



IP Literature Watch

CRA Charles River
Associates

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This newsletter contains an overview of recent publications concerning intellectual property issues. The abstracts included below are as written by the author(s) and are unedited.

IP & Antitrust

Predatory patent litigation

Erik N. Hovenkamp

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308115

Despite their extensive experience in patent litigation, the most litigious patent assertion entities (PAEs) fair relatively poorly in court. These firms commonly file dubious infringement claims on which they are ostensibly very likely to lose money if litigated to judgment. It is therefore tempting to conjecture that these PAEs are mistaken to pursue such litigation. However, we argue that this is in fact part of a calculated strategy of predatory patent litigation used to monetize low quality, excessively broad patents. In effect, the PAE aggressively litigates when its licensing demands are rejected -- despite expecting to lose money on the suit -- in order to injure the defendant and develop a litigious reputation that intimidates future defendants into more lucrative settlements. Like predatory pricing, this involves a short run loss that is recouped in the long run through supra-competitive pricing.

The welfare impact of predatory patent litigation is unambiguously negative: it creates a market for low quality patents, exacerbates the patent thicket problem and inflates social costs -- and it does so without improving on the ability of non-predatory PAEs to encourage innovation. The welfare impact of non-predatory PAE activity, by contrast, is prima facie ambiguous. Rather than fee shifting remedies like the SHIELD Act, we propose that potential defendants form a litigation cost-sharing agreement: a contractual agreement that divides a member's defense costs among the group when the plaintiff is a PAE, and which requires members to litigate predatory claims to judgment. This deters predatory litigation without deterring meritorious infringement claims.

AstraZeneca's abuse of IPR-related procedures - a hypothesis of antitrust offence, abuse of rights, and IPR misuse

Mariateresa Maggiolino and Maria Lillà Montagnani

World Competition: Law and Economics Review, 2011

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298576

The General Court has recently upheld the AstraZeneca decision by ascertaining that AstraZeneca enforced fraudulently the procedure to obtain the Supplementary Protection Certificates (SPCs) connected to one of its patented drugs, and misused the procedure governing the withdrawal of the related market authorizations. AstraZeneca manipulated these procedures and — since it held a dominant position — was deemed liable under article 102 TFEU. However, enforcing fraudulently the procedure to obtain SPCs and misusing the procedure governing the withdrawal of market authorizations may qualify as offences even when firms do not hold market dominance insofar the acts do not find any justification in the rationale underpinning the patent system. This behavior may amount to conduct that harms the single market as it abuses both the intellectual property-related procedure and the underlying intellectual property right. This behavior may also amount to conduct that, by falling outside the scope of a Community provision, distorts its purpose and abuses the underpinning right. The paper uses the discussion of AstraZeneca's behavior from the EU and US antitrust standpoint to explore the further offences that such behavior may constitute.

IP & Innovation

Patent experimentalism

Lisa Larrimore Ouellette

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294774

Many scholars have wrestled with what I call the “first-order question” in patent law: What policies should we adopt to promote innovation? This article grapples with the second-order question: What policies should we adopt to promote innovation about promoting innovation? I argue that empirical progress in patent law depends on greater policy diversity (rather than the current emphasis on uniformity), but unconstrained “laboratories of experimentation” are suboptimal due to the spillovers from local policies. Instead, patent policymakers should adopt a third way between uniformity and local control: centralized promotion of policy variation. The gold standard of randomization should be used more often, both in the field (e.g., testing prizes in a random selection of pharmaceutical classes) and in the lab (e.g., testing how varying disclosure affects performance in implementing software patents). But many nuanced, dynamic issues — such as the patent-eligibility of new technologies in heterogeneous jurisdictions — are better approached not through fixed experiments, but rather through an adaptive “experimentalist” governance regime. Local actors — patent examiners, judges, or even individual countries — should be granted broad discretion to meet centrally defined framework goals, with the requirement of defending their decisions through robust peer review. This new “patent experimentalism” can be guided by recent trends in personalized and evidence-based medicine, and the resulting framework for legal experimentation has implications for policy learning beyond patent law.

