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From the Editor
The Intellectual Property Literature Watch contains a selection of the most recent working papers, published reports, and books that are relevant to the understanding of intellectual property rights (IPR) issues.

Dhiren Patki, Editor
dpatki@lecg.com

Contact LECG
For more information on the issues discussed in this newsletter, please contact:

Anne Layne-Farrar
Chicago
ALayne@lecg.com
312.267.8243

IP & PATENTS

How SME's Exploit Their Intellectual Property Assets: Evidence from Survey Data

Gaétan De Rassenfosse
Small Business Economics, forthcoming
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726208)

This paper seeks to understand how motives to patent affect the use of the patent portfolio with a particular focus on motives aimed at the monetization of intellectual property (IP). The analysis relies on data from an international survey conducted by the European Patent Office (EPO). The main results can be summarized as follows. First, small and medium-sized enterprises (SMEs) exhibit a much stronger reliance on 'monetary patents' than large companies and nearly half of the SMEs in the sample patent for monetary reasons. Second, SMEs tend to use their patents more actively than large firms. Third, smaller companies generally have a higher proportion of their portfolio that is licensed but the licensing rate is significantly higher in the U.S. An American SME is twice as likely as a European SME to have a high share of its portfolio that is actually licensed, witnessing a fragmented market for technology in Europe.

A Uniform Framework for Patent Eligibility

Efthimios Parasidis
Tulane Law Review, Vol. 85, 2010
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718742)

There is a need to clarify patent law so as to advance resolution of its most fundamental question – delineating the categories of subject matter that are eligible for patent protection. Coupled with the active role the Supreme Court has taken in examining this precise issue, individuals and non-profit organizations have galvanized a public discourse through constitutional challenges to the issuance of various biotechnology patents. Despite a statutory framework that has remained constant since 1793, courts have been unable to create a comprehensive test for determining patent-eligible subject matter that accurately embodies the foundational principles that underlie the federal grant of patents. I argue that the proximate cause of the lack of an appropriate framework is the failure of courts to clearly define the statutory categories and the absence of a technology-agnostic method of analyzing whether an invention claims ownership over a product of nature. This Article sets forth a uniform framework that addresses patent-eligible subject matter through the creation of a practical methodology that focuses on these two principles. The advantages of the proposed framework are highlighted through the application of the framework to traditional inventions and emerging biotechnologies.

Policy Levers Tailoring Patent Law to Biotechnology: Comparing European and US Approaches

Geertrui Van Overwalle
University of California Irvine Law Review, forthcoming
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720875)

In their animated book 'The Patent Crisis and How the Courts can Solve It', Dan Burk and Mark Lemley give an account of their quest into the judicial treatment of patents in different industry sectors. They present an in-depth commentary on industry specific differences in the patent system from both a legal and economic perspective. The present article attempts to enrich the conversation by sketching the situation in Europe and providing an interesting measure for comparison. In doing so, the paper mainly focuses on the legal situation, and does not enter into the economics discussion.

The paper concludes that current European patent law holds substantial potential for technology-specific application. Even though the European Convention (EPC) may have been conceived at its inception as a nominally neutral patent statute, our study

clearly reveals that substantial discretion to differ the patent system by industry, and in particular to tailor it to the specificities of the biotechnology sector, is built into the system over the years. Although the EPC was introduced as a unitary regulatory tool, intended to operate the same way across technologies, EPO case law has shown increased interest and ability in tailoring patent law to the needs of distinct technology sectors, and in particular the biotechnology sector.

Given the civil law tradition in which European patent law operates, a prevalence of well articulated macro rules openly set forth by the legislature was anticipated. However, a clear predominance of jurisprudential micro policy levers has emerged. Not all European policy levers uncovered in the present study, come to the advantage of the biotechnology industry. Closer analysis of the various policy levers, reveals that rather than systematically expanding the patent system to accommodate biotechnology inventions and stimulating innovation in the biotechnology sector, some policy levers narrow down the patent potential for biotechnological inventions, in an attempt to give echo to concerns of public health and ethical conscience.

