting conduct of a property owner, and that “patent trespass” is a better characterization for technology implementers' attempt to evade the conclusion of licensing agreements. Part II proposes a definition and provide illustrations of patent trespass. To that end, the paper relies on the qualitative data gathered during interviews with industry stakeholders as well as on an analysis of holdout in case-law. Part III exposes the factors that determinatively make patent trespass transactional, systematic and/or systemic. Part IV records the results of a quantitative study of patent trespass, based on the intuitions that arose from received theory and qualitative interviews as exposed in previous parts. The preliminary empirical

results show a correlational link between the nature of patent trespass and the heterogeneity of market actors and markets. In particular, MNCs operating in developed markets seem to primarily deploy extensive delaying tactics with the main goal of reducing their royalty payments, while large firms in emerging markets (LFE) and small to medium-sized enterprises (SMEs), especially the “long tail” of microvendors, seek to avoid payment altogether.

## IP & Licensing

### **Aggregated royalties for top-down FRAND determinations: revisiting ‘joint negotiation’**

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

*Antitrust Bulletin, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3051502](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051502)

In an environment in which widely-adopted technical standards may each be covered by large numbers of patents, there have been increasing calls for courts to determine “fair, reasonable and non-discriminatory” (FRAND) royalties payable to holders of standards-essential patents (SEPs) using “top-down” methodologies. Top-down royalty approaches begin with the aggregate royalty that should be payable with respect to all SEPs covering a particular standard, and then allocate a portion of the total to individual SEPs. Top-down approaches avoid many drawbacks associated with bottom-up approaches in which royalties for individual SEPs are assessed, often in an inconsistent and piecemeal manner, without regard for the other SEPs that cover the standard. Yet despite the potential benefits of top-down methodologies, one of the most promising means for determining aggregate royalty levels – joint agreement by the members of the relevant standards-development organization (SDO) – has gained little traction. The idea of SDO participants jointly negotiating FRAND royalties attracted the attention of commentators and antitrust agencies about a decade ago, when a handful of SDOs began to explore mandatory ex ante rate disclosure requirements. But few SDOs adopted such policies, and joint negotiations were never incorporated into the mainstream standardization process. One of the principal reasons that SDOs have been hesitant to endorse joint royalty negotiations is the perceived risk of antitrust liability arising from concerted action among competitors. But as numerous commentators and antitrust officials have reiterated, this fear is largely misplaced in the context of industry standard-setting. Thus, SDOs should follow the lead of patent pools and begin more actively to determine aggregate patent royalty burdens for standards that they develop. In addition, antitrust and competition authorities should assure the market that collective agreement on aggregate royalty rates alone should not give rise to antitrust liability.

### **Smallest salable patent practicing unit and component licensing - why 1\$ is not 1\$**

Axel Gautier (University of Liege – Research Center on Public and Population Economics; Catholic University of Louvain (UCL) – Center for Operations Research and Econometrics (CORE))

Nicolas Petit (University of Liege – School of Law; International Center for Law & Economics (ICLE); University of South Australia – School of Law)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2954592](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954592)

The Smallest Salable Patent Pricing Unit (SSPPU) is a valuation method used by courts and some Standard Setting Organizations (SSOs) as a preliminary step towards the calculation of fair, reasonable and non-discriminatory (FRAND) royalties for licenses over Standard-Essential Patents (SEPs). Under

SSPPU, royalties should reflect the value added to the smallest salable component implementing the patented invention. In this paper, we discuss plans to convert SSPPU into a pricing rule that not only assists the assessment of SEPs added-value, but also forces the specification of royalties terms as a share of component costs in SEP licensing negotiations (I). We call this rule SSPPU, and show that it distorts the distribution of surplus between SEP owners and implementers by laying down a hidden revenue-cap on standardized technologies (II). We then predict that the distributional effect of SSPPU may be accompanied by adverse efficiency effects when SEPs cover General Purpose Technologies (“GPT”) (III). This pleads against a generalization of SSPPU at early standardization and negotiation stages.

