Mind the Gap: Analysing the Disconnect between IP Research and Policy

1. Introduction

There has long existed a vein of scepticism surrounding intellectual property (IP) rights.[1] In the twentieth century, this scepticism became pronounced as economists increasingly analysed the welfare implications of granting property rights over intangible goods. In his 1958 report to the US Congress on the economics of patent rights, economist Fritz Machlup came to a famously ambivalent conclusion, that is: on the basis of the economic evidence, he could not recommend the introduction of a patent system into a country that did not already have one, but equally could not recommend the abolition of pre-existing patent systems.[2] Meanwhile, in copyright, Stephen Breyer (soon to become US Supreme Court Justice Breyer) similarly concluded that the case for the copyright system is an "uneasy" one because the economic evidence is so finely balanced,[3] while Arnold Plant advocated that all books be subject to compulsory licensing five years after publication.[4] And in trademark law, Ralph Brown Jr argued that extending protection beyond the origin function merely allowed businesses to eliminate legitimate competition.[5]

In the twenty-first century, our understanding of the welfare effects of IP has deepened with the "empirical turn" in IP scholarship.[6] As Mark Lemley writes: "In the past three decades

[1] See Fritz Machlup and Edith Penrose, 'The Patent Controversy in the Nineteenth Century' (1950) 10 The Journal of Economic History 1.

[2] Fritz Machlup, An Economic Review of the Patent System (1958) Study of the Subcommittee on Patents, Trademarks and Copyrights (US).

[3] Stephen Breyer, 'The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programmes' (1970) 84 Harvard Law Review 281.

[4] Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1(2) Economica 167. See also Arnold Plant 'The Economic Theory Concerning Patents for Inventions' (1934) 1(1) Economica 30.

[5] Ralph S Brown Jr, 'Advertising and the Public Interest: Legal Protection of Trade Symbols' (1948) 57 Yale LJ 1165.

[6] Emily Hudson and Andrew Kenyon, 'Intellectual Property Law and Empirical Research' (2020) in Graeme Austin et al, *Across Intellectual Property: Essays in Honour of Sam Ricketson* (Cambridge University Press 2020) 240. The empirical turn is illustrated by the Copyright Evidence Wiki, recently launched by the CREATe research centre at the University of Glasgow. The Wiki provides a complete catalogue of existing empirical evidence related to copyright policy. So far, the team has abstracted and indexed 859 empirical studies in

there has been an unprecedented—indeed, astonishing—outpouring of sophisticated empirical work on virtually every aspect of IP law and innovative and creative markets".[7] That empirical work includes research by economists such as Josh Lerner – who analysed the impact of changes in patent policy across 60 countries and 150 years, only to come to the "puzzling" conclusion that strengthening patent laws did not have a meaningful impact on innovation[8] – and Petra Moser – whose historical analysis of nineteenth century innovation concludes that "overall, the weight of the existing historical evidence suggests that patent policies which grant strong intellectual property rights to early generations of inventors, may discourage innovation"[9] – and many more.[10] Not all IP scholars are convinced, of course.[11] Nor do all researchers speak with one voice. But it is illustrative that even supporters of IP rights sometimes concede that the existing economic case for such rights is not a very strong one. As Robert Merges wrote in *Justifying Intellectual Property*: "[t]ry as I might, I simply cannot justify our current IP system on the basis of verifiable data showing that people are better off with IP law than they would be without it".[12]

And yet, on some accounts, legislators and judges do not show a similar scepticism towards IP rights. On the contrary, lawmakers have tended to expand and strengthen IP protections. Of course, the direction has not been entirely in one direction.[13] Nevertheless, the following new IP and related rights have been added to the law since the late twentieth century: a sui

copyright law. See https://www.copyrightevidence.org/wiki/index.php/Copyright_Evidence (accessed 16 November 2022). From those 859 studies, 827 have been published post 2000.

[7] Mark A Lemley, 'Faith-Based Intellectual Property' (2015) 62 UCLA L Rev 1328, 1332.

[8] Josh Lerner, 'The Empirical Impact of Intellectual Property Rights on Innovation: Puzzles and Clues' (2009) 99 American Economic Review 343, 347.

[9] Petra Moser, 'Patents and Innovation: Evidence from Economic History' (2013) 23 Journal of Economic Perspectives 23, 33.