On the effectiveness of patenting strategies in innovation races

Jurgen Mihm, Fabian J. Sting and Tan Wang

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295947

Which inventions should a company patent? Should it patent at all? Many companies engaged in an innovation race seek a patenting strategy that will protect their intellectual property, but not much is known about factors that determine the best strategy. Although scholars in various management, economics, and engineering disciplines have conducted research on patents, little work has addressed the normative issues pertaining to formation of an appropriate patenting strategy. We develop an inventory of patenting strategies and integrate them into a framework accommodating the contingencies that influence their selection. Our simulation model characterizes the optimal patenting choices for different settings, and it captures the dynamics between firms that compete via strategic interactions. We identify those competitive dynamics driven by the choice of R&D strategy as the most salient determinant of the firm's optimal patenting strategy. Thus our research contributes to establishing a contingency theory of patenting strategies.

Patents as genre: a prospectus

Dan L. Burk and Jessica Reyman

25 Law & Literature (Forthcoming)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298433

Like other forms of intellectual property, patents have increasingly been the subject of controversy regarding their successes and failures in promoting and channeling innovation. But unlike other forms of intellectual property, patents are constituted and defined in terms of officially sanctioned texts. As a consequence, patents are deeply embedded in communities of composition, interpretation, and practice. In this paper we outline how genre analysis can be applied to interrogate the "typified rhetorical action" of the patent system and its constituent communities. We argue and demonstrate that understanding the rhetorical work of patents is key to addressing current criticisms of the patent system.

The effect of non-practicing entities on the rate of innovation

Jorge Lemus and Emil Temnyalov

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308136

In this paper we propose a theoretical model to study the effect of non-practicing entities (NPEs) on the rate of innovation, when firms engage in sequential patent races before entering the product market. We model an NPE as an entity that does not generate original innovation, or produce a good, but operates by buying patents and litigating or licensing them under the threat of litigation. We fully characterize the equilibrium effects of an NPE in a model that includes trade in patents, licensing, and litigation with uncertain outcomes. We show that there is scope for NPEs to make positive profits even in a frictionless environment, because they make a credible threat of increased litigation, which an operating firm could not commit to in equilibrium. We then incorporate the patent trade, licensing and litigation model as a continuation game of a prior research stage, in order to explicitly study the incentives for innovation. Under plausible assumptions the effect of an NPE is to increase the total research effort exerted by the competing firms and thus increase the rate of innovation in the economy.

Challenges for regional innovation policies in CEE countries: spatial concentration and foreign control of US patenting

Balázs Lengyel, Tamás Sebestyén and Loet Leydesdorff

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293845

Using techniques of data collection and mapping as overlays to Google Maps – on the basis of patent information available online at the U.S. Patent and Trademark Office (USPTO) – we point at two major and interconnected challenges that policy-makers face in Central and Eastern Europe (CEE) when combating the lagging innovation performance. First, we address the spatial concentration by using a distribution analysis at the city level. The results suggest that patenting is concentrated in post-socialist territories more than in western nations and regions. However, there is not a single outstanding hub in CEE when one compares USPTO patents normalized for the respective population sizes. Secondly, we argue that dominance of foreign control over USPTO patents is mostly embodied in international co-operations at the individual level, and only rarely spilled-over to MNE subsidiaries. In our opinion, catching-up of CEE in terms of patenting is unlikely, unless innovation policy measures focus on growing hubs and target both domestic inventors and international relations of companies.

Entrepreneurial exits and innovation

Vikas A. Aggarwal and David H. Hsu

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306053

We examine how IPOs and acquisitions affect entrepreneurial innovation as measured by patent counts and forward patent citations. We construct a firm-year panel dataset of all venture capital-backed biotechnology firms founded between 198'22'008 tracked yearly through 2006. We address the possibility of unobserved self-selection into exit mode by using coarsened exact matching (CEM), and in two additional ways: (1) comparing firms that filed for an IPO (or announced a merger) with those not completing the transaction for reasons unrelated to innovation, and (2) using an instrumental variables approach. We find that innovation quality is highest under private ownership and lowest under public ownership, with acquisition intermediate between the two. Together with a set of within-exit mode analyses, these results are consistent with the proposition that information confidentiality mechanisms shape innovation outcomes. The results are not explained by inventor-level turnover following exit events or by firms' pre-exit window dressing behavior.