### **An empirical look at the ‘brokered’ market for patents**

Brian J. Love (Santa Clara University School of Law)

Kent Richardson (Richardson Oliver Law Group)

Erik Oliver (Richardson Oliver Law Group)

Michael Costa (Richardson Oliver Law Group)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3056444](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3056444)

We study five years of data on patents listed and sold in the quasi-public “brokered” market. Our data covers almost 39,000 assets, an estimated 80 percent of all patents and applications offered for sale by patent brokers between 2012 and 2016. We provide statistics on the size and composition of the brokered market, including the types of buyers and sellers who participate in the market, the types of patents listed and sold on the market, and how market conditions have changed over time. We conclude with an analysis of what our data can tell us about how to accurately value technology, the costs and benefits of patent monetization, and the brokered market’s ability to measure the impact of changes to patent law.

## **IP & Innovation**

### **The market for technology: harnessing creative destruction**

Pere Arque-Castells (Northwestern University)

Daniel F. Spulber (Northwestern University – Kellogg School of Management)

*Northwestern Law & Econ Research Paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3041558](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041558)

We provide an analytical framework for identifying business creation and business stealing in the market for technology from the derivatives of the gains from trade with respect to technological proximity, market proximity and the interaction between the two. We create a dataset that tracks interactions in the market for technology between publicly held US companies with at least one patent in the USPTO. Estimates of the probability of a match between pairs imply that the gains from trade are increasing with respect to technological and market proximity, and decreasing with respect to the interaction of the two. Combined with the identification framework, this sign combination implies that both business creation and business stealing exist. When technological proximity is high but market proximity is low the gains from trade are positive because only business creation is present. However, with perfect product market overlap business creation is totally offset by business stealing.

## General innovation competitions

Jason Reinecke (Stanford University, School of Law, Students)

*Stanford Technology Law Review*, Vol. 21, 2018, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050267](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050267)

The extensive patents-versus-prizes literature has thus far focused on specific competitions — competitions that reward inventions based on how well they solve a narrow, predetermined problem. However, prize competitions do not have to specify the problem to be solved in such great detail. Indeed, the degree by which prize competitions specify the problem to be solved falls along a spectrum, with completely general competitions that permit submission of any innovation under the sun falling on one end of the spectrum, and highly specific competitions that lay out the problem to be solved in painstaking detail falling on the other end. This Article makes three primary contributions to the innovation literature. First, this Article analyzes and discusses prize competitions of various degrees of generality, and in particular tackles theoretical considerations related to where prize competitions fall along this spectrum of generality. Second, this Article highlights key factors to consider when designing these unexplored general innovation competitions. Third, this Article provides survey data collected from participants of more general innovation competitions regarding their subjective evaluations of whether and how general innovation competitions affected their innovative activity.

## Thinking machines and patent law

Liza Vertinsky (Emory University School of Law)

*Liza Vertinsky, Thinking Machines and Patent Law, Chapter to be included in Research Handbook of Artificial Intelligence, Edward Elgar Publishing (2018, Forthcoming).*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3036030](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036030)

This chapter focuses on the challenges that a thinking machine paradigm of invention - one in which thinking machines play significant and sometimes dominant roles in the invention process - creates for U.S. patent law. It examines the disconnect between a thinking machine paradigm and the traditional model of invention that lies at the heart of patent law, explores some of the doctrinal challenges and practical problems that result from this disconnect, and concludes with four considerations to inform a patent policy response.

## IP & Litigation

### Heterogeneity among patent plaintiffs: an empirical analysis of patent case progression, settlement, and adjudication

Christopher Anthony Cotropia (University of Richmond School of Law)

Jay P. Kesan (University of Illinois College of Law)

David L. Schwartz (Northwestern University – Pritzker School of Law)

*Journal of Empirical Legal Studies* (Forthcoming)

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3049678](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049678)

This article empirically studies current claims that patent assertion entities (PAEs), sometimes referred to as ‘patent trolls’ or non-practicing entities (NPEs), behave badly in litigation by bringing frivolous patent infringement suits and seeking nuisance fee settlements. The study explores these claims by examining the relationship between the type of patentee-plaintiffs and litigation outcomes (e.g., settlement, grant of

summary judgment, trial, and procedural dispositions), while taking into account, among other factors, the technology of the patents being asserted and the identity of the lawyers and judges. The study finds significant heterogeneity among different patent holder entity types. Individual inventors, failed operating companies, patent holding companies, and large patent aggregators each have distinct litigation strategies largely consistent with their economic posture and incentives. These PAEs appear to litigate differently from each other and from operating companies. Accordingly, to the extent any patent policy reform targets specific patent plaintiff types, such reforms should go beyond the practicing entity versus non-practicing entity distinction and understand how the proposed legislation would impact more granular and meaningful categories of patent owners.