[10] See e.g. Glynn S Lunney Jr, *Copyright's Excess: Money and Music in the US Recording Industry* (Cambridge University Press 2018) (challenging the idea that higher revenue is positively correlated with more productivity in the music industry). Kate Darling and Aaron Perzonowski, *Creativity without Law: Challenging the Assumptions of Intellectual Property* (NYU Press 2017) (documenting 'negative spaces' where creativity exists despite the lack of IP protections).

[11] See e.g. Jonathan M Barnett, *Innovators, Firms and Markets: The Organizational Logic of Intellectual Property*' (Oxford University Press 2020).

[12] Robert P Merges, *Justifying Intellectual Property* (Harvard University Press, 2011) 3.

[13] For example, see Marrakesh Treaty to Facilitate Access to Published Works to Visually Impaired Persons and Persons with Print Disabilities (2013).

generis right for databases,[14] additional copyright-like rights for press publishers,[15] neighbouring rights for broadcasters and phonograms,[16] rights for those who publish previously unpublished works,[17] protection for pharmaceutical giants who produce clinical test data,[18] and more.[19] Furthermore, pre-existing IP rights have expanded, while attempts to weaken IP rights meets stiff resistance. Patents in many jurisdictions now frequently cover computer-related inventions[20] and business methods,[21] which not long ago were outside the scope of patentable subject matter. At the same time, attempts to subject Covid-19 treatments to an IP waiver were unsuccessful.[22] Trademarks now give businesses protection not only against uses of their mark which might confuse consumers, but also against use that might harm a business's investment in their brand.[23] And the copyright term in several jurisdictions has been extended well beyond what TRIPS requires, i.e. from the life of the author plus 50 years, to life of the author plus 70 years.[24] As noted by Julie Cohen copyright is today not so much about incentivizing creativity, but rather is about providing framework though which copyrighted work can be exploited.[25]

[14] Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the legal protection of databases.
[15] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, art 15.
[16] Copyright, Designs and Patents Act (1988) ss 5-6. See also Academics against Publishers' Right: 169 European Academics warn against it (6th August 2018) available at: https://www.ivir.nl/publicaties/download/Academics_Against_Press_Publishers_Right.pdf (accessed 10 September 2022).
[17] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.
[18] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994) art 39.
[19] See e.g. the International Convention for the Protection of New Varieties of Plants (1961) art 5.
[20] At least, in the context of the UK and European patent systems, when such inventions are not claimed as such. See e.g. *Pension Benefit Systems Partnership*, T 931/95 [2001] OJ EPO 441, *Protecting Kids the World Over's Patent Application* [2011] EWHC 2720.
[21] See *Peterson/Queueing System* T1002/92 [1995] OJ EPO 605.
[22] See Waiver from certain provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of Covid-19 IP/C/2/669.Rev.1 (original proposed waiver submitted by South Africa and India). Some progress has been achieved regarding the compulsory licensing of Covid-19 vaccines. See MC12 Outcome Document, World Trade Organisation Ministerial Conference WT/MIN(22)/24 (17 June 2022).
[23] *Interflora Inc v. Marks & Spencer*, Case C-323/09 [2011] ECR-I-8625
[24] Copyright Term Extension Act, 112 Stat. 2827 (US). Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).
[25] Julie E. Cohen, 'Copyright as Property in the Post-Industrial Economy: A Research Agenda' (2011) Wisconsin L Rev. 141, 143.

If a gap between IP research and policy truly does exist, this might be a reason for concern. If IP scepticism is to be believed, expansion of the IP system potentially is detrimental to our society's economic welfare. Moreover, the existence of a gap might say something unflattering about both research and the IP lawmaking process. One of the most important recommendations in the UK's Hargreaves Review of Intellectual Property and Growth was that "[g]overnment should ensure that development of the IP System is driven as far as possible by objective evidence".[26] Yet, at least in the US context, Mark Lemley accuses society of simply "ignoring the evidence".[27] Meanwhile, questions are raised about the significance of IP research if it truly is ignored.

The Mind the Gap project sought to shed light on this topic. In June 2022, the City Law School invited a range of IP lawyers to discuss the nature of the gap between IP research and IP policy. This comment paper summarises the main themes arising from that exercise. Section 2 summarises the methodology involved in the project and defines important terms. Section 3 reflects on the existence and nature of the gap: is there truly a gap between IP research and policy? If so, is such a gap a cause for concern? Section 4 then turns to possible ways to address the gap, and to enhance the level of knowledge exchange between IP researchers and IP lawmakers going forward.