Standards and the incentives for innovation

Troy J. Scott and John T. Scott

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298403

We develop a new survey-based method for assessing the effects of standards on innovative investment and its private and social value in a market equilibrium setting. Our method relies on the informed opinions of industrial respondents; this paper explains our model and illustrates it with the responses from a small, trial set of respondents. Parameterized with the responses of industrial respondents to the survey, the model can describe the differences in effects of standards for different types of firms and for different types of industrial research, and it can describe the net effects caused by the impact of standards on intellectual property (IP) protection, using the industrial responses to answer the question of

how the opposing effects from changes in IP protection on balance affect innovative investments. For our trial group of respondents, the net effects of standards for IP protection are positive, increasing innovative investments and increasing their private and social value.

IP Law & Policy

Why do juries decide if patents are valid?

Mark A. Lemley

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2306152

For the last two decades, patent lawyers and courts have assumed that the Constitution requires that juries decide whether patents are valid. But that assumption rests on an uncertain foundation. Juries did not decide patent validity during most of American history, and as recently as 30 years ago jury trials in patent cases were quite rare. There is, surprisingly, no precedential decision resolving the Seventh Amendment question. And English practice before 1791 -- the basis for Seventh Amendment jurisprudence -- is ambiguous at best on whether juries must decide patent validity. I argue that if and when the issue is presented to the Supreme Court, the Court is unlikely to find a constitutional right to jury trial on issues of patent validity, and certainly not the broad right of the sort that is now common practice. Removing the jury from most patent validity determinations would change patent litigation in important ways.

The failed promise of user fees: empirical evidence from the United States Patent and Trademark Office

Michael Frakes and Melissa F. Wasserman

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295561

Despite the proliferation of user-fee financing structures of governmental agencies, little research has been conducted on the possible influence of such structures on agency decision-making. This paper attempts to fill this gap in the context of the Patent and Trademark Office (PTO). We first suggest that the PTO's historical fee schedule and its reliance on patent grantees to subsidize patent applicants exposes the Agency to a risk that its obligatory costs will fall out of balance with its incoming fee collections. Second, we theorize the steps that the PTO may take in such instances in order to restore financial balance while allowing it to satisfy as many of its examination obligations as it can. In broad terms, we contend that a budget constrained PTO will distort its examination practices in an effort to increase the average fee income generated per application reviewed and/or to decrease the average examination costs incurred per application processed. We hypothesize that the PTO achieves these goals through the extension of preferential examination treatment — i.e., higher granting propensities and/or shorter wait times — to some technologies over others. Building on Frakes and Wasserman (2013), which had explored the PTO's inflationary granting response, this paper draws on novel patent-processing data and presents evidence suggesting that the PTO will attempt to maintain as much aggregate application throughput as it can during times of financial strain by prioritizing the examination of applications within those technologies that cost the PTO the least to review.

Optimal patent term and cross-industry measures of patent term sensitivity

Neel U. Sukhatme and Judd N. L. Cramer

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293245

Patents are monopolies granted to inventors in order to promote innovation, but they have a limited term because they also impose social costs. There is little empirical research on what constitutes an optimal patent term, or whether patent term should vary across industry categories.

We take a first step in studying these issues by examining cross-industry differences in patent term sensitivity. We take advantage of a change in law -- the passage of the TRIPS agreement in 1994 -- that caused patent term to be measured from the date a patent application was filed rather than the date the patent was granted, thereby reducing patent term by the amount of time an application was pending before the U.S. Patent and Trademark Office. Using a new dataset, we determine what portion of this delay is attributable to the applicant for 307,597 issued patents filed in 1994-1996. This shows, for the first time, how patent applicants in different industries sped up their prosecution behavior in response to the change in law, which gives us a measure of industry sensitivity to patent term change.

