THE EFFECT OF JUDICIAL IDEOLOGY IN INTELLECTUAL PROPERTY CASES

Matthew J. Sag*    Tonja Jacobi†
Maxim Sytch‡

*De Paul University College of Law  
†Northwestern Law School  
‡Kellogg School of Management, Northwestern University  
This working paper site is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the publisher’s permission.  
http://law.bepress.com/alea/18th/art131  
Copyright ©2008 by the authors.
THE EFFECT OF JUDICIAL IDEOLOGY IN INTELLECTUAL PROPERTY CASES

Matthew Sag
DePaul University College of Law

Tonja Jacobi
Northwestern University School of Law

Maxim Sytch
Kellogg School of Management at Northwestern University

Abstract

This article investigates the relationship between ideology and judicial decision-making in the context of intellectual property. Using data drawn from Supreme Court intellectual property cases decided between 1954 and 2006, we show that ideology is a significant determinant of cases involving intellectual property rights. The more conservative a justice is, the more likely he or she is to vote in favor of an intellectual property claim. Our analysis also shows that there are significant differences between intellectual property and other areas of the law with respect to the impact of ideology. This analysis has important implications for the study of intellectual property. It also contributes to the broader judicial ideology literature by demonstrating the effect of ideology in an economic context, where the effect of ideology is more opaque.
1 Introduction

The highly determinative role of ideology in predicting judicial decision-making has been well-established within the political science literature known as ‘attitudinalism’ (Segal and Spaeth 1993). The vast majority of these accounts, however, focus on exceptionally salient social issues, such as the death penalty (George and Epstein 1992), first amendment jurisprudence (Epstein and Segal 2006) and search and seizure analysis (Segal and Spaeth 2002). Far less analysis has been undertaken on the effect of judicial ideology in “economic cases” – those concerned with economic division, such as taxation, securities, anti-trust and intellectual property.

The results of studies of economic cases have been more muted and mixed. Some have produced ambivalent results with respect to the effect of ideology (e.g. Sullivan and Thompson 2004); others have found an effect of ideology only in a subset of cases (e.g. Staudt, Epstein and Wiedenbeck 2007). In intellectual property cases, only two empirical studies have previously been undertaken, both of which were narrow in scope and produced null results (Moore 2001; Beebe 2006).

This paper undertakes the first broad empirical study of the role of judicial ideology in intellectual property (IP) cases before the Supreme Court. It establishes a clear and significant effect of judicial ideology: the more conservative a justice is, the more likely he or she is to vote in favor of an intellectual property claim. But this paper also undertakes a comparative analysis of the extent of the effect of judicial ideology in IP cases and all other cases brought before the Supreme Court, and shows that there is a significantly lower impact of judicial ideology in IP cases. As well as obviously providing insight into intellectual property jurisprudence, this analysis contributes to an
understanding of the effect of judicial ideology in economic cases, and suggests why economic cases may be different from social cases.

Intellectual property is an ideal sphere in which to test the effect of judicial ideology in an economic setting, for two reasons. First, many scholars in the intellectual property community claim that ideology has no relevance to their field (e.g. Rogan 2004; Patry 2005); one leading scholar describes the suggestion that ideology could be relevant as “extraordinarily boring” (Lessig 2004a). To support the claim that judicial ideology is irrelevant to intellectual property, scholars point to anecdotal evidence, such as the high number of unanimous IP cases, and cases in which unusual coalitions of liberals and conservatives defy the predictions of the attitudinal model. These impressionistic conclusions, while helpful in drawing scholarly attention to the phenomenon, may be impacted by an availability bias, thereby placing excessive significance on salient cases, which broad empirical study can dispel.