2. Methodology and Definitions

On June 10, 2022, the City Law School hosted a day-long workshop entitled "Mind the Gap: Analysing the Disconnect between IP Research and Policy". A small group of IP lawyers were invited to participate in a constructive dialogue about the topic. The participants included IP researchers and lawyers with extensive experience of IP policy. Both the idea of research and the idea of policy were defined broadly: IP research was understood as the conclusions of reasoned inquiry into aspects of the IP system typically undertaken by individuals with full

[26] Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (2011) 8.
[27] Lemley (n 7) 1336. Although research does still clearly play an important role in US IP lawmaking on some level. See e.g. Testimony of Mark A Lemley, Hearing Before the Senate Judiciary Committee, Patentable Subject Matter Reform (4 June 2019).

time university appointments; meanwhile, IP policy was understood to include legislative, international, and judicial development of the law in addition to administrative policy.

The participants included:

- Anthony Taubman (Director, Intellectual Property Division, World Trade Organization) (participating for one session remotely via Zoom)
- Catherine Stihler (CEO, Creative Commons; former MEP For Scotland)
- Christopher Rennie-Smith (European Patent Consultant, European Patent Office Appeal Judge (retired))
- Dr Enrico Bonadio (Reader in Intellectual Property Law, City Law School)
- Dr Marc Mimler (Senior Lecturer, City Law School)
- Dr Patrick Goold (Reader in Law, City Law School)
- Dr Siva Thambisetty (Associate Professor of Law, London School of Economics)
- Florian Koempel (Director, IusArtium; advising UK Music, the Music Publishers Association, British Copyright Council)
- Lord Justice Richard Arnold (Justice of the Court of Appeal England and Wales)
- Professor Ilanah Fhima (Professor of Intellectual Property Law, University College London)
- Professor Tanya Aplin (Professor of Intellectual Property Law, Kings College London)

The workshop was divided into three sections: copyright and associated rights, patents and associated rights, and brands. In each of the sections, a range of discrete IP issues were discussed. In each of the sections, the participants sought to address a series of interrelated questions, including: to what extent is there a 'gap' between IP research and policy? Is the existence of a gap concerning? If there is a gap, how sizeable is it and why does it occur? And what, if anything, ought we to do about it? These questions were discussed within the context of UK, EU, and international law. The following sections sketch the group's general observations; they do not reflect the views of individual participants. The workshop was funded by a Higher Education Innovation Fund grant and aimed primarily to promote knowledge exchange.

3. The Existence and Nature of the Gap

There is frequently a gap between IP research and IP policy. In all areas of IP, it is relatively easy to identify points of controversy where policymakers make decisions that diverge with the views broadly held within the IP research community. As a general matter, there ought to

be actions taken to address that gap. However, it is important to note that the existence of a gap does not necessarily mean that lawmakers are ignoring the evidence – at least, in the context of the UK and EU. Countervailing considerations make the existence of a gap less concerning.

Firstly, while there are occasions where research and policy seem to part ways, there are also numerous examples where research has clearly informed and influenced policy. Notably, the 2011 Hargreaves' recommendations[28] regarding new and extensive exceptions to the UK copyright framework and promoted by UK academics were fully incorporated into the UK Copyright Act in 2014.[29] Similarly, the Fair Remuneration provisions contained in the Directive on the Digital Single Market were in part a response to research findings.[30] As the European Copyright Society (an independent collection of IP researchers) explains:

> "There is a well-established body of empirical studies that shows an enormous disparity between the earnings of winners-take-all star authors and performers, as well as the persistent precariousness of the financial situation of the vast majority of creators and performers. Such studies demonstrate that median creators' earnings (not only in Europe) are often below the minimum income".[31]

To address the apparent unfair treatment of creators, the Directive on the Digital Single Market requires that authors and performers who license or transfer their rights are still entitled to receive "appropriate and proportionate remuneration".[32] This prompts the questions: why do academic opinions sometimes impact the direction and travel of law, while at other times such opinions find less traction?

---

[28] Hargreaves, (n 27).

[29] For an overview of the proposed exception, see Florian Koempel, 'Life after the Hargreaves review' (2012) 2(3) Queen Mary Journal of Intellectual Property 267.

[30] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, arts. 18-23 (hereinafter Directive on Copyright in the Digital Single Market).

[31] Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, at 3, available at: https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf (accessed 10 September 2022).

[32] Directive on Copyright in the Digital Single Market, art 18. Furthermore, in some cases, text of draft legislation was revised in response to academic criticism. *Cf* Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (2016) art. 13 and Directive on Copyright in the Digital Single Market, art 17.

