



IP Literature Watch

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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

A broader look at patent royalties and antitrust

Erik N. Hovenkamp (Northwestern University, Department of Economics)

Working paper

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657243

It is well known in antitrust economics that competitors can rely on patent licensing with high royalties as a surrogate for price fixing. This paper addresses a number of alternative situations in which patent royalty agreements may raise antitrust concerns, even if the royalty rate is ostensibly reasonable. For example, a royalty charged to a competitor creates an “alignment effect” by giving the licensor a stake in its rival’s success. This is the same problem that arises when a firm buys stock in a competitor (a potential antitrust violation). By aligning the firms’ interests, this blunts competition and benefits both parties independently of the underlying exchange. Thus, for example, if a firm charges a rival \$5 per unit for an invention that lowers production costs by the same \$5, then even the rival-licensee strictly benefits, because its net costs are unchanged, but now the market is less competitive. More generally, the alignment effect may lead welfare to decline overall even if the royalty rate is strictly lower than the licensing value (e.g. \$4), just as a merger may reduce welfare even if it produces some cost efficiencies.

Additionally, offsetting (i.e. reciprocal) license payments between competitors often warrant scrutiny even if each royalty appears individually reasonable. Even under cross-licensing, offsetting payments are never necessary for the parties to reach a mutually-beneficial agreement, which is generally the relevant antitrust question. Instead, the practical effect of offsetting royalties is to replicate a collusive agreement to restrain consumer pass-through, ensuring the firms retain more of the licensing surplus. The results shed new light on the competitive impact of patent pools, which typically create widespread royalty offset and alignment between competing members, even if patents are complementary.

A dose of competition: EU antitrust law in the pharmaceuticals sector

Leigh Hancher (Tilburg Law and Economics Center (TILEC); Tilburg Law School)

Wolf Sauter (Tilburg Law and Economics Center (TILEC); Dutch Healthcare Authority; Tilburg Law School)

TILEC Discussion Paper No. 2015-017

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655691

In the pharmaceuticals sector there is an inherent tension between intellectual property rights and antitrust. This paper examines this tension over the past 10 years since modernisation of EU competition law. It looks at three types of problems: (i) restrictions on parallel imports; (ii) abuse of administrative procedure; and (iii) pay for delay cases. This overview shows that the European Commission is now especially active in areas (ii) and (iii) and generally relies on a more formalistic approach of finding restrictions by object instead of using economic arguments to demonstrate restrictions by effect. The by object approach is supported by the EU Courts. Also, the molecule (active ingredient) is often regarded as the relevant product market, facilitating a finding of dominance. Some national competition authorities have followed in the footsteps of the Commission but on the whole they are less active, for instance on pay for delay. This may be because the EU Courts have yet to rule on this type of case. For pharmaceutical companies the net result is that they cannot assume their intellectual property rights will stand in the way of a finding of antitrust infringement and their behaviour will be scrutinised closely.

Comment on the Canadian Competition Bureau's Draft Updated Intellectual Property Enforcement Guidelines

Joshua D. Wright (George Mason University School of Law)

Douglas H. Ginsburg (U.S. Court of Appeals for the DC Circuit; George Mason University School of Law)
George Mason Legal Studies Research Paper No. LS 15-14

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655754

This comment is submitted in response to the Canadian Competition Bureau's (the Bureau's) draft stage 2 update of its Intellectual Property Enforcement Guidelines (Draft Updated Guidelines). This comment addresses five issues in the Draft Updated Guidelines: (1) product switching in the context of pharmaceutical patents; (2) settlement of patent infringement litigation between competitors, commonly referred to as "reverse-payment settlements"; (3) deceptive failure to disclose patents essential to a standard, commonly referred to as "patent ambush"; (4) reneging on a commitment to license a standard-essential patent (SEP) on fair, reasonable, and nondiscriminatory (FRAND) terms; and (5) seeking injunctive relief against infringement of a FRAND-encumbered SEP.

Comment on the Japan Fair Trade Commission's Draft Partial Amendment to the Guidelines for the Use of Intellectual Property under the Antimonopoly Act

Joshua D. Wright (George Mason University School of Law)

Douglas H. Ginsburg (U.S. Court of Appeals for the DC Circuit; George Mason University School of Law)
George Mason Legal Studies Research Paper No. LS 15-13

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2655685

This comment is submitted in response to the Japan Fair Trade Commission's (JFTC's) request for public comments on the Draft Partial Amendment to the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (Draft Amendment). The Draft Amendment specifies that seeking injunctive relief to

enforce a standard essential patent (SEP) encumbered by a commitment to license on fair, reasonable, and nondiscriminatory (FRAND) terms against a party that is willing to take a license on FRAND terms “may” constitute an unlawful exclusion of business activities in violation of Article 3 of Japan’s Antimonopoly Act (AMA) (Draft Amendment Part 3(1)(e)) or an unfair trade practice in violation of Article 19 of the AMA (Draft Amendment Part 4(2)(iv)).