### **Repealing patents**

Christopher Beauchamp (Brooklyn Law School)

*Brooklyn Law School, Legal Studies Paper No. 534*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044003](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044003)

The first known patent case in the United States courts did not enforce a patent. Instead, it sought to repeal one. The practice of cancelling granted patent rights has appeared in various forms over the past two and a quarter centuries, from the earliest U.S. patent law in 1790 to the new regime of inter partes review (“IPR”) and post grant review. With the Supreme Court’s grant of cert in *Oil States Energy Services v. Greene’s Energy Group* and its pending review of the constitutionality of IPR, this history has taken on a new significance.

This essay uses new archival sources to uncover the history of patent cancellation during the first half-century of American patent law. These sources suggest that the early statutory provisions for repealing patents were more widely used and more broadly construed than has hitherto been realized. They also show that some U.S. courts in the early Republic repealed patents in a summary process without a jury, until the Supreme Court halted the practice. Each of these findings has implications—though not straightforward answers—for the questions currently before the Supreme Court.

### **Testing the white hat effect in patent litigation**

Bernard Chao (University of Denver Sturm College of Law)

Roderick O’Dorisio (University of Denver Sturm College of Law)

*27 Federal Circuit Bar Journal, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3048500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048500)

Although everyone believes that telling a good story is an important part of jury persuasion, attorneys inevitably rely on their intuition to choose their stories. Experimental methodologies now allow us to test how effective these stories are. In this article, we rigorously test how two different narratives common to patent law affect mock jurors. First, we look at whether accused infringers can improve their chances of prevailing by being the aggressor. Prior studies have observed that accused infringers that file declaratory judgment actions to vindicate their rights win more often than those that are sued by patent holders. However, these results may simply be an artifact of the selection effects. For example accused infringers may simply be suing on stronger cases. To date, no studies have tried to control for these selection effects and determine whether it is truly the story that sways juries. Second, we looked at whether an accused infringer can influence mock jurors by making a few disparaging remarks about one kind of patentee’s business model, the non-practicing entity (NPE). NPEs, often pejoratively called patent trolls, may have a more difficult time prevailing at trial than practicing entities do.



To test how these narratives affect potential juries, we used a 2x2 between-subjects online experiment. We randomly assigned virtual mock jurors to watch one of four different scenarios of an abbreviated patent trial and render verdicts. The results showed that accused infringers that filed declaratory judgment actions prevailed more often than those where the patentee initiated the lawsuit. In addition, our study found that NPEs won less often than practicing entities. We discuss implications for strategy and policy.

### **Certiorari, universality, and a patent puzzle**

Tejas N. Narechania (University of California, Berkeley – School of Law)

*Michigan Law Review, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044035](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044035)

The most important determinant of a case's chances for Supreme Court review is a circuit split: If two Courts of Appeals have decided the same issue differently, review is substantially more likely. But practically every appeal in a patent case makes its way to a single court—the Court of Appeals for the Federal Circuit. How, then, does the Supreme Court decide whether to grant certiorari in a patent case?

The petitions for certiorari in the Court's patent docket suggest an answer: The Supreme Court looks for splits anyways. These splits, however, are of a different sort. Rather than consider whether two Courts of Appeals have decided the same issue differently, the Court looks to whether two fields of law conflict over the application of the same trans-substantive doctrine. Such "field splits" are an unusual candidate for Supreme Court attention. After all, the Court's interest in circuit splits is motivated by a desire to preserve geographic uniformity in federal law. But field splits, unlike circuit splits, do not give rise to forum shopping concerns, do not undermine the predictability of the law, nor otherwise implicate the legal values that counsel in favor of uniformity. Instead, the Supreme Court's attention to field splits may suggest that legal universality—consistency across substantive fields of law—is an important (but unstated) priority in certiorari decision making.

The exercise of this universality interest through certiorari decisions in patent cases has several consequences for the Supreme Court's agenda. First, we must better understand—and the Court must better explain—how to distinguish those field splits that implicate its universality-related concerns from those that do not. Moreover, the Supreme Court should eliminate patent's privileged place in certiorari practice by applying this universality value across doctrinal fields.