Secondly, in some respects the claim that there exists an outpouring of empirical research that justifies scepticism may be an oversimplification. In this respect, it is instructive to separate research that questions the very basis and justification for IP rights, from research on discrete and concrete issues within IP law, such as the effect that fair remuneration requirements may have on cultural markets or the how exceptions operate in practice. While policymakers are sometimes called upon to consider whether IP rights *in toto* are economically justifiable, more commonly the decisions made are at a more granular level (for example, about the appropriate scope of rights). On these more granular questions, often less empirical evidence exists to help guide lawmakers. Although, such research continues to grow.[33]

Of course, however, the point may also be made that in absence of specific empirical evidence relevant to granular questions of policy, the background economic scepticism as to justifications ought to serve as a guidepost for policymakers' judgement. If the economic justification for IP rights as a whole is questionable, it would be surprising, perhaps, if extensions at the granular level would improve society's welfare.

And finally, the existence of a gap is somewhat justifiable. Prior to the groundbreaking work of researchers such as Plant, Machlup, and many more, the economic analysis of IP rights was at a much less developed state.[34] The gap that exists today is present precisely because IP research has flourished in the past decades. As a general matter, it is likely that IP research informs policy more today than at any other time in the history of IP law. Nonetheless, even today, one should not expect a perfectly harmonious relationship between research and policy. Academic research is partly conducted to inform policy, but that is not exclusively what researchers hope to accomplish. Academia is a petri dish of experimentation and a laboratory for new ideas to grow and flourish. It would likely be detrimental not only to policy, but also free and independent research, if all conclusions of all academic research were followed to the letter.

[33] See CREATe Copyright Evidence Wiki (n 6). See also European Commission, European Innovation Council and SMEs Executive Agency, Study on the legal protection of trade secrets in the context of the data economy: final report (Publications Office of the European Union, 2022) https://data.europa.eu/doi/10.2826/021443.
[34] See notes 1-5.

4. Addressing the Gap

While the gap may be less troublesome than some accounts suggest, strengthening the relationship between research and policy remains desirable. The following is a non-exhaustive list of ideas which, if followed, may give research greater impact on future IP policymaking.

i. Making work accessible and visible

Academics can take actions to make their research more accessible and visible. It remains the case that substantial amounts of research are published in journals and periodicals that can only be accessed via payment. Meanwhile, libraries and research services in national courts and legislative bodies operate on limited budgets. Choosing to publish in open-access venues will likely make research more accessible to a broader range of lawmakers. In the UK academics have increasingly strong incentives to choose such venues due to changes in the UK Research Excellence Framework Open.[35] Furthermore, academics can make research more visible by contributing to non-traditional periodicals such as IP blogs. Research-informed voices on blogs such as the IPKat.com and Kluwer Copyright, Patent and Trademark Blogs help raise the public profile for important research findings.

ii. Communication and complexity

Academics may give thought to how their research conclusions are communicated. Creating sound IP policy is a difficult task. The existing empirical evidence on the welfare effects of IP rights has been described as "complicated",[36] "decidedly ambiguous,"[37] and "maddeningly inconclusive".[38] It is accordingly difficult to say ex ante whether any given IP policy intervention will have a positive effect on the economy. Against this background of epistemic uncertainty, simplified slogans and aphorisms created by corporate actors (about the need to

[35] See REF 2021: Overview of open access policy and guidance (November 2019) https://www.ref.ac.uk/media/1228/open_access_summary__v1_0.pdf (accessed November 2022).
[36] Lemley (n 7) 1334
[37] *Id*.
[38] Merges (n 12) 3.

protect investment or reduce the value gap) gain traction and can exert significant impact on the policymaking process. Similarly, the ability to summarise complex research concisely and pithily is important for IP academics who wish to gain the attention of policymakers.

iii. Collaboration, partnership, and forums

Academics may wish to build stronger relationships with policymakers through collaborative projects, partnerships, and shared forums. Open and respectful conversations with those of different views can be challenging, but are also rewarding and have the potential to reduce the gap; the conditio sine qua non is trust between academics and other stakeholders in the policy making process. To an extent, these sorts of endeavours are already taking place. One of the aims of the IP & Innovations Researchers of Asia Network is to connect researchers with international organisations, national governments, and non-governmental organisations with the aim of promoting policy-oriented discussions regarding IP.[39] Furthermore, such collaborative endeavours may be increasingly important in the UK research environment. The greater focus on impact in the UK Research Excellence Framework may provide incentives for academics to forge such relationships with policymakers.

iv. Third Party Interventions and Amicus Curiae

One interesting aspect of American IP litigation is the common filing of amicus curiae briefs by academic researchers. However, to date, this has not commonly featured in UK and EU IP litigation. Yet, there may potentially be a space for academic voices within litigation in the UK and EU.