Second, although the empirical evidence of the lack of impact of ideology in IP cases is weak, there is nonetheless a credible theoretical basis for this claim that warrants testing. Whereas most social rights are justified in terms of natural rights, IP rights tend to be seen in instrumentalist or utilitarian terms, as reflected in the incentive-based rationale for patents and copyrights in the Constitution. Traditional liberals and conservatives may therefore not fully analogize between IP rights and other rights. Also, IP raises different trade-offs in terms of protection of property, free expression and market interference than do other forms of property. Finally, each of the central areas of IP raises different trade-offs: for example, copyright law balances the incentive to create with free speech; patent law balances the incentive to create with free competition; and
trademark law balances consumer protection with free competition. Consequently, judicial ideology could credibly be expected to imperfectly track in IP law, or to be more or less salient for conservatives and liberals respectively, or to apply inconsistently to the different areas that constitute IP law.

As such, we test first whether judicial ideology broadly predicts IP case outcomes; then we test whether the effect of judicial ideology is contingent on the type of IP raised, or other relevant legal issues; then we assess whether liberal and conservative justices’ votes are equally affected by judicial ideology; and finally we test whether judicial ideology affects IP law to the same extent that it affects other cases.

The next section provides a brief background on the attitudinal model, the prior evidence on the effect of judicial ideology in IP, and the theoretical basis for the claim that the extent of the effect of ideology may be different in IP cases. In section 3 we specify our hypotheses, describe our data and present our results. Section 4 considers implications and potential extensions.

2 IP and the Attitudinal Model

There is a rich literature demonstrating the significance of ideology in judicial decision making in both the U.S. Supreme Court and in the Federal Courts of Appeal. The effect of ideology in Supreme Court decisions has been demonstrated across a number of issue areas, including: the death penalty (George & Epstein 1992); first amendment (Epstein & Segal 2006); search and seizure (Segal & Spaeth 2000); federalism (Cross & Tiller 2000); and administrative law (Crowley 1987). The effect of ideology has also been demonstrated in the Federal Courts of Appeal in areas as diverse as environmental regulation (Revesz 1997), administrative law (Cross & Tiller 1998), piercing the
corporate veil, campaign finance law, and affirmative action and discrimination law (see Pinello 1999). One comprehensive study of almost 15,000 individual judge votes in twelve different issue areas for the Federal Courts of Appeal found that ideology (as measured by the political party of the appointing president) helps predict how individual judges vote in nine of the twelve issue areas (Sunstein, Schkade & Ellman 2004).

Not only have attitudinalists broadly established the effect of ideology, various studies have shown the mechanism of this effect, a logic that applies to economic cases. Both judicial interviews (Perry 1991) and studies of judicial behavior (Epstein & Knight 1998) have shown that judges care strongly about the outcomes of many cases and about which cases they hear. To the extent the issues raised are ideologically salient, it follows that judges will vote according to their political ideology. Again, judicial accounts (Posner 1993) and empirical studies (Epstein & Segal 2006) bear out the intuition that judges decide cases ideologically.

The social and economic impact of IP strongly suggests that judges will hold policy preferences with respect to IP cases and that the logic of the attitudinal model should apply to IP. At a policy level, IP cases raise fundamental questions regarding property rights, government regulation and freedom of speech. The effects of IP laws are also widely felt at a practical level. Copyright and patent law define the relationship between creators (authors and inventors) and the public. Perhaps more importantly, these laws also mediate the relationships between creators who build upon each other’s work. Similarly, trademark law and trade secret law each police the means of competition between rival businesses: trademark law regulates the ways in which a business may represent its products to consumers; and trade secret law regulates the means through
which one business may acquire valuable information held by another business.

Advances in information technology and the increasing importance of intellectual capital in the U.S. economy have further highlighted the importance of IP law. Given the significance of IP rights – in the modern economy as well as in determining fundamental questions regarding property rights, government regulation, freedom of expression and mediating business relationships – we expect that judges have policy preferences over the fundamental questions raised by IP disputes.

Nevertheless, past efforts to establish the effect of ideology in “economic cases” – those areas of the law concerned with economic division, such as taxation, securities, antitrust and IP – have not established that effect as clearly as the attitudinalist literature generally predicts. In contrast to the obviously politicized and politically salient areas attitudinalists typically focus on – such as civil rights, civil liberties, criminal law, environmental law and labor regulation – there is very little evidence that judicial ideology is determinative at all, or to the same extent, in economic cases.

