

*The IP Law Disputing Process: Strategic Enforcement of Patent,
Trademark, and Copyright Claims*

William Gallagher

My research-in-progress is an empirical study that explores how, why, and to what effect the enforcement of intellectual property rights affects the practical scope of IP protection. While IP scholars rightly focus on legislative and doctrinal developments in the law, we know that most of what occurs in the everyday practices of IP owners and their lawyers occurs “under the radar”—outside the scrutiny of virtually any academic analysis. In IP law (as in most other areas of law) most disputes do not result in actual litigation. Most filed litigation settles well before a final judgment is rendered, and thus, most IP disputes never result in published judicial decisions. Yet it is in the everyday practice in the “shadow of the law” that IP rights are actually asserted, enforced, negotiated, sometimes resisted, and settled. My work thus aims to illuminate the IP disputing process and its significance for our understanding of IP law and policy. Although there is a growing interest in the empirical study of IP litigation filings and judgments, there is little empirical work that examines the level where most IP disputing occurs: disputes that may or may not result in actual litigation. That is the focus of my study in progress.

The data for this paper derive from semi-structured face-to-face interviews with litigators who regularly represent IP owners who enforce patent rights—both in court and in pre-litigation enforcement proceedings (e.g., licensing demands). One theme I am exploring in this research is whether the IP “haves” come out ahead in what I call “strategic IP litigation” and enforcement of IP claims. This research also explores whether over-enforcement of IP rights has a deleterious affect on competition. Finally, this paper also explores how IP litigators experience and respond to ethical issues in practice.