An Economic Defense of Flexibility in IPR Licensing: Contracting Around "First Sale" in Multilevel Production Settings

Anne Layne-Farrar

Working Paper

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734865)

The legal doctrine of first sale (or exhaustion for patents) dictates that the first sale of any good (intermediate or final) that embodies licensed IPR exhausts the holder's rights. Thus, a patent holder is held to licensing just one party in a good's production chain and an original copyright holder cannot affect the resale of a copyrighted good. The Supreme Court's decision in the Quanta case strengthened the patent exhaustion rule, but the ruling appears to leave open the possibility that the parties could contract around patent exhaustion. In this paper, the author presents an economic argument in support of such contractual flexibility in situations involving intermediate production goods. In particular, she argues that under several real world circumstances the ability to license more than one party in a vertical production process makes economic sense and does not result in anticompetitive harm. Concerns such as "double dipping", raised during Quanta, do not hinge on multi-level licensing. Thus, as long as the parties involved can be presumed to understand the terms and conditions, they should be free to contract around a default "first sale" rule.

Turning Patent Swords into Shares

Geertrui Van Overwalle

Science, Vol. 330, 2010

The present paper discusses the decision earlier this year of Judge Robert W. Sweet of the District Court for the Southern District of New York to deny patent protection for isolated human genes and associated diagnostic methods. The case related to genetic tests for familial breast and ovarian cancer developed by the company Myriad Genetics. The product claims (used to describe the compound in question) were directed to isolated DNA containing human BRCA1 and BRCA2 gene sequences. The method claims (used to describe the activity exercised upon the compound) covered the process of identifying certain mutations in the BRCA genes. The court held that the claimed isolated DNA "is not markedly different from native DNA as it exists in nature" and constitutes unpatentable subject matter. The court also ruled that the claimed method is "directed only to the abstract mental process of comparing or analyzing gene sequences," fails the so-called "machine or transformation test" and is unpatentable as well.

The case hit the biotech community as a shock-wave as it is a U-turn in the 30 year old US patent practice to grant patents for human genes as a matter of routine. Although the Myriad decision has been appealed and may be reversed in light of the heavily criticized transformation test in the Bilski case or arguments set forth by the U.S. Department of Justice, many public-

policy issues relating to diagnostic gene patenting will persist. In light of the controversies surrounding gene patents and the growing discontent with some undesirable effects of the current patent system, the paper analyses a series of measures to meet the alleged problematic impact of patents in the area of human genomic science.

The paper discusses compulsory licenses, diagnostic-use exemptions, "march in" rights, and carefully examines the exclusion of patents for diagnostic methods, the exclusion of gene patents altogether and purpose-bound protection regimes. The paper also explores specially tailored genetic patent pools and clearinghouses to navigate through the genetic patent landscape.

The paper concludes that in order to assist modern patent law in achieving its major objectives and in coping with the various public-policy concerns, patent rights need to be reconceptualized. Especially in the field of healthcare, a patent can no longer be viewed as a title giving (almost) complete freedom to exclude others from use, but rather as a temporary permit to exploit monopoly rights under fair and reasonable conditions, investing technology owners with the authority to invent and share, in other words, as a "dutybearing privilege".

The Role of the Patent System in Stimulating Innovation and Technology Transfer for Climate Change (Including Aspects of Licensing and Competition Law)

Hee-Eun Kim

Working Paper

The world is increasingly facing the adverse impact of climate change. In this context, what is the role of intellectual property (IP) for stimulating the innovation and technology transfer that are considered essential to resolving this global issue?

Taking the existence of the IP system as a foundation, this paper aims to provide a comprehensive review of pragmatic IP-based options in the multilateral climate change regime. The paper does so principally by addressing the possibilities afforded by three components of the patent system: patent law, patent policy and patent information. Complementing these public options are technology transfer initiatives by IP communities, some of which the paper also describes, together with associated IP issues. In the green technology context, the paper also looks at competition law as a means for balancing the exclusivity of IP and for safeguarding dynamic efficiency for future innovation.