The Draft Amendment is premised upon the assumption that seeking injunctive relief “generally makes it difficult to research & develop ... products adopting the standards,” which in turn deters widespread adoption of standards. This assumption lacks empirical support. Further, as we explain, ordinary contract law makes an AMA sanction unnecessary to deter any instances of anticompetitive patent holdup that might arise; indeed, an AMA sanction is likely to reduce incentives to innovate and deter participation in standard setting, thereby depriving consumers of the substantial procompetitive benefits of standardized technologies. For these reasons, we respectfully recommend that Parts 3(1)(e) and 4(2)(iv) be deleted in their entirety. Should the JFTC decide to retain these provisions, however, they should at the very least be amended to limit liability to situations when there is proof that a FRAND-encumbered SEP holder has engaged in patent “holdup,” i.e., that the patent holder used the threat of injunctive relief to demand supra-competitive royalties.

IP & Litigation

Reverse payment patent settlements in the European Union and the United States

Damien Geradin (George Mason University School of Law; Tilburg University – Tilburg Law and Economics Center (TILEC))

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

Graham Safty (Independent)

George Mason Legal Studies Research Paper No. LS 15-22

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662575

In recent years, reverse patent settlement agreements — whereby a patent holder pays or gives other forms of value to an infringer in order to avoid or to settle patent litigation — have raised considerable debate in the pharmaceutical field in both the United States and the European Union, with the antitrust authorities and courts reaching different conclusions as to their compatibility with competition rules. In the United States, the Supreme Court addressed this matter in the Actavis case, in which it determined that reverse patent settlements should be assessed under the “rule of reason.” In contrast, the European Commission in its Lundbeck decision considered that reverse patent settlements were per object restrictions of EU competition law and therefore the effects of such agreements did not need to be analyzed. This decision is, however, being appealed before the General Court of the EU. In its more recent Servier decision, the Commission has modified its approach as, while it declared that the reverse patent settlements in question were per object restrictions, it also demonstrated that these agreements had anticompetitive effects. Against this background, we contrast the approaches taken in the US and the EU with respect to reverse patent agreements, and assess which approach makes the most sense. We also address a number of important questions, which are being looked at by lower courts in the US and may also be relevant in the EU.

The Supreme Court's quiet revolution in induced patent infringement

Timothy R. Holbrook (Emory University School of Law)

Notre Dame Law Review, Forthcoming

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2653077

The Supreme Court over the last decade or so has reengaged with patent law. While much attention has been paid to the Court's reworking of what constitutes patent eligible subject matter and enhancing tools to combat "patent trolls," what many have missed is the Court's reworking of the contours of active inducement of patent infringement under 35 U.S.C. § 271(b). The Court has taken the same number of § 271(b) cases as subject matter eligibility cases – four. Yet this reworking has not garnered much attention in the literature. This article offers the first comprehensive assessment of the Court's efforts to define active inducement. In so doing, it identifies the surprising significance of the Court's most recent case, *Commil USA, LLC v. Cisco Systems, Inc.*, where the Court held that a good faith belief on the part of the accused inducer cannot negate the mental state required for inducement – the intent to induce acts of infringement. In so doing, the Court moved away from its policy of encouraging challenges to patent validity as articulated in *Lear, Inc. v. Adkins* and its progeny. This step away from *Lear* is significant and surprising, particularly where critiques of the patent system suggest there are too many invalid patents creating issues for competition. This article critiques these aspects of *Commil* and then addresses lingering, unanswered questions. In particular, this article suggests that a good faith belief that the induced acts are not infringing, which remains as a defense, should only act as a shield against past damages and not against prospective relief such as injunctions or ongoing royalties. The courts so far have failed to appreciate this important temporal dynamic.