Results in studies of economic cases have been mixed. A study of Supreme Court cases dealing with securities and antitrust law discounts the attitudinal model, arguing that it does not adequately explain the post-Powell period in which the Court was more evenly split on securities and antitrust cases (Sullivan & Thompson 2004).

Traditional measures of ideology have also fared poorly in the context of tax cases. A 2004 study found that taxpayer standing decisions were ideological, but only when legal doctrine is vague and when little or no judicial monitoring exists (Staudt 2004). Likewise, a study of circuit court tax decisions found that political ideology has some influence on tax case outcomes, but only when combined with other sociological
characteristics of a judge – namely, race and the eliteness of the judge’s law school education (Schneider 2005). Staudt, Epstein and Wiedenbeck’s comprehensive study of Supreme Court tax cases found no effect for judicial ideology when relying on the liberal/conservative coding in the Speath database (Staudt, Epstein & Wiedenbeck 2007). The study nevertheless found that ideology is significant in corporate tax cases, and suggested that the conventional coding of all tax outcomes favoring the government as liberal is over-inclusive, given the heterogeneity of non-government parties. These studies suggest that tax law is affected by ideology, but not with the same clarity as the non-economic cases that the attitudinalist literature typically analyses.

Intellectual property is an area of economic regulation that is often assumed to be non-partisan. Intellectual property academics commonly assume that judicial decision making in their specialized field does not conform to traditional notions of the liberal-conservative ideological continuum (e.g. Simensky 2003; Rogan 2004; Patry 2005). Lessig, for example, argues that limiting IP protection should appeal to Democrats and Republicans alike (Lessig 2004b). Even within the attitudinal literature, this view sometimes surfaces; for example, copyright has been described as “often very technical… and less clearly ‘ideological’” (Edelman, Klein & Lindquist 2007). We term this common wisdom “IP exceptionalism.” The presumed irrelevance of ideology and partisan affiliation in the IP literature is such that there are very few articles where the question is even raised. This conflict between the attitudinal model and IP exceptionalism is an empirical question, the study of which could also shed insight on the effect of ideology on economic areas of the law more generally.

Two prior studies have examined the role of ideology in specific areas of IP cases.
Beebe’s study of the application of the *Polaroid* factors in trademark cases averts to the possibility that political ideology might affect judicial decision making in this context, but found no significant effect (Beebe 2006). Likewise, Moore’s study of patent claim construction appeals found no significant difference in how judges appointed by Republicans and judges appointed by Democrats construe patent claims, nor any discernable difference in their tendencies to affirm or reverse district court claim constructions (Moore 2001). The results of these narrow studies are consistent with IP exceptionalism, but minimally persuasive because they are null results.

Additional evidence for IP exceptionalism is found in observations such as: (i) that unanimous decisions are more common in Supreme Court IP cases than in other Supreme Court cases; (ii) that IP cases manifest disordered voting – unusual coalitions of liberals and conservatives appear to defy the predictions of the attitudinal model; and (iii) that there are instances of liberal justices voting to expand IP protection and/or conservative justices voting to limit the scope of IP protection.¹ These are anecdotal observations, the generality and significance of which have not been tested.

Although the empirical foundation of IP exceptionalism is minimal, its theoretical roots are strong. The labels liberal and conservative (Democrat and Republican) extrapolate easily in certain contexts: liberals (in the modern sense) tend to look favorably upon social programs that require government intervention in the economy, but unfavorably upon government regulation of individual expression or “morality;” conservatives in contrast resist government interference in property rights and increasing regulation of the economy, but often endorse laws to enforce “traditional values.”

Consistent with this dichotomy, in the IP context we expect conservatives to view IP as
property and thus as an end in itself. Just as Epstein and Segal (2006) found that liberal support for free speech is often subordinated in pursuit of other social values, we expect that liberals will be more receptive to placing limitations on IP rights in the pursuit of other social values, such as freedom of expression or distributive justice. Yet there are good reasons to expect that judicial policy preferences with respect to IP may not fit neatly within the stereotypical view of the liberal-conservative ideological continuum.