In providing the above description and analysis, this paper identifies a number of potential controversies at the crossroads of IP and climate change, for example, compulsory licensing for climate change, patent offices' preferential treatment policy for 'green' technology and TRIPS compliance, consideration of 'greenness' in substantive patent law, and emerging antitrust disputes affecting green technology sectors.

The paper illustrates the need for a multifaceted approach to make effective use of IP for combating climate change. Technical progress can be rooted in a range of areas of scientific experimentation; likewise, policy solutions for climate change can come from complementary sources ranging from laws and regulations to tailored means of organizing patent information. Indeed, no matter how such options are combined and whether they are government regulated or privately initiated, the core promise of IP in this context may well be the optimal provision of information to technology users.

On the Price Elasticity of Demand for Patents

Gaétan De Rassenfosse and Bruno Van Pottelsberghe de la Potterie

Oxford Bulletin of Economics and Statistics, forthcoming

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726211)

This paper provides an analysis of the impact of patent fees on the demand for patents. It presents a dataset of fees since 1980 at the European (EPO), the U.S. and

the Japanese patent offices. Descriptive statistics show that fees have severely decreased at the EPO over the nineties, converging towards the level of fees in the U.S. and Japan. The estimation of dynamic panel data models suggests that the price elasticity of demand for patents is about -0.30. These results suggest that the laxity of fee policy at the EPO has significantly contributed to the rising propensity to patent.

IP & LICENSING

Striking a Balance between Intellectual Property Rights and Competition Law: A New Approach to Resolving Refusal to License Disputes

Kelvin H. Kwok

World Competition, Vol. 34, forthcoming 2011

This article proposes a new approach to resolving the conundrum of a monopolist refusing to license intellectual property rights to a competitor, one of the most complex issues at the interface between intellectual property and competition law. It reviews the approaches adopted by the competition authorities in both the European Union and United States when confronted with this perplexing issue, and argues that the extreme positions they took – either that competition should trump intellectual property rights (IPRs) or that IPRs should trump competition – were mistakenly simplistic. The article proceeds to argue that the preferred approach is to strike an appropriate balance between anticompetitive effects and procompetitive effects of a refusal to license, and accordingly allocative efficiency losses and dynamic efficiency gains. A substantial part of this article is devoted to a proposed framework illustrating how the balance can be struck, emphasizing how the refusal at issue interacts with various circumstantial factors such as market power, network effects, monopoly leveraging, predatory intent, degree of follow-on innovation, and the causal connection between IPR protection and innovation incentives. Reference will be made to precedents from the European Union (Magill, IMS, and Microsoft) and United States (Kodak and Xerox) in explaining how the framework works in practice.

Friends or Foes? Creative Commons, Freedom of Information Law and the EU Framework for Re-Use of Public Sector Information

Mireille M. M. Van Eechoud

OPEN CONTENT LICENSING: FROM THEORY TO PRACTICE, L. Guibault, ed., Amsterdam University Press, 2011

(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722189)

Public authorities keep vast amounts of information. Freedom of information ('FOIA') laws give the public rights of access to much public sector information. The spread of FOIAs across the globe testifies to their importance as instruments for enhancing democratic accountability. But access to public sector information not only serves political purposes. It is also thought to have economic benefits, enabling the development of new information products and services. This is the policy objective behind the EU Directive 2003/98 on the Re-use of Public Sector Information (PSI Directive).

Despite popular belief to the contrary, much public sector information is subject to intellectual property rights. Both access to public sector information for democratic purposes and for economic purposes have implications for how intellectual property rights in information produced by governments are exercised. Rather curiously perhaps, FOIA's are generally silent on the issue. Nor does the PSI Directive prescribe how public sector bodies should exercise any exclusive rights in information. This paper explores the role of copyright policy in the light of the objectives and principles of both freedom of information law and the regulatory framework for re-use of public sector information. More specifically, it queries whether open content licenses like Creative Commons are indeed the attractive instrument they appear to be for public

sector bodies that seek to enhance transparent access to their information, be it for purposes of democratic accountability or re-use for economic or other uses.