### **Reassessing the role of trial in patent litigation**

Joshua Lee Sohn (Quinn Emanuel Urquhart & Sullivan, LLP)

*27 Fed. Cir. B.J. \_\_\_ (2017, Forthcoming)*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3052279](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3052279)

This Article argues that the role of trial in patent litigation has become much larger than it should be, because courts have systematically misunderstood which patent infringement disputes are actually factual disputes that require a trial. Specifically, whenever the operation of the accused product is not in genuine dispute, any dispute over whether that operation meets the patent claims should be recognized as a pure claim construction dispute. Claim construction is an issue of law for the court, not an issue of fact for the jury. Thus, these disputes should be resolved by the court at summary judgment, rather than sent to a jury for resolution at trial.

By recognizing that many (if not most) infringement disputes are really just claim construction disputes, courts would be able to greatly reduce the number of patent trials. This would have several public policy benefits. First, it would save significant resources, given the time and expense of patent trials. Second, it would promote more accurate and informed decision-making, since district court judges have a comparative advantage over juries in accurately deciding complex questions of patent infringement.

## IP Law & Policy

### **Final report of the Berkeley Center for Law & Technology Section 101 Workshop: addressing patent eligibility challenges**

Jeffrey A. Lefstin (University of California Hastings College of the Law)

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

David O. Taylor (Southern Methodist University – Dedman School of Law)

*Berkeley Technology Law Journal*, 2018 Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050093](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050093)

Over the past five years, the Supreme Court has embarked upon a drastic and far-reaching experiment in patent eligibility standards. Since the founding era, the nation's patent statutes have afforded patent protection to technological innovations and practical applications of scientific discoveries. However, the Supreme Court's 2012 decision in *Mayo Collaborative Services v. Prometheus Laboratories* imposed a new limitation on the scope of the patent system: that a useful application of a scientific discovery is ineligible for patent protection unless the inventor also claims an "inventive" application of the discovery. The following year, the Court ruled that discoveries of the location and sequence of DNA compositions that are useful in diagnosing diseases are ineligible for patent protection. And in its 2014 *Alice Corp. v. CLS Bank International* decision, the Court ruled that software-related claims are ineligible for patent protection unless the abstract ideas or mathematical formulas disclosed are inventively applied.

These decisions sent shock waves through the research, technology, business, and patent communities. Medical diagnostics companies experienced a dramatic narrowing of eligibility for core scientific discoveries. Reactions within the information technology community have been mixed, with some applauding the tightening of patent eligibility standards on software claims and the opportunity to seek early dismissal of lawsuits, particularly those filed by non-practicing entities, and others criticizing the shift in patent eligibility. Several members of the Federal Circuit bluntly criticized the Supreme Court's shift in patent eligibility standards on jurisprudential and policy grounds. Additionally, the Patent Office has struggled to apply the Supreme Court's new and rapidly evolving standards.

As this sea change unfolded, many patent practitioners, scholars, PTO officials, and jurists hoped that the Supreme Court would provide fuller and clearer guidance on patent eligibility standards. In the aftermath of the Supreme Court's rejection of the invitation to reexamine its *Mayo* decision, many stakeholders have shifted their attention toward legislative reforms. This Report summarizes the presentations and discussion of a workshop of leading industry representatives, practitioners, scholars, policymakers, and a retired jurist exploring the legal background and effects bearing on legislative action.

Part I contains a lightly edited version of the background document circulated to participants prior to the workshop. Part II summarizes the four workshop sessions leading up to the discussion of legislative proposals: (A) legal background; (B) effects on research and development (R&D); (C) effects on patent



prosecution; and (D) effects on patent assertion, litigation, and case management. Part III summarizes the discussion of legislative proposals and sets forth a framework for seeking compromise on reform legislation.