We predict, via a formal model, that patent applicants in industries with higher profits toward the end of patent term are the applicants most likely to speed up patent prosecution after TRIPS. Our results show that pharmaceuticals patentees sped up patent prosecution significantly, which accords with prior theory on the primacy of patents in this industry. We find, however, that software patentees also significantly sped up prosecution, which is unexpected given prior theory suggesting patents are less important in spurring software development.

Additionally, our paper exploits another, separate aspect of the legal change that gave some firms longer patent term extensions vis a vis others. We perform an event study and find that firms receiving longer extensions tended to have higher market returns. We obtain similar results using a new empirical technique known as regression kink design, which addresses potential selection issues.

Finally, we test for and find a high degree of correlation between our two new measures of patent term sensitivity. This high correlation helps validate our formal model, suggesting that patentees in industries most likely to receive higher profits toward the end of patent term were the ones most sensitive to the change in patent term rules.

Patent disclosure and the timing of licensing

Deepak Hegde and Hong Luo

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293225

This study investigates how patent disclosure affects the timing of licensing. We address the issue by analyzing the effects of the American Inventor's Protection Act (AIPA) of 1999, which required, beginning on November 29, 2000, that US patent applications be published 18 months after their filing, rather than at the time the patent is granted. We develop a simple framework that yields predictions about the timing of licenses before and after AIPA, and test the predictions using a sample of 339 licenses of biomedical inventions negotiated between 1996 and 2009. Consistent with our predictions, post-AIPA inventions experience a sharp increase in the probability of licensing after the 18-month disclosure of their patent

applications, and on average, are 18% less likely to wait till allowance to be licensed, than pre-AIPA patent applications. In addition, for patent applications that are not licensed until they are issued, 18 month-disclosure significantly shortens the time to licensing. As a consequence, for inventors that choose to license, post-AIPA patents are licensed 8.5 months earlier than pre-AIPA patented inventions on average. The publication of patent applications appears to benefit patentees by facilitating licensing transactions in the market for ideas.

Pluralism, principles and proportionality in intellectual property

Justine Pila

(2014) Oxford Journal of Legal Studies, Forthcoming

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304794

This review article offers a European perspective on the pluralistic, principles-based model of intellectual property (IP) advanced by Robert Merges in his book *Justifying Intellectual Property*. After introducing Merges's model and theory of IP with reference to IP theories generally, other pluralistic legal models, and patterns of judicial reasoning in the patent and copyright fields, the article argues that European jurisprudence offers broad support for Merges's operational model of IP, while also challenging certain aspects of his wider analysis. They include his 'one size fits all' foundational theory of IP, his account of key IP rules and practices, and his choice and conception of IP's midlevel principles. Through this critique the article draws attention to the utilitarian bias of Merges's model; a bias which undermines its pluralistic claims, in part by undermining Merges's own foundational theory of IP. The result is to underline the limits of a regime unconcerned with its own normative basis, and the need for more rather than less discussion of IP theory, including more work of the type which Merges's book undertakes.

Make no little plans: response to Ted Sichelman, Purging Patent Law of 'Private Law' Remedies

Thomas F. Cotter

Texas Law Review, Vol. 92, 2013 (Forthcoming)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298680

This essay responds to Professor's Ted Sichelman's forthcoming article, *Purging Patent Law of "Private Law" Remedies*, 91 *Tex. L. Rev.* ___ (2013), which argues that courts should abandon the conventional view of patents as private rights for which private-law remedies are appropriate, and instead should award damages and injunctions only when, and to the extent that, doing so serves the public interest for which patents are granted in the first place. Although some of Sichelman's specific recommendations are well within the mainstream of contemporary patent scholarship, in particular some of his recommendations relating to permanent injunctions and enhanced damages, he also argues that courts should award monetary relief for patent infringement so as to align *ex ante* incentives with *ex post* rewards; this could mean awarding either more or less than would be necessary to restore the patentee to the position it would have occupied but for the infringement (the traditional benchmark for compensatory damages). Although I remain skeptical that such a system could ever work in the real world, Sichelman defends his thesis with aplomb – and recognizes its practical infeasibility in the near term. In addition, his analysis suggests that at least in industries in which patents are unlikely to play a major role in inducing invention, disclosure, or commercialization, efforts to ensure that defendants restore patentees to the position they would have occupied, but for the infringement, may not be worth the candle; some risk of undercompensation may be more tolerable than is commonly assumed. I will suggest that this implication, if valid, possibly could have some practical payoff even in the short run.