Even if IP is property in the general sense, the ideological significance of that classification may be contested, given that the institution of private property is predominantly justified in terms of natural rights, whereas the primary justifications for IP rights tend to be instrumentalist and utilitarian. Although the U.S. Constitution protects private property rights as a fundamental aspect of individual liberty (U.S. Const. Am. 5, Am. 14), its support for IP is subject to a purposive limitation, “To promote the Progress of Science and useful Arts,” and is thus usually considered merely instrumental (U.S. Const. art. I, § 8, cl. 8; Merges, Menell & Lemley 2005). To the extent that IP rights are not attributable to a natural rights framework, one might expect that they would have less intrinsic appeal to political conservatives.

Moreover, the attitudinal model must also contend with the fact that the various sub-fields of IP – copyright, patent, trademark and trade secret law – are separate legal categories, each raising potentially divergent ideological implications. Patent law balances the need for incentives for innovation against the competing claims of competitors and second generation inventors. Copyright raises similar policy issues in many respects but also requires an account of the public interest in freedom of expression – a salient issue for liberals in particular (Epstein & Segal 2006). Trademark law, with its
focus on consumer confusion and consumer search costs, is different again. Even if there is a coherent liberal or conservative view with respect to one field of IP, such as patent law, it cannot be assumed that view will apply to other fields of IP.

The same considerations that argue for the ideological ambiguity of IP in general also suggest that we may observe a difference between the consistency of the effect of ideology for liberal and conservative justices. For example, conservative justices might divide on the threshold question of whether IP is property, or the correct balance between property rights and free competition. Alternately, liberal justices who value free speech might divide on how to balance freedom of expression with protecting consumers from confusion (trademark) or providing incentives to authors (copyright). Arguably these tensions will be more apparent when the IP owner is a traditional liberal underdog as opposed to a large corporation. In either case, we may discern a coherent stance toward IP relating to one group of justices, but not the other.

In summary, because IP is important, both economically and socially, we predict that it will be significantly impacted by judicial ideology. In contrast to the extensive attitudinalist evidence of the substantial role of ideology in predicting case outcomes, the empirical basis for IP exceptionalism is weak. As such, consistent with the attitudinal literature, we predict that pro-property conservatives will be more protective of IP rights and that liberals will be more tolerant of incursions of those rights when those incursions promote other values, such as freedom of expression. We do not expect that IP is immune to the effect of judicial ideology. Nevertheless, there are plausible intuitions underpinning the belief that IP issues do not fall neatly across party lines. Similarly, the component spheres of IP may themselves raise cross-cutting issues which place IP as a whole outside
the traditional liberal-conservative ideological spectrum or reduce the extent of the consistency of the effect of ideology on IP. As such, although we expect ideology to be a strong predictor of outcomes in IP cases, as in other economic areas, the effect of ideology in IP may be more ambiguous than in other cases generally. Accordingly, in the empirical analysis which follows, we first test for the broad effect of ideology in IP cases. We then conduct additional analysis to determine the significance of the various sub-fields of IP, other case specific factors, and the consistency in the effect for liberal and conservative justices. Finally, to see if, like other economic areas, the effect of ideology is potentially attenuated by these vying considerations, we test the relative extent of the effect of ideology on IP and all other cases.

3 Empirical Analysis

3.1 Testable Hypotheses

In this section, we set out the testable hypotheses arising from the attitudinal model in relation to IP. Using judicial vote as our unit of analysis, we begin with the testable proposition that judicial decision-making in IP is a function of ideology.

Hypothesis 1. Judicial ideology predicts judicial decision-making in IP cases.

The theory of IP exceptionalism explored in Section 2 suggests that liberals and conservatives may be internally divided on IP issues, either because of the ideological ambiguity of IP generally or because differences between fields of IP may present conflicting ideologically salient issues.

Hypothesis 2. The effect of judicial ideology is affected by the type of IP right.

Hypothesis 3. The effect of judicial ideology differs between liberals and conservatives.

If there is a significant relationship between voting in IP cases and ideology, the
next natural question is whether the effect is as strong as it is for all other cases.