### **Myriad genetics and the BRCA patents in Europe: the implications of the US Supreme Court Decision**

Jessica C. Lai (Victoria University of Wellington)

*5(5) UC Irvine Law Review 1041-1076*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053070](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053070)

Biotech patents are perhaps the most controversial form of property, and the U.S. Supreme Court decision in 2013 in *Association for Medical Pathology v. Myriad Genetics*, which held that simply isolated DNA constitutes natural products, was applauded by many, particularly civil society groups and medical practitioners. From a legal perspective, the decision itself is brief and leaves much to be desired. Nevertheless, it is interesting to question what might be its potential impact on European research, the biotech industry, and patent law. Given the fact that the Biotech Directive was in large part passed in order to keep the European Union competitive with the United States, it is possible that the European Union has gained an advantage over the United States in terms of research and local industry. However, this is far from clear. At the same time, the Myriad decision may relight the fire surrounding the Biotech Directive, which was hotly debated and reluctantly implemented by the Netherlands, Germany, and France. This Article looks at patent law in Europe as it pertains to biotechnology before addressing what the possible implications may be of the U.S. Supreme Court Myriad decision on research, the biotech industry, and the policy debate in Europe.

### **Contextualizing patent disclosure**

Colleen V. Chien (Santa Clara University School of Law)

*Vanderbilt Law Review, Vol. 69, No. 6, 1849*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050917](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050917)

One of the main justifications for a patent system is that patents disclose useful technical information that others can learn from. However, patents are not performing this function well. The average patent is written in legalese, uses vague language, and is hard to connect to commercial activity. Legal scholars have responded with calls to improve the patent document through better writing, more examples, and better enforcement of patent doctrines. The courts have sought to ensure that patent specifications are robust and justify the grant of a monopoly. This follows from the Supreme Court's characterization of technical teachings within a patent as the "quid pro quo" for the patentee's exclusive rights.

The problem with these approaches is that they focus exclusively on patent content, and overlook the many ways in which patent context matters to the dissemination of technical information. A review of the ways in which patents truly promote the progress reveal that patent information beyond, not just within, a patent's four corners, can shape the extent to which the subject invention of the patent spreads beyond the inventor. Whether a patent is in force, is commercially important, is subject to licensing or other commitments, or is held for defensive or offensive reasons, for example, can determine whether and how the teachings within the patent spread.

In this Article, I argue that we need to rethink the concept of patent disclosure. Rather than focusing only on the content of the patent, we should keep in mind the context of the patent, and how the greater

availability of contextual information about the patent can promote the progress. This contextual information represents not only the final “product” of a patent as issued, but the “process” by which it is made and used, the timing and terms on which it is provided to the world, and the publicly reported transactions in which the patent is involved. Making contextual information more accessible would do much to reinvigorate the disclosure function of the patent system — in many cases, using already existing information.

### **The myth of patent quality**

Neal Solomon (Advanced System Technologies, Inc.)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3036969](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036969)

The U.S patent system has been under attack for about a decade. One of the main justifications for changing the patent system has centered on the issue of patent quality. According to patent critics, patents are bad or low quality, justifying major changes to the patent examination and review system.

I argue that patent quality is a proxy for attacking patent validity, which has a complex history. Patent critics, particularly market incumbents, obtain a free ride when the bar is set low to attack patent validity. The changes to standards for patent obviousness have been a core source of lowering the standards for patent validity. The recent Inter Partes Review (IPR) program has overzealously applied the weak obviousness standards, causing a broad range of problems for innovators.

The false big-tech narrative that attacks patent quality has unduly undermined the patent system, with numerous adverse consequences. The introduction of IPRs pushes patent validity determinations out of the federal courts, which enable due process, into a politicized administration agency that generally denies due process for patent holders after a patent is presumed to be valid from the original PTO examination and grant.

The introduction of after-grant reviews, based largely on the myth of patent quality, have been used to justify wholesale changes to the patent system that deviate dramatically from validity tests the courts have applied for over a century.

The increase in transaction costs to defend a patent in after-grant reviews and in enforcement, after challenging free riding efficient infringers, alters the economics for innovators and market entrants, with a tendency to diminish patent valuation. While once market forces were key determinates of an invention’s value, artificial factors associated with reproving patent validity that originate with the false narrative of bad patent quality, have altered technology economics and have ultimately diminished incentives to invest in technology, with adverse consequences to productivity growth and aggregate economic growth.