A look at both sides of the coin: investigating the protective and the disclosure effect of patenting

Diana Heger and Alexandra Karin Zaby

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304648

This paper presents a theoretical and empirical investigation of the two basic effects of patenting: the positive effect of temporarily mitigating competition, and the negative effect of mandatory disclosure of a patent application. Providing empirical evidence for the presented theoretical results we find that (i) a technological lead and the propensity to patent are negatively related as opposed to common intuition, (ii) in industries with imperfect appropriability in case of secrecy the extent of the technological lead is positively associated with the propensity to patent, and that (iii) the intensity of patent protection mitigates the competitive threat a patentee faces.

Reasonable royalties and the calculation of patent damages: reflections and recommendations for a fair and adequate calculating basis of reasonable royalties in terms of harmonization of China-Taiwan regional patent laws

Chung-Lun Shen

Chicago-Kent Journal of Intellectual Property, Vol. 12(1), pp. 156-176, 2013

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296075

Among the substantive issues of patent law, patent enforcement has received increasing focus in the global community. Owing to the intangibility of patents, and in view of the symmetry of exclusive rights with damages, courts and juries have difficulty calculating appropriate damages for patent infringement. Compared with the traditional calculation of patent damages, which rests upon the patentee's losses or infringer's profits, the basis of reasonable royalties provides a flexible concept for accommodating damages when the patentee cannot adequately prove damages, especially, when the patented or infringing products were not available in the market at the time of infringement. Until the amendment of Taiwan's Patent Act in 2011, the authority of reasonable royalties as patent damages was not officially codified. China's Patent Act had recognized the remedy of patent infringement subject to reasonable royalties since 2000. In light of the development of comparative patent laws and original jurisprudence guiding patent law, the provisions of Taiwan's Patent Act and China's Patent Act concerning reasonable royalties as patent damages still have room for refinement. Consequently, this article attempts to establish an optimal model for applying related provisions in future judicial practice. The proposed model could contribute a common guideline for the determination of reasonable royalties to the regional harmonization of patent laws in Taiwan and China.

And how: Mayo v. Prometheus and the method of invention

Jacob S. Sherkow

Yale Law Journal Online, Vol. 122, p. 351, 2013

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296033

The Mayo Court's novel test for patent eligibility — whether or not an invention involves “well-understood, routine, conventional activity, previously engaged in by researchers in the field” — focuses on how an invention is accomplished rather than what an invention is. That concern with the method of invention poses several normative, statutory, and administrative difficulties. Taken seriously, the “how” requirement will likely have broad effects across all levels of patent practice.

EU perspectives on employees' inventions

Marie-Christine Janssens

M. Pittard, A. Monotti and J. Duns (eds), Business Innovation and the Law: Perspectives from Intellectual Property, Labour, Competition & Corporate Law, Edw. Elgar Publ., Cheltenham, UK, 2013, 11-130

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287765

For some decades, there has been a growing emphasis on the importance of intellectual property rights in general, and patents in particular, as a tool of economic strategy and competitiveness. More than 90% of the patents granted in industrialized countries originate from employee inventors. This reality has prompted legislators in most European Member States to promulgate laws that regulate the matter of employee inventions. This paper aims, in a first part, at describing the characteristics of the legislative regime in several EU Member States. It is shown that, save for university inventions, the legislative landscape has not undergone fundamental changes during the past decades. In a second part, the paper discusses some attempts that have been made in the past all of which have failed at an early stage. In a last part, the paper criticizes the current reticence demonstrated by the European legislator. The viewpoint that existing differences between member states' laws on employees' inventions are not likely to have an impact on innovation or on the conditions of competition seems short-sighted. The paper shows that a coherent regulatory framework that takes the trend towards Europeanization is not illusive and may have many benefits for intra-European relationships. It is argued that such a goal is feasible even though the specific details of the current statutes vary from Member State to Member State.