Database Ownership: Myth or Reality
Sallie Smith, Susanna Leers, Pat Roncevich
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711979)

What does it mean to "own" a database? Full-text electronic databases are often distributed with separate rights of access and ownership. The purchase of a database may be limited to its digital content, with access to the supporting search interface available only through a license agreement and ongoing subscription payments. As librarians increasingly add digital resources to their collections, they struggle to provide information to their users within the legal framework that governs the use of those resources. The authors describe their experience with a full-text database acquired under a "purchase plus access" distribution model, and the in-house system they developed using their purchased content. Their case study raises questions and concerns about this database distribution model and its impact on the ability of libraries to build reliable, accessible collections of information resources for their users.

IP & INNOVATION

Access to Intellectual Property for Innovation: Evidence on Problems and Coping Strategies from German Firms
Elisabeth Muller, Iain M. Cockburn, and Megan MacGarvie
TILEC Discussion Paper No. 2010-042
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718408)

Transaction costs and contracting problems associated with proliferation of patents may have a negative impact on innovation. The authors present novel data on the frequency with which innovative German firms encounter problems with access to intellectual property (IP) for innovation. While only a small percentage of all firms report halting or not starting innovation projects because of IP issues, larger fractions report taking actions such as modifying projects or use of "coping mechanisms" such as acquisition or exchange of IPR in the market for technology. Much of this activity is concentrated in firms which are larger, more R&D intensive, and have more patents. Firms operating in technology areas in which IP ownership is more concentrated appear to be better able to prevent problems of access to IP from arising by using coping mechanisms, suggesting that transacting in the market for technology may be less costly where ownership of IP is less fragmented. Interestingly, the authors find no evidence that problems of access to IP are more severe in the complex/cumulative industries where patent thickets are thought to present the most serious challenges.

Corporate Innovations and Mergers and Acquisitions
Jan Bena and Kai Li
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1727401)

Using a large patent-merger dataset over the period 1984-2006, the authors examine the

motives and outcomes of acquisitions from the perspective of the property rights theory of the firm. Our measures of corporate innovation capture not only innovation quantity and quality, but also more importantly, asset complementarity that stem from technological overlaps between merger partners. The authors first show that more innovative companies, as measured by both patent quantity and quality, are more likely to engage in acquisition activities. Further, technological overlaps between the bidder's and the target firm's innovation activities as captured by patent cross-citations and common knowledge base have positive and significant impact on merger pairing. Finally, the authors show that innovation-driven acquisitions achieve better long-term real outcomes: more and significant innovation output as well as improved operating and stock market performance. Overall, our evidence provides strong support for the property rights theory of the firm.

Estimating the Innovator's Dilemma: Technology Adoption and Industry Evolution in the Global HDD Market
Mitsuru Igami
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1733174)

This paper studies the effects of incumbency on the timing of technology adoption and their implications for the evolution of an industry. I develop and estimate a dynamic oligopoly model of entry, exit, and technology adoption, using a panel data set of the world's hard disk drive (HDD) manufacturers between 1976 and 1998, which I construct from the annual publications of industry reports. To separately identify the sources of observed delay in incumbents' adoption, I estimate (1) the degree of substitution between old and new products, (2) marginal costs of production, and (3) the sunk costs of adoption for incumbents and entrants. I use the estimates to run computational experiments with (1) R&D subsidy to incumbents, (2) a broad-based patent policy, and (3) a ban on non-compete clause.