# Copyright Law

## **Opinion of the CEIPI on the European Commission's proposal to reform copyright limitations and exceptions in the European Union**

Christophe Geiger (Université de Strasbourg – CEIPI)

Giancarlo Frosio (Université de Strasbourg – CEIPI ; Stanford Law School)

Oleksandr Bulayenko (Université de Strasbourg – CEIPI)

*Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2017-09*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053983](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053983)

The Centre for International Intellectual Property Studies (CEIPI) is an institute devoted to education and research in intellectual property and is a constituent part of the University of Strasbourg. CEIPI analyses and comments the main developments in the area of intellectual property at national, European and international levels. From this perspective, the European Commission's Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14 September 2016 — and more generally any step towards copyright reform in the European Union — is of particular interest to CEIPI, which hereby intends to react on the proposal to introduce in EU law new mandatory copyright exceptions and limitations to promote the Digital Single Market.

## **Freedom of artistic creativity and copyright law: a compatible combination?**

Christophe Geiger (Université de Strasbourg – CEIPI)

*UC Irvine Law Review 2018, Volume 8, Issue 3, Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3053980](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053980)

Copyright was originally intended to serve creators as an engine of free expression, protecting them from the interference of others and from all risk of censorship. To this end, a balance was conceived between exclusive control and freedom and in order to enable future creativity, some uses were kept outside the control of the right owner through limitations to the exclusive right. However, none of the existing systems of limitations in the various jurisdictions was specifically designed to address the creative reuse of copyright protected material in the context of derivative works. On the contrary, when an author in his creative process needs to use the expression of a previous copyrighted work, he will have to get the authorization of the copyright owner of the original work. This situation can be quite cumbersome, as right owners are not always easy to trace, but most of all it can lead to a situation private censorship, as private entities or individuals have the potential to decide what can be created or not and block the dissemination of new works. It might thus be questionable how this situation can be reconciled with either the copyright's rationale of incentivizing creativity or the obligations imposed on States by international and regionally protected human rights such as freedom of expression and freedom of artistic creation. In this article, the different options available for legislators and courts to secure creative uses in the context of derivative works will be assessed in order to develop a satisfying legal mechanism *de lege ferenda*, discussing in particular the possible objections that could result from the international and regional framework for both intellectual property and human rights protection.

## **Fairness in copyright law: an Anglo-American comparison**

Ilanah Simon Fhima (Institute of Brand and Innovation Law, University College London)

*Santa Clara Computer and High Technology Law Journal*, Vol. 34, 2017

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3044047](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044047)

Fairness stands at the crossroads of copyright law. The concept is present in the exceptions to copyright in both the U.S. and the U.K., seeking to balance the interests of copyright owners and users, as well as the needs of the public in receiving information. The U.S. and U.K. adopt different approaches to how the defenses should be structured, with the U.S. having an open list of which types of use can benefit, leaving this for judges to develop in response to specific fact patterns and changing conditions before them. On the other hand, the U.K. has a list, pre-determined by the legislator, of which uses can benefit. Both use the notion of fairness to moderate between different interests at stake, and much of this piece is devoted to documenting how the factors used to determine whether use is fair are in fact very similar. However, it is argued that the open versus closed list approach does make a big difference to the likely outcomes in the jurisdictions, by giving U.S. courts the license to privilege the type of use over the countervailing interests of the copyright owner in a way that is just not open to U.K. judges.

## **IP & International Law**

### **Procedural aspects of compulsory licensing under TRIPS: Report No. II of webinar series on reinterpreting TRIPS in the life sciences**

Jakob Wested (University of Copenhagen – Centre for Information and Innovation Law)

Timo Minssen (University of Copenhagen – Centre for Information and Innovation Law – Faculty of Law)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3043720](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043720)

In 2013, Indian authorities granted a compulsory license to NATCO Pharmaceuticals for a patented pharmaceutical product sold by Bayer. This decision raised several complex issues regarding the grant a CL and their consistency with the principles and objectives of TRIPS. Furthermore, in January 2017 an amendment to the TRIPS agreement entered into force, allowing compulsory licensors to export their generic pharmaceuticals to least developed countries (LDC), further recalibrating the intersection between the patent institution and public interest. On this background, the webinar presentations and discussion addressed the framework and context for CL provided by the TRIPS convention. Both the specific requirements enshrined in TRIPS art 31 and the broader objectives and principles enshrined in TRIPS, e.g. transfer and dissemination of technology (art 7), protection of public health (art 8) and technology neutrality (art 27) were included in the discussion.