Innovation and incarceration: an economic analysis of criminal intellectual property law

Christopher J. Buccafusco and Jonathan S. Masur

Southern California Law Review (2014, Forthcoming)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297488

The scope and enforcement of intellectual property (IP) laws are becoming salient, for the first time, to a wide cohort of U.S. and international communities. National and international legislation, including the Stop Online Piracy Act (SOPA), the PROTECT IP Act (PIPA), and the Anti-Counterfeiting Trade Agreement (ACTA), have generated protests online and in the streets by people who are concerned about the expansion of IP rights. Common to each of these proposals was an expansion in the use of criminal sanctions to deter IP violations. Many copyright owners and the associations that represent them support criminal enforcement of IP, including the use of imprisonment, to combat the threat of increased IP piracy on the internet and throughout a globalized economy. Others, including a heterogeneous coalition of scholars, activists, and internet based companies like Google and Wikipedia, fear that using criminal sanctions to protect IP will expand already overgrown rights and chill valuable expressive and inventive behavior.

Copyright Law

Fair use for the rich and fabulous

Andrew Gilden and Timothy Denny Greene

University of Chicago Law Review Dialogue, Vol. 80, 2013

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304043

In this short essay, we identify some potential drawbacks to an audience-centered approach to copyright's fair use doctrine. In its recent decision in *Cariou v. Prince*, the Second Circuit rejected the notion that famous appropriation artist Richard Prince must specifically intend to critique or comment on the copyrighted photos he appropriates. Although *Cariou* provides a welcome shift away from the author's subjective intent and towards the perceptions of a reasonable audience, we are concerned that this shift may not be enjoyed equally by all would-be fair users. Fair use ensures that copyrighted works can serve as "raw materials" for legitimate artistic endeavors, but an audience's perceived distinctions between legitimate and illegitimate authorship may unduly hinge upon the user's wealth, fame and social status. We explore this dynamic by juxtaposing *Cariou* against the similar facts and very different result in the Second Circuit's early decision in *Salinger v. Colting*.

Copyright and cultural capital

Xiyin Tang

Rutgers Law Review, Forthcoming

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302674

This Article explores the oft-ignored relationship between copyright law and class stratification. Copyright law widens and perpetuates the gulf between the elite and the masses in three ways. First, within copyright doctrine, the values of originality, lone artistic creation, and a fetishism of the original over the copy (evident in the Visual Artists Rights Act of 1990) align with the American high-brow's claim to avant-garde newness, utter originality, and the demoted status of art forms dependent on copies (chromolithography, photography, industrial arts). Second, copyright's legal remedies — including control over rote copying and the derivative works right — facilitate the high-brow's obsession with limited production and against appropriation ("watering down") by the middle brow and low brow. Third, a copyright holder's monopoly power puts a high price on cultural fluency that may be impossible to achieve for those in emerging economies and the less affluent. In this way, copyright law incorporates, perpetuates, and exacerbates the cultural and capitalist class divide. As the late '80s and early '90s gave way to what I term a reverse-culturalization, or, the high-brow appropriating from the low-brow and making it high art, the relevance of copyright to the domestic artistic elite has diminished. Instead, copyright is now being deployed by big Hollywood studios and the recording industry as a means of denying equal access to knowledge in foreign countries. If the sociologist Pierre Bourdieu had written many years ago that it is only the rich, upper-class who can afford to engage in limited production or the coded literary language of high-brow culture, we are now seeing that adage playing itself out on the global arena in relation to culture as a whole — with copyright as its means of separating the cultural elite from the culturally less affluent.