IP Law & Policy

Three quasi-fallacies in the conventional understanding of intellectual property

Jonathan Barnett (USC Gould School of Law)

Journal of Law, Economics & Policy, 2015, Forthcoming

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656368

In recent years the Supreme Court, Congress and the White House have taken actions designed to weaken patent rights. These actions track widely expressed views among legal and some economics scholars that cast doubt on the social value of robust intellectual property rights. These views rely on some combination of three core propositions: (i) IP rights raise entry barriers and increase costs to users; (ii) innovation often proceeds without IP rights; and (iii) IP rights usually or often entrench large incumbent firms. Using theoretical argument and empirical evidence, I show that each of these propositions is unlikely to be true in a significant set of commercially relevant circumstances. IP rights can reduce entry barriers and users' costs relative to the organizational and transactional structures that markets would adopt without those rights. Environments that support innovation without IP rights typically rely on alternative mechanisms for securing exclusivity at some point in the relevant bundle of products and services, potentially imposing access costs that would not exist under a robust IP regime. With the exception of the pharmaceutical industry, large integrated incumbents in technology markets usually or often oppose expanding IP rights while the opposite is often true of unintegrated, R&D - intensive (and often smaller) firms that have difficulty funding the innovation and commercialization process without IP rights. These revised propositions cast doubt on the IP-skeptical presumptions that tend to dominate

scholarly, policy and popular discussions of IP rights and drive support for legislative and judicial reforms to weaken IP rights.

Taking patents

Gregory Dolin (University of Baltimore – School of Law)

Irina D. Manta (Hofstra University – Maurice A. Deane School of Law)

Washington and Lee Law Review, Forthcoming

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652526

The America Invents Act (AIA) was widely hailed as a remedy to the excessive number of patents that the Patent & Trademark Office issued, and especially ones that would later turn out to be invalid. In its efforts to eradicate “patent trolls” and fend off other ills, however, the AIA introduced serious constitutional problems that this Article brings to the fore. We argue that the AIA’s new “second-look” mechanisms in the form of Inter Partes Review (IPR) and Covered Business Method Review (CBMR) have greatly altered the scope of vested patent rights by modifying the boundaries of existing patents. The changes in the boundaries of the patent grant made it significantly more likely that the patent owner would see his patent invalidated. This new state of affairs has already reduced the value of some patents that were obtained before the AIA became effective, and further declines will likely follow. We show on the basis of constitutional takings jurisprudence that the loss of value that some patent owners have suffered as a result of the new procedures — even if their patents have not been specifically subjected to them — potentially compare with physical takings and definitely fall under the umbrella of regulatory takings. The way to remedy these failings is for the government either to change its procedures or provide just compensation to the patent owners that received patents from the PTO before the enactment of the AIA.

Specialized standards of review

Jonas Anderson (American University – Washington College of Law)

Stanford Technology Law Review, Vol. 18, No. 151, 2015

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661017

The applicable standard of review on appeal is governed by a simple rule: appellate courts review questions of law de novo, questions of fact for “clear error,” and questions of discretion for “abuse of discretion.” Despite the apparent simplicity of the rule, its application has been uneven, to state it mildly. Scholars have written extensively about the application of the rule, but have yet to consider whether the traditional rule of “deference” should be altered when the appellate court is a specialized court.

Despite the dearth of legal scholarship on specialized deference, the Supreme Court is keenly interested in the topic. Recently, the Court held in two cases (both of which arose from the U.S. Court of Appeals for the Federal Circuit, a specialized court of appeals that hears all patent appeals) that specialized courts do not enjoy specialized standards of review. This Essay supports those decisions.

Furthermore, this Essay marshals additional support for the Court’s decisions in three ways. First, this Essay argues the Federal Circuit’s use of de novo review has had a deleterious effect on the patent system. The use of de novo by the Federal Circuit has increased litigation, demoralized judges, and led to inferior decisions. Second, it offers an alternative to de novo review that is based in traditional principles of appellate practice. The Essay concludes by arguing for a reduced role for stare decisis in standard of review cases.

Patent ‘trolls’ and claim construction

Greg Reilly (California Western School of Law)

91 Notre Dame Law Review (2016 Forthcoming)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650221

This Essay explores the largely overlooked relationship between claim construction and patent assertion entities (patent “trolls”), finding that claim construction problems and trends benefit patent assertion entities. First, the Federal Circuit is deeply divided as to the proper approach to claim construction. This split is a significant contributor to uncertain patent scope, which is widely-recognized as a core reason for the rise and success of patent assertion entities. Second, case law and commentary increasingly endorse an approach to claim construction that relies on the “general meaning” in the technical field with limited reliance on the patent itself. This approach increases the breadth and uncertainty of patent scope, the exact conditions under which patent assertion entities thrive. Unsurprisingly, patent assertion entities often rely on “general meaning” arguments. Third, the Supreme Court’s recent adoption of a more deferential standard of review for claim construction in *Teva v. Sandoz* is widely praised. However, because patent assertion entities file in favorable district courts, like the Eastern District of Texas, deferential review increases both the benefits patent assertion entities receive from favorable districts and their incentive to file in those districts.