### **TPP, RCEP and the future of copyright normsetting in the Asia-Pacific**

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

*MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC? JUXTAPOSING HARMONISATION WITH FLEXIBILITY*, Susan Corbett and Jessica Lai, eds., ANU Press, 2017, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3054328](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054328)

The past decade has seen two mega-regional intellectual property norm-setting exercises focusing on countries in the Asian Pacific region: the Trans-Pacific Partnership (TPP) and the Regional Comprehensive Economic Partnership (RCEP). Taken together, these two mega-regional norm-setting

exercises will have unlimited potential to shape future copyright norms in the Asian Pacific region. For countries involved in either the TPP or RCEP negotiations, legal obligations concerning new protection and enforcement standards will have to be incorporated into domestic law once the applicable agreement enters into force. These standards can be quite burdensome, as they often exceed what is currently required by the WTO TRIPS Agreement. Countries that happen to be members of both the TPP and the RCEP will also have to be ready to resolve conflicts between these two agreements, should they arise. Even those countries that remain outside of the TPP or RCEP negotiations may end up accepting norms enshrined in either agreement, or both, despite their lack of legal obligation to do so.

In view of this potentially considerable change in the intellectual property norm-setting landscape in the Asian Pacific region, this chapter closely examines the roles of the TPP and the RCEP in shaping future regional copyright norms. It begins by discussing the historical origins of these two partnerships. It then highlights the similarities and differences between the copyright provisions in the TPP Agreement and a leaked draft of the RCEP intellectual property chapter. This chapter continues to explore the ramifications for the United States' withdrawal from the TPP shortly after the inauguration of the Trump Administration in January 2017. It concludes by outlining the future of copyright norm setting in the Asian Pacific region.

### **Rising economies in the international patent regime: from rule-breakers to rule-changers and rule-makers**

Jean-Frederic Morin (Laval University – Departement de Science Politique)

Omar Serrano (University of Geneva)

Mira Burri (University of Lucerne)

Sara Bannerman (McMaster University Department of Communication Studies and Multimedia)

*New Political Economy*, July 2017

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3032903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032903)

Rising economies face a crucial dilemma when establishing their position on international patent law. Should they translate their increasing economic strength into political power to further developing countries' interests in lower levels of international patent protection? Or, anticipating a rising domestic interest in stronger international patent protection, should they adopt a position that favours maximal patent protection? Drawing on multiple case studies using a most-similar system design, we argue that rising economies, after having been coerced into adopting more stringent patent standards, tend to display ambivalent positions, trapped in bureaucratic politics and caught between conflicting domestic constituencies. We find that the recent proliferation of international institutions and the expansion of transnational networks have contributed to fragmentation and polarisation in domestic patent politics. As a result, today's emerging economies experience a more tortuous transformative process than did yesterday's. This finding is of particular relevance for scholars studying rising powers, as well as for those working on policy diffusion, regulatory regimes, transnational networks and regime complexes.

### **When the Chinese intellectual property system hits 35**

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

*Queen Mary Journal of Intellectual Property*, Vol. 8, 2018, *Forthcoming*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3043586](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043586)

In 1982, China promulgated its first modern intellectual property law, offering protection to trademarks. Since then, China adopted the Patent Law in 1984, the Copyright Law in 1990 and the Anti-Unfair Competition Law in 1993. In December 2001, China finally became a member of the WTO, assuming

obligations under the TRIPS Agreement.

One can certainly debate about the actual age of the modern Chinese intellectual property system, but it will not be too far-fetched to suggest that the system began in the early to mid-1980s and is now entering, or approaching, its middle age. What exactly does a middle-aged Chinese intellectual property system mean? Will the system hit its prime? Or is it about to face a hard-to-predict mid-life crisis?

Written for a special issue on 35 years of the Chinese intellectual property system, this article explores what it means for this system to hit 35. It begins by briefly recapturing the three phases of development of the system. In the style of David Copperfield, it discusses the system's evolution from its birth all the way to the present. The article then explores three different meanings of a middle-aged Chinese intellectual property system – one for intellectual property reform, one for China and one for the TRIPS Agreement and the global intellectual property community.