Copyright and the profitability of authorship – evidence from payments to writers in the Romantic Period

Megan MacGarvie and Petra Moser

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296095

Proponents of stronger copyright terms have argued that stronger copyright terms encourage creativity by increasing the profitability of authorship. Empirical evidence, however, is scarce, because data on the profitability of authorship is typically not available to the public. Moreover at current copyright lengths of 70 years after the author's death, further extensions may not have any effects on the profitability of authorship. To investigate effects of copyright at lower pre-existing levels of protection, this chapter introduces a new data set of publishers' payments to authors of British fiction between 1800 and 1830. These data indicate that payments to authors nearly doubled following an increase in the length of copyright in 1814. These findings suggest that – starting from low pre-existing levels of protection – policies that strengthen copyright terms may, in fact, increase the profitability of authorship.

The economics of copyright levies on hardware

Patrick Legros and Victor A. Ginsburgh

Review of Economic Research on Copyright Issues, 2013, 10(1), 20-35

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305548

The fight against illegal music downloading has taken many forms. Beside legal prosecution (Hadopi in France, for example), many countries have chosen to tax blank tapes and CDs, both to reduce their use for illegal copying, but also to redistribute the proceeds to content providers. This has become less effective, since now illegal copying is stored on hardware devices, such as smartphones, computers, MP3 players, and external hard disks. We provide an economic analysis of the effects of copyright levies on hardware used to access original content. A first effect is to decrease the consumption of both illegal and legal content. We show that in a static model, content providers can hardly be compensated, and therefore are made worse off by the levy. We also consider a dynamic model where current sales contribute to the reputation of the content provider, and to his future revenues. A levy on hardware tends to penalize 'young' content providers in terms of reputation acquisition.

IP & Biotechnology

From HIV to NCDs: will patent fights again spur better treatment access?

Thomas J. Bollyky

PLOS Medicine, Vol. 10, No. 7, July 2013

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305589

A decade ago, a crisis over access to HIV/AIDS treatment was the catalysis for elevating that disease and the other infectious diseases disproportionately affecting the world's poor as a foreign policy issue, mobilizing billions in global health aid. Now, a new controversy over patented medicines for cancer, diabetes and other noncommunicable diseases (NCDs) is emerging, particularly in middle-income countries. The intergovernmental institutions designated to address trade and global health concerns are proving unable to resolve this conflict. Alternatives to intellectual property, such as prizes or R&D treaties, have not attracted significant donor and multilateral support. Addressing the emerging NCD treatment-

access crisis will require another transformation in global health, this time focusing on low-cost interventions and patient-centered, rather than country-focused, strategies.

Other IP Topics

Patent PR

Eric L. Lane

Working Paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2293087

As debates about the patent system have spread beyond the legal community into the public square, there has been an increase in mainstream media coverage of patent issues, including PR content generated by patent holders. However, we know very little about the subject matter of this media content and even less about its potential effects on public opinion and patent policy. This study begins to fill these gaps by building and analyzing a data set of patent-focused press releases generated by patent holders, or their licensees, and cataloging the subject matter contained therein. It offers a taxonomy of patent-focused PR content and calculates the relative proportions of patent PR relating to the top-level categories of Prosecution; Litigation; Transaction; Post-Grant Procedure; Honors/Accolades; Patented or Patent-Pending Product; ANDA Patent Challenge; and Miscellaneous. Within the top-level categories, this study calculates the relative proportion of second-level subject matter categories. In the Prosecution category, for example, this study calculates the proportion of press releases involving the categories of Patent Granted; Notice of Allowance; Application Filed; Application Pending; Application Accelerated; Response to Office Action Filed; Application Withdrawn from Issue; and Interference Declared. The Litigation category includes, inter alia, the categories of Settlement; Lawsuit Filed; Court Order or Ruling; Verdict; Comment; and Appealed. The study also analyzes patent PR by industry to determine which industries or technology fields generate the most patent-focused PR content and which subject matter areas are favored by particular industries. The data presented in this study enable us to determine which patent matters technology firms believe are important to highlight and provide a baseline for subsequent inquiries into how patent PR may affect policy and public opinion of patents and patentees.

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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