The Good, The Bad, and the Ugly (and the Self-Destructive) of Innovation Policy: A Policymaker's Guide to Crafting Effective Innovation Policy
Stephen J. Ezell and Robert D. Atkinson
The Information Technology & Innovation Foundation, 2010
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722845)

Innovation has become the central driver of economic growth and thus a key focal point of countries' economic development strategies as they seek to gain competitive advantage. Accordingly, countries are increasingly designing national innovation strategies that seek to coordinate their policies toward skills, scientific research, information and communications technologies (ICTs), tax, trade, intellectual property, government procurement, standards, and regulations in an integrated approach designed to drive economic growth through innovation. While a focus on innovation is positive, countries can implement policies that are either: "Good," benefiting the country and the world simultaneously; "Ugly," benefiting the country at the expense of other nations; "Bad" failing to benefit either the country or the world; or "Self-destructive," actually hurting the country while benefiting others.

Notwithstanding the fact that countries can readily implement a range of "Good" innovation policies, there remain far too "Ugly" and "Bad" (and occasionally "Self-destructive") mercantilist strategies that are neither sustainable nor productive. Moreover, these Ugly, Bad, and Self-destructive mercantilist strategies suffer from three other failures. They: 1) undermine confidence in the international trading system, while reducing global GDP growth; 2) fail to recognize that neither the United States nor Europe - nor even both combined - can indefinitely absorb imports if Brazil, China, India, Japan, Russia, and others continue to promote exports while limiting imports as their primary path to prosperity; and 3) ignore that raising the productivity across-the-board of all sectors, traded and

non-traded, is the surer path to lasting economic growth.

The Determinants of Innovation Adoption

Corinne Autant-Bernard, Jean-Pascal Guironnet and Nadine Messard
GATE Working Paper No. 1034
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731550)

Using a sample of 46,000 EU firms from the Community Innovation Survey, this paper analyses the drivers of innovation adoption. In contrast to most empirical studies on innovation diffusion in which a specific technology is analyzed, this study covers several countries and industries in the European Union. Following Van de Ven and Van Praag (1981), Heckman's method is applied in a context of binary endogenous variable to explain the choices made by firms regarding innovation. Distinctions are made between the internal generation of innovation and the adoption of innovation produced by others, as well as between different types of adoption (product vs. process and cooperation-based adoption vs. isolated adoption). The study is focused on the impact of users' features and their cooperation with suppliers on the adoption choices. The results point out that cooperation is a key driver of adoption choices. Usual determinants such as firm size, absorptive capability or exports would foster generation of innovation instead of adoption.

Monopoly Innovation and Welfare Effects

Shuntian Yao and Lydia L. Gan
Economics Discussion Paper No. 2010-10
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726766##)

In this paper the authors study the welfare effect of a monopoly innovation. Unlike many partial equilibrium models carried out in previous studies, general equilibrium models with non-price-taking behavior are constructed and analyzed in greater detail. The authors find that technical innovation carried out by a monopolist could significantly increase the social welfare. They conclude that, in general, the criticism against monopoly innovation based on its increased deadweight loss is less accurate than previously postulated by many studies.

IP & LAW

Playing by Different Rules? Property Rights in Land and Water

Richard A. Epstein
NYU Law and Economics Research Paper No. 10-56
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719688)

This article examines both the similarities and differences between the law of land and water in both a private law and constitutional law setting. The first critical difference is that the nature of the two resources differs enough such that exclusive rights for occupation usually sets the right framework for analyzing land use disputes, while a system of shared, correlative duties work best for water. Once these baselines are established, it follows that an accurate rendition of the constitutional law issues necessarily rests on the proper articulation of private law rules of adjudication. Unless those efficient private rules are used as a baseline for constitutional adjudication, it becomes impossible to explain which government actions result simply in a "mere" loss of economic value and which government actions generate losses that require compensation. Parties can engage in wasteful political arbitrage without limitation.