### **An India perspective on establishing a prima-facie case in patent suits**

Thammaiah Ramakrishna (Chair Professor– Ministry of Commerce And Industry (GOI) Chair on Intellectual Property Rights)

*Working paper*

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3047057](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3047057)

This paper reviews the nature and the grounds for granting injunctions in general and in patent related disputes, in particular while focusing specifically on the requirement of establishing a prima facie case in granting an injunction. In this regard the paper has analyzed different provisions under Indian Civil Procedure Code, The Specific Relief Act and different judicial precedents for analyzing the standard set for the establishment of a prima facie case towards granting an injunction in case of patent suits. Further, the paper has also analyzed the provisions of Indian Patents Act to examine the legislative intent in such regard. The paper has made an attempt to evaluate the legal position and judicial practice towards setting a standard for the establishment of prima-facie case.

This paper is based upon a statistical survey of all patent related decisions of the Indian High Courts between the years 2000 to 2016, in which granting an injunction was considered. The study shows that a good standard and fixing of specific requirements for the establishment of a prima facie case while granting injunctions in patent suits, is still lacking in Indian judicial practice. This paper examines setting of a standard and specifying the requirements to establish a prima facie case and suggests a model based upon weighted average of proposed requirements.

### **Recent developments in Korean antitrust cases concerning FRAND-encumbered standard-essential patents**

Jinyul Ju (Pusan National University)

*Jindal Global Law Review* (2017). DOI: 10.1007/s41020-017-0051-1

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3057341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3057341)

In Korea, there have been four antitrust cases concerning the “fair, reasonable, and non-discriminatory” (FRAND) related standard-essential patents (SEPs) in the last six years:

- (1) the Seoul Central District Court's decision in Samsung v. Apple (August 2012);
- (2) the Korean Fair Trade Commission (KFTC)'s consent decision on Microsoft's acquisition of Nokia (August 2015);
- (3) the Seoul High Court's decision in Qualcomm v. KFTC (August 2012) pending in the Supreme Court;



and

(4) the KFTC's decision against Qualcomm (January 2017) pending in the Seoul High Court.

This article provides an analyses of the four cases, and comments on the application of the Korean Monopoly and Fair Trade Act towards FRAND-encumbered SEPs.

## Other IP Topics

### Critical race IP

Anjali Vats (Boston College)

Deirdre A. Keller (Ohio Northern University – Pettit College of Law)

*Cardozo Arts & Entertainment Law Journal*, Vol. 36

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050898](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050898)

In this article, written on the heels of Race IP 2017, a conference which we co-organized along with Amit Basole and Jessica Silbey, we propose and articulate a theoretical framework for Critical Race Intellectual Property (Critical Race IP). Specifically, we argue that, given trends toward maximalist intellectual property policy, it is now more important than ever to study the racial investments of the laws of copyright, trademark, patent, right of publicity, trade secret, and unfair competition in a manner that draws upon Critical Race Theory (CRT). Situating our argument historically we articulate provisional boundaries and core ideological commitments that define Critical Race IP, particularly in contrast to existing theorization of Critical Intellectual Property. After exploring the landscape of the developing area of study through its central themes, we draw upon scholarship in the area of public feelings to demonstrate the importance of community building and intimacy making practices in its growth. Public feelings, we contend, are an implicit and often undertheorized aspect of intellectual property law that come to the fore in engagements with race and (neo)coloniality. We conclude by discussing Critical Race IP as decolonizing praxis that can aid in anti-racist and anti-colonial struggles.

### Humanizing IP

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

*Vanderbilt Journal of Entertainment & Technology Law*, Forthcoming

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050262](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050262)

This Article compares the natural rights property framework with the human rights framework for intellectual property. These two frameworks share a common theoretical basis in the natural rights tradition, but they appear to lead to conflicting outcomes.

Proponents of natural rights to intellectual property tend to support more expansive intellectual property protections. Advocates of a human rights approach to intellectual property contend, however, that human rights will have a moderating influence on intellectual property law. This Article is among the first scholarly works to explore the apparent conflict between these two important frameworks for intellectual property. It concludes that a human rights approach to intellectual property enriches the natural rights intellectual property dialogue by broadening the analysis to acknowledge and value human interests that go beyond the individual property interest.

## 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.

## Contact

For more information about this issue of *IP Literature Watch*, please contact the editor:

Anne Layne-Farrar  
Vice President  
Chicago  
+1-312-377-9238  
[alayne-farrar@crai.com](mailto:alayne-farrar@crai.com)

[www.crai.com/antitrust](http://www.crai.com/antitrust)  
[www.crai.com/ip](http://www.crai.com/ip)

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