*Hypothesis 4.* The effect of judicial ideology in IP cases is less pronounced than in other Supreme Court cases.

### 3.2 Data and Variables

#### 3.2.1 Sample

To test these hypotheses, we constructed the Supreme Court Intellectual Property database. This database contains an entire population of Supreme Court opinions dealing with IP cases from 1954 through 2006. Much of our IP database is adapted from a widely used database of Supreme Court opinions developed by Harold Spaeth: the United States Supreme Court Judicial Database (Spaeth 1997). This database also serves as our comparison data for all other Supreme Court cases. For simplicity we refer to these databases as the IP database and the general database, respectively. The IP database consists of 102 IP cases with 844 separate votes by the individual justices. The general database contains over 8900 cases with more than 105,670 separate votes. We based our case selection on the subject matter codes in the general database plus a Lexis search for the core-terms: patent, copyright, trademark, trade secret, and fair use.

#### 3.2.2 Dependant Variables

The general database records a multitude of attributes for each decision relating to the origins of the case: the legal subject at issue, key dates, the identities of the parties and the votes of the individual justices. The outcome of each decision is coded as either “liberal” or “conservative,” “1” and “0” respectively. In general, a case outcome is coded as liberal if it favors classic liberal underdogs, such as the accused in a criminal case, civil rights or civil liberties claimants, children, indigents, or American Indians.
Outcomes favoring affirmative action and reproductive freedom are also coded as liberal. Pro-union decisions are coded as liberal except in the context of antitrust cases, where a pro-union decision is regarded as conservative. In economic activity cases, liberal outcomes include pro-competition, anti-business, pro-indigent, pro-small business vis-a-vis large business, pro-debtor, pro-bankrupt, pro-Indian, pro-environmental protection, pro-consumer, and pro-economic underdog.¹

Since liberal outcomes are coded as “1” and conservative outcomes as “0”, this variable is referred to in both the general database and herein as simply “LIBERAL.” The term “liberal” appears in all caps when referring to the variable, in plain text otherwise – for example when referring to a justice being liberal, rather than conservative.

In spite of its impressive scope and complexity, the general database is not adequately detailed in relation to IP, beyond the inclusion of basic subject matter categories. This is because the dependant variable in the general database, LIBERAL, is based on party status, divorced from any ruling as to doctrinal entitlement. To determine the effect of ideology on predicting IP outcomes requires a measure of case outcomes that is relevant to IP – specifically, it needs to stipulate the property determination. Accordingly, we created a new dependant variable, XIPO, which records case outcomes in relation to IP. XIPO stands for “Against the IP Owner” who is asserting the IP right in the case. XIPO is a binary variable that codes a decision favoring the party asserting an IP right as “0” and a decision against that party as a “1”.²

In a scenario where one large corporate patent holder sues another similar entity, the LIBERAL variable provides no strong intuitive expectation as to how an ideologically driven court should rule. Whereas XIPO, which specifies party status in
relation to a legal doctrine, distinguishes between whether the entity is defending or
claiming a property interest. XIPO outcomes should therefore correlate with an expansion
or contraction of IP rights. More generally, to the extent that attitudinalists claim that
judges care about case outcomes, they should expect judges to care about the numerous
case outcomes that will follow as a result of the doctrinal determination, not just the fate
of the specific parties before them in the case at hand. Ordinarily the attitudinal approach
gets at the doctrinal aspect of outcome by subdividing issue areas – for example
distinguishing between free speech cases in general and free speech in the context of
protests outside abortion clinics. Since this nuance is not provided in the general database
in relation to IP, it is necessary to create the XIPO variable. To ensure the robustness of
our results, we carry out tests on both the LIBERAL and XIPO dependant variables.

3.2.3 Independent Variables

We use two different measures of judicial ideology as our key independent variables. The
first is the Party of the Appointing President, which uses the party of the president who
nominated the justice as a proxy for a judge’s ideological leanings. The variable takes on
the value of “1” for Republican presidents and “0” for Democratic presidents. The
assumption here is that Republican presidents are inclined to appoint conservative
justices and Democrat presidents are inclined to appoint liberal ones.