In dealing with the private law issues, the first step is to develop principles of parity between private claimants, to the extent that this approach is physically possible. The second step then picks the set of rules that maximizes the overall utility of all parties concerned, subject to the parity constraint. This system must yield to reasonableness considerations when the conditions of physical parity cannot be satisfied, which covers all cases of dispute between upper

and lower owners of land, as well as upstream and downstream riparians. In both these settings, the objective is to create, whenever possible, rules that treat the last element of loss to one party equal to the last element of gain of the next.

Using these natural law baselines produces by and large efficient results in private disputes. The rejection of these rules in the takings context in both land and water cases yields the opposite result, by conceding far too much power to state authorities in both land and water cases. It is no mistake that the modern law of regulatory takings for land, as developed in the 1978 Penn Central case, explicitly rests on the same intellectual confusions about property rights and economic losses that underlie the 1944 Willow River case, dealing with water rights. The only rationalization of both areas of law requires that the constitutional protection of private property start with the definitions of private property that have worked so well in practice under the natural law traditions of private law.

Beyond Invention: Patent as Knowledge Law
Michael J. Madison
Lewis & Clark Law Review, forthcoming
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729857)

The decision of the Supreme Court of the United States in Bilski v. Kappos, concerning the legal standard for determining patentable subject matter under the American Patent Act, is used as a starting point for a brief review of historical, philosophical, and cultural influences on subject matter questions in both patent and copyright law. The article suggests that patent and copyright law jurisprudence was constructed initially by the Court with explicit attention to the relationship between these forms of intellectual property law and the roles of knowledge in society. Over time, explicit attention to that relationship has largely disappeared from the Court's opinions. The article suggests that renewing consideration of the idea of a law of knowledge would bring some clarity not only to patentable subject matter questions in particular but also to much of intellectual property law in general.

Death From the Public Domain?
Kevin Outterson
Texas Law Review, Vol. 87, 2010
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1725973)

In his recent article in the Texas Law Review, Ben Roin advances the claim that pharmaceutical innovation and the public's health are harmed by the doctrines of non-obviousness and novelty. He does not mince words, labeling the nonobvious requirement as "perversity" with a "pernicious" effect on drug development. In his view, these standards pose an insurmountable barrier for drug companies seeking to commercialize inventions already in the public domain. He claims that valuable, life-saving drug ideas languish in the public domain because the companies face high barriers to entry from the FDA, but potential free riders are encouraged through the generic Abbreviated New Drug Application (ANDA) process. A major example given in the article is Ultracet, but in that case the public domain did not hinder commercialization of the drug. His second major argument suggests that FDA-administered data exclusivity periods are the best response to this problem. This brief Comment will challenge both aspects of Roin's argument and then briefly propose alternatives for addressing the free rider problem.

INTELLECTUAL PROPERTY OVERLAPS
Robert J. Tomkowicz
Routledge, 2011

Intellectual property is traditionally split into three main segments that of copyright, patents and trademarks. In theory, each category of intellectual creations should belong in only one segment of the system and only to the extent authorized by relevant statutory provisions or judicial doctrines. However, as the scope of each segment expanded, their boundaries began to overlap, which resulted in consequences that had not been anticipated at the time of their inception and the issue of intellectual

property rights overlaps surfaced. When the statutory monopoly expires, most intellectual property rights should vest in the general public. In practice however, due to overlaps of the segments comprising intellectual property system, some of the creations or inventions have qualities that make them capable of being protected under more than one intellectual property monopoly. For example, a machine can be protected under patent law, but drawings of that machine could enjoy copyright protection.

The book identifies the complex interfaces between different intellectual property rights, especially in the context of new technologies, such as computer programs and the internet. The book considers intellectual property rights and their overlaps in light of the right's purposes, relying on the concept of balance of rights as the measuring rod for assessment of the consequences resulting from use of the overlapping rights. In doing so the book investigates how use of intellectual property rights associated with one segment of the system can affect carefully crafted balance of rights of various stakeholders in an overlapping segment and whether effectiveness of this segment to advance its purposes will be impeded by such use. The book considers experiences of different jurisdictions with the overlaps, the US, the UK, and Canada in particular.