In the UK, academic researchers may intervene in litigation as third party interveners.[40] Since the mid nineties, a body of practice has evolved permitting third party interventions in certain

[39] See IP Innovation Researchers of Asia Network, About, http://ipresearchersasia.org/ (accessed 10 September 2022).

[40] In the UK, a 'third party intervener' is distinct from an amicus curiae. The latter is a court-appointed assistant of the court. Civil Procedure Rule r.3.1.A(4). Practice Direction 3G – Requests for the Appointment of an Advocate to the Court.

circumstances.[41] This practice has developed further since the Criminal Justice and Courts Act 2015. Following this new practice, courts can permit interventions when to do so would raise issues of public importance which may otherwise not be well-addressed by the parties, and where the intervener can add value to the court's consideration of the issue. To date academic researchers in the UK have not commonly applied for permission to intervene. Yet there is no bar against them doing so. It is conceivable that IP research centres with significant research evidence could make reasonable and helpful interventions into select litigation.

Researchers would need to consider the benefit of their interventions thoroughly before making an application to intervene. Interventions may increase the duration, complexity, and cost of the litigation. Courts accordingly have the discretion to deny interventions which would fail to add value. Furthermore, courts may award costs against the intervener if their intervention is seen as unreasonable or an abuse of process. The JUSTICE Report "To Assist the Court" helpfully outlines these, and other, considerations that third parties ought to consider before applying to intervene.[42]

There is no ability for individuals to submit amicus curiae before the Court of Justice of the European Union. However, articles 23 and 40 of the Statute of the Court of Justice of the European Union permit Member States to file written observations in reference cases.[43] Prior to the UK's withdrawal from the European Union, the UK IPO solicited comments on preliminary references.[44] Moreover, both the EU Intellectual Property Office, and the European Patent Office, accept amicus briefs.[45]

v. Research informed legislation

[41] JUSTICE, 'To Assist the Court: Third Party Interventions in the Public Interest (2016) 3 https://files.justice.org.uk/wp-content/uploads/2016/06/06170721/To-Assist-the-Court-Web.pdf (accessed November 2022).
[42] Ibid.
[43] Consolidated Version of the Treaty on European Union, Protocol 3 on the Statute of the Court of Justice of the European Union.
[44] See UK IPO, References to the Court of Justice of the European Union, available at https://www.gov.uk/government/publications/references-to-the-court-of-justice-of-the-european-union (18 November 2014).
[45] The International Trademark Association's amicus briefs before the EU IPO can be accessed online. See INTA, Amicus Curiae briefs, https://www.inta.org/advocacy/?searchType=advocacy&refinementList%5Bcontent_type%5D%5B0%5D=Amicus%20Briefs&dateRangeFilterType=all (November 2022).

Last, but certainly not least, researchers have opportunities to influence draft legislation before it reaches the legislative body. In the UK, the process of legislation drafting, particularly secondary legislation in the form of statutory instruments, can be somewhat opaque. But the UK IPO does frequently send draft legislation out to stakeholders for comment.[46] Organised responses from academic research institutions providing objective evidence are particularly valuable in ensuring research-informed legislation is laid before Parliament.

5. Conclusion

If the development of the IP system ought to be driven by objective evidence, then noticeable gaps between policy and research-produced evidence may be a source of concern. Any changes to the IP framework need to be justified by solid evidence; it is key for the objectivity of such evidence that it considers real (and not only anecdotal) evidence from all sides of the IP policy spectrum, including academics and rights holders. Evidence by academic researchers will continue to play a substantial part in the policy making process. As discussed in section 3, perhaps the gap is not as significant as at times suggested. Nevertheless, as demonstrated by section 4, there is more that can be done to ensure that research informs policy. The ideas presented in this comment provide a starting point towards that end. No doubt readers will be able to suggest more. This will be to the enduring strength of the IP system.

[46] See UK Intellectual Property Office, Consultation on draft regulations concerning trade secrets (19 February 2018) available at https://www.gov.uk/government/consultations/draft-regulations-concerning-trade-secrets, and UK Intellectual Property Office, Consultation on draft secondary legislation to regulate collecting societies (9 September 2013) available at https://www.gov.uk/government/consultations/draft-secondary-legislation-to-regulate-collecting-societies (accessed 10 September 2022).