While intuitively appealing, this measure may not be the most precise for a
number of reasons. First, presidential ideology is more nuanced than a simple binary
choice between liberal and conservative (Epstein & King 2002). Second, other factors
such as the composition of the Senate and its prevailing norms may either constrain or
enhance the power of the president with respect to judicial appointments (Jacobi 2005).
Third, Party of the Appointing President is a time-invariant proxy for ideology and hence precludes the possibility of accounting for variations in each justice’s ideology over time. Clearly such variation occurs: for example, Justice Stevens was appointed by Republican President Nixon, but is now the most liberal member of the Supreme Court.

The more complex measure we employ is the “Martin-Quinn” scores of judicial ideology (Martin & Quinn 2002). The Martin-Quinn scores are derived from the votes of the justices over time, estimated using a dynamic item response theory model which takes into account not just case outcomes, but also voting coalition patterns in each term.  

There are several advantages to using the Martin-Quinn scores for empirical analysis such as ours. First, Martin and Quinn provide a measure that allows for comparison over time. Second, the Martin-Quinn scores for individual justices can and do change over time and are thus more realistic than measures of ideology that hold justices’ ideology constant (Epstein, Martin, Quinn & Segal 2007). Finally, although the method used to derive the scores is quite complex, the Martin-Quinn scores themselves align closely with press and popular perceptions of the ideological positions of the justices.

Martin and Quinn have shown that there is minimal concern with circularity in using scores developed from cases to predict voting behavior, since rerunning the analysis with any given issue area excluded has a minimal effect on the resulting scores (Martin & Quinn 2005). Nevertheless, to be certain to avoid any circularity problems, we conducted our analysis using a version of the Martin-Quinn scores that excludes intellectual property cases from the ideology score derivation procedure.

We also created new dummy variables relating to case subject matter – Copyright, Patent, Trademark and Trade Secret.
3.2.4 Control Variables

We created control variables relating to other common elements of IP cases: whether the case involved an author or inventor, whether the case raised an antitrust issue and whether the case was decided before or after the creation of the Court of Appeals for the Federal Circuit in 1982.

The binary variable “Author/Inventor” takes on the value of “1” if the party claiming the IP right was also the author or inventor of the IP interest, “0” if simply the owner of the IP interest. This variable addresses the possibility that that judges might be more sympathetic to the claims of creators of IP than those of mere owners.6

The binary variable “Antitrust” takes the value “1” if the case involved an issue of antitrust law and “0” if otherwise. This variable addresses the possibility that IP-antitrust cases might take on a different ideological significance because they do not address the validity or infringement of IP rights, but instead focus on the legitimacy of the exercise of those rights.

We also added a binary variable “Post1982” that takes the value of “1” if the case was decided in or after 1982 and “0” if otherwise. The Federal Circuit was established in 1982 and vested with exclusive jurisdiction over patent appeals in order to make patent law more consistent, reduce forum shopping and (implicitly) to increase the value of patent rights. The creation of the Federal Circuit changed substantive patent law and also affected the types of patent cases the Supreme Court is likely to review (Lunney 2004).

We use the binary variable “Lower Court” for the direction of the lower court decision as a control variable throughout our analysis, to account for the strong tendency of the Court to reverse lower court decisions. “Lower Court” takes the value “1” if the
decision of the court whose decision the Supreme Court reviewed was itself liberal and “0” if that lower court decision was conservative.

3.3 Results

Given our dependent variables XIPO and LIBERAL are binary outcomes, we use logit to test the relative effects of judicial ideology on justices’ voting behavior. We also verify our results using probit – which differs from logit in assuming the normal rather than the logistic distribution of the error term – and they remain substantively the same. Since several observations often belong to the same judges and cases, we relax the assumption of observation non-independence by using robust standard errors adjusted for the clustered structure of the data. This adjustment also allows us to relax the assumption of homoskedastic error variance. We report three variations of estimation, with Huber-White robust standard errors (Huber 1967, White 1980), with robust standard errors clustered by judges and clustered by cases (Rogers 1983, Huber 1967). Using this adjustment helps mitigate under-estimation of standard errors and thus reduces the risk of rejecting a false null.7

3.3.1 Ideology and IP

To test hypothesis 1, which predicted a relationship between a justice’s ideology and his or her voting patterns, we first consider the effect of ideology on case outcomes using Martin-Quinn scores (a continuous variable where higher scores indicate a more conservative justice) and Party of the Appointing President (a binary variable where “1” indicates a Republican President appointee and “0” a Democratic President appointee).