The book also presents solutions to identified and potentially objectionable uses of overlapping rights in an attempt to provide judiciary and law practitioners with analytical framework for resolving disputes involving overlaps in the intellectual property system. In particular, it suggests that a properly construed doctrine of misuse of intellectual property rights would provide an adequate response to the challenge posed by improper use of overlapping intellectual property rights.

Top Tens in 2010: Patent, Trademark, Copyright and Trade Secret Cases

Stephen M. McJohn

Northwestern Journal of Technology and Intellectual Property, January 2011 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731887)

This piece discusses notable intellectual property decisions in 2010 in the United States. Viewed across doctrinal lines, some interesting threads emerge. The scope of protection was at issue in each area, such as whether human genes and business methods are patentable, whether a product idea may be a trade secret, and where the constitutional limits on copyright legislation lie. Secondary liability remains widely litigated, as rights holders seek both deep pocket defendants and a means to cut off individual infringers. The courts applied slightly different standards as to the state of mind required for secondary liability. Many of the cases involved disputes between hiring and hired parties, over the ownership of intellectual property rights: professors and universities contesting rights to federally funded inventions; an artist seeking to prevent a museum from showing an unfinished commissioned work; a party that commissioned a sculpture, but without obtaining the copyright, relying on fair use to exploit derivative works; entrepreneurs disputing how to apply the work-made-for-hire doctrine in the informal context of a start-up business; and a company hiring a competitor's employees to reverse engineer its trade secrets. A number of cases concerned the relationship between intangible rights and physical property: liability for false patent marking, attempts to limit a biotech patent to the sample submitted to show possession of the invention, seeking trademark protection for the shape of a round beach towel, and sales of second hand software on eBay.

IP & COPYRIGHT

Ten Years of File Sharing and Its Effect on International Sales of Copyrighted Music: An Empirical Analysis Using a Panel of Countries

Alejandro Zentner
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724444)

Consumers today have larger music collections than ever before and music consumption is arguably at a historic high. File sharing technology would undoubtedly be welfare improving provided that it did not displace music sales. But music purchases have decayed sharply since the introduction of file sharing a decade ago. Has file sharing reduced the copyright value of music? The answer to this question is important, since if file sharing reduces music purchases it may as well decrease musical creations. This paper seeks to measure the effect of peer-to-peer file swapping on music sales. I use a long panel of twelve years of country-level data containing information on both physical and digital music sales and on Internet and broadband penetration. This database does not only include information going back to a period when file sharing did not exist but also includes recent information up to the year 2008. I employ Internet connectedness and the speed of Internet connections as proxies for unauthorized downloading, and study whether physical and total country-level music purchases have decayed more rapidly in countries experiencing faster increases in the adoption of file sharing technology. My results indicate that peer-to-peer file swapping can explain a reduction in music sales that ranges from half of the actual decrease in sales up to the entire decrease.

Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century

Patrick McKay
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1728150)

Fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture, and in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products. The Internet has enabled what scholar Lawrence Lessig calls a “read/write” culture where ordinary Internet users are empowered to become active creators of culture rather than mere passive consumers. Yet if this exciting trend is to continue, the copyright laws of the twentieth-century must adapt to accommodate the possibilities of the twenty-first.

This Article describes the importance of amateur fan-made derivative works in the new folk culture of the twenty-first century, and demonstrates how this culture is under attack by the creators of the popular works it pays tribute to. It describes how overreaching copyright claims by media companies cast a considerable chilling effect on vibrant new art forms such as fan fiction, fan-made videos, and virtual worlds. Finally, this Article argues that the Copyright Act must be amended to (1) explicitly clarify that noncommercial, transformative works are fair use, (2) ban the use of the DMCA takedown process and automated copyright filters to block this type of content, and (3) provide real penalties to deter copyright owners from abusing copyright law to suppress legitimate follow-on creativity.