If patent assertion entities are as problematic as widely thought, these claim construction problems and trends warrant reconsideration. Some may argue that current claim construction rules and trends are warranted despite their positive impact on patent assertion entities. And other means may exist for combatting patent assertion entities without altering claim construction rules or trends. But the positive effects for patent assertion entities must at least be factored into any cost-benefit analysis of claim construction rules. Moreover, the fact that current claim construction rules and trends produce the conditions under which patent assertion entities thrive suggest that patent assertion entities may be a symptom of larger problems with claim construction doctrine.

Copyright Law

The Australia-US Free Trade Agreement’s impact on Australia’s copyright trade policy

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

Australian Journal of International Affairs, Vol. 69, No. 5, pp. 538–558, 2015

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656945

The Australia-US Free Trade Agreement (AUSFTA) required extensive changes to Australian copyright law. This paper assesses the impact of these changes one decade on. It considers, first, whether the costs and/or benefits predicted in 2004 have eventuated, finding clear evidence that AUSFTA has undesirably constrained domestic copyright policy, but no clear evidence either of the feared financial costs to society, or, importantly, the touted benefits to copyright owners. The most significant impact of AUSFTA’s copyright provisions, however, appears to have been their impact on Australia’s copyright trade policy. Pre-AUSFTA, Australia promoted multilateral standards and mostly sought to comply with, but not exceed international IP standards. Post-AUSFTA, Australia has pursued an approach akin to that of the US: endorsing international copyright rules that are significantly stronger, and more detailed. The paper queries whether this shift has been in Australia’s national interest, and raises interesting questions

of path-dependence in policymaking and trade negotiations that warrant more, and broader attention in the literature.

IP & Asia

The incremental development of the ASEAN – China strategic intellectual property partnership

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

HANDBOOK ON INTELLECTUAL PROPERTY LAW IN SOUTHEAST ASIA, Christoph Antons, ed., Edward Elgar Publishing, 2016

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657358

In November 2000, a few years after the Asian Financial Crisis, Premier Zhu Rongji announced China's interest in developing a free trade area with ASEAN within a decade. Since then, the two trading powers have established a framework agreement as well as agreements on trade in goods, trade in services and investment. They have also developed memoranda of understanding on cooperation in the fields of agriculture, sanitation and phytosanitation, intellectual property, and standards, technical regulations and conformity assessment. Taken together, these instruments help build the ASEAN–China Free Trade Area (ACFTA) to serve important economic, geopolitical and strategic goals.

This chapter focuses on the cooperation between ASEAN and China in the intellectual property arena. It begins by recounting the historical development of ACFTA. It also briefly examines the provisions in the Memorandum of Understanding on Cooperation in the Field of Intellectual Property. The chapter then discusses the ongoing intellectual property norm-setting activities in Asia, focusing in particular on the negotiation of the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership. It further explores China's potentially changing approach to negotiating free trade agreements. This chapter concludes with a discussion of the benefits and drawbacks of a strategic intellectual property partnership between ASEAN and China.

Other IP Topics

From meerkat to periscope: does intellectual property law prohibit the live streaming of commercial sporting events

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

Columbia Journal of Law & the Arts, Vol. 39, No. 4, 2016

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2661875

This article discusses the potential impact of live streaming on the commercial sports industry and analyzes whether commercial sports enterprises have the legal power to stop live streaming of professional and collegiate sporting events. Part I of this article explores the history of live streaming commercial sporting events. Part II analyzes whether courts are likely to hold live streamers directly liable for their actions under federal copyright law. Part III discusses whether courts are likely to hold manufacturers of live streaming applications secondarily liable for copyright infringement. Part IV assesses the legality of live streaming under right of publicity law. Part V then analyzes the legality of live

streaming under unfair competition doctrines. Finally, Part VI concludes that current federal and state laws adequately address all meaningful public policy concerns related to the live streaming of commercial sporting events.

Trolls or toll-takers: do intellectual property non-practicing entities add value to society?

Samuel F. Ernst (Chapman University, The Dale E. Fowler School of Law)

Chapman Law Review, Vol. 18, No. 3, 2015

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2650055

There are few areas of patent law more contentious than the dispute over the social utility of “non-practicing entities,” or (if you will excuse the expression) “patent trolls.” Whether non-practicing entities add value to society is a topic of much debate, and the focus of the 2015 Chapman Law Review Symposium.

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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