IP & TRADE

HIV and AIDS in Africa: Compulsory Licensing Under Trips and DOHA Declaration

Ufoma Barbara Akpotaire
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719555)

This paper will examine the importance of compulsory licensing to facilitate access to life-serving medications for Africans and will explore the global debate on the TRIPS Agreement and public health, as it has evolved over the years. Specifically, it will focus on the implications, and limitations, of the Doha Declaration to compulsory licensing. The paper will further make recommendations for narrowing the divergence between the needs of HIV/AIDS patients and the protection of patent holders Intellectual Property Rights (IPRS).

Growing Foreign Investment and Regulatory/Policy Risks Facing High Technology Innovations

Lawrence A. Kogan
Global Customs and Trade Journal, Vol. 6, 2011

High technology innovators and investors operating in the life sciences, clean energy and information and communication technology sectors face complex economic and legal uncertainties compounded by regulatory and policy risks during the course of guiding an innovative concept from its research and development through product testing and commercialization stages that will be indicative and determinative of economic value assigned to said technology in a given domestic or foreign marketplace. This assessment of value is directly dependent on local jurisdictions maintaining established rules of law and related standards which recognize and robustly enforce exclusive intellectual property rights without disruptive or excessive limitations and/or restrictions. An increasing number of developing countries aspire to become 21st century knowledge economies by seeking to recharacterize international law in a manner that enables the conversion of high technology patents and trade secrets from private to public goods. These countries have promoted the establishment of regimes to achieve this objective, principally compulsory licensing and interoperability frameworks that express or compel government procurement preferences for nonproprietary and/or royalty-free patented technologies emplaced within regional, national and/or international technology standards. Beyond recourse to public international law remedies, companies and investors may also take private initiatives to mitigate the inherent regulatory and policy risks on company financial performance. Such initiatives include internal structural vigilance, wide external diligence and carefully crafted communications with individuals and organizations, both public and private. This effort is predicated upon astute monitoring and analysis of relevant events in international and national fora discussing these issues.

OTHER IP TOPICS

Whose Body is it Anyway? Human Cells and the Strange Effects of Property and Intellectual Property Law

Robin Cooper Feldman
Stanford Law Review, forthcoming
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1731648)

This article examines both property and intellectual property doctrines in relation to human cells that are no longer within the body. In particular, the article discusses the Bilski decision, in the context of life science process patents, and the Molecular Pathology case, in the context of gene patents. For patent law, the article concludes that the problem lies not with the fact that genes constitute patentable subject matter, but rather with the extent of the reach that is allowed. For both property and intellectual

property law, the article concludes that a more careful application of basic legal principles would better reflect the interests of society as a whole and the interests of individual human subjects, as well as the interests of those who innovate.

Six Minutes to Midnight – Can Intellectual Property Save the World?
Peter Drahos
EMERGING ISSUES IN INTELLECTUAL PROPERTY, Kathy Bowrey, Michael Handler and Dianne Nicol, eds., Oxford University Press 2011
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723774)

Can we harness intellectual property institutions for the purpose of innovating to save the world from the worst climate change scenarios? The standard optimization view of intellectual property suggests that intellectual property can play an important role. The paper argues that the standard view ignores real-world problems of opportunistic uses of intellectual property by private actors. Globalized intellectual property standards are a poor way in which to manage the nested complexity of climate change. The paper concludes by looking at the lessons of the Manhattan Project for climate change.

Dynamics of Enforcement and Infringement of Intellectual Property Rights and Implications for the Incentive Function
Sebastian Derwisch and Birgit Kopainsky
Working Paper
(http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729142)

The literature recognizes the dynamics of intellectual property rights implementation. However, a framework that examines these dynamics and analyses the interactions is missing. The authors use established theory to build a system dynamics model that explores the feedback effects of intellectual property rights use, infringement and enforcement to explain how the strength of intellectual property rights arises endogenously. The model looks at a scenario in which Intellectual Property Rights have been implemented recently. The authors show that the strength of Intellectual Property Rights arises endogenously without being tied to the formulation of the law.