Table 1 shows the results using our three robustness adjustments for standard errors.
Table 1: Effect of Judicial Ideology on Voting Against the IP Owner and Voting LIBERAL, using Case and Judge Robust Errors

<table>
<thead>
<tr>
<th></th>
<th>XPO: Martin-Quinn Scores</th>
<th>LIBERAL: Martin-Quinn Scores</th>
<th>XPO: Appointing President</th>
<th>LIBERAL: Appointing President</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideology</td>
<td>-.14</td>
<td>-.22</td>
<td>*</td>
<td>-.47</td>
</tr>
<tr>
<td>Robust SE</td>
<td>(.04)</td>
<td>**</td>
<td>(.04)</td>
<td>**</td>
</tr>
<tr>
<td>Clustered SE on Judges</td>
<td>(.04)</td>
<td>**</td>
<td>(.05)</td>
<td>**</td>
</tr>
<tr>
<td>Clustered SE on Cases</td>
<td>(.04)</td>
<td>**</td>
<td>(.05)</td>
<td>**</td>
</tr>
<tr>
<td>N</td>
<td>844</td>
<td>844</td>
<td>844</td>
<td>844</td>
</tr>
<tr>
<td>Log-Likelihood</td>
<td>-517.33</td>
<td>**</td>
<td>-511.55</td>
<td>**</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01 (two-sided test; standard errors in parentheses)

The results confirm our prediction that ideology matters in predicting judicial decisions in IP cases, indicating that more conservative judges are less likely to vote LIBERAL (β=-0.22 using Martin-Quinn, β=-0.39 using Political Party of Appointing President) and less likely to vote against IP owner (β=-0.14 using Martin-Quinn and β=-0.47 using Party of Appointing President). The substantive similarity of the results under the two different measures confirms the strong effect of ideology in IP, whether measuring judicial ideology through case voting patterns or through political alignment.

When using both measures of judicial ideology together – Martin-Quinn scores as well as Party of Appointing President – the Martin-Quinn coefficient remains negative and significant throughout, and completely absorbs the explanatory power of the Party of Appointing President measure.

Additionally, we ran the same tests using a measure of each judge’s prior voting
history, using either the count or the fraction of judicial votes against the IP owner for each justice, over the five years prior to the focal year or over all preceding years. While the history measure is also a significant predictor of future voting when run independently, when combined with the Martin-Quinn scores, the history measure became insignificant while leaving the effect of Martin-Quinn score intact. These additional analyses show that establishing the effect of ideology is not contingent upon use of one particular score of ideology. The results further indicate that while the Martin-Quinn scores are congruent with the same broad effect of ideological preferences and consistency, the Martin-Quinn scores reflect a more precise estimate of ideology than these alternative proxies. As such, the remainder of our analysis uses only the Martin-Quinn scores as a measure of ideology.

To assess how substantively significant the relationship between IP and ideology is, we converted our logit coefficients into expected changes in the odds. Having a justice who was appointed by a Republican President decreases the odds of voting LIBERAL by 32.3% and the odds of voting against the IP owner by 37.5%. Martin-Quinn scores of ideology are theoretically unbounded, but the actualized range of ideological differentiation is from -6.331 at the most extreme historical liberal end to 4.310 at the most extreme historical conservative end. Moving from the liberal extreme to the conservative extreme reduces the odds of voting against the IP owner by 79%. Thus the difference between strong liberals and strong conservatives translates to a massive difference in the likelihood of supporting an IP claim. This effect is not limited to the extremes. A move from one standard deviation below the historical mean ideology (-2.33) to one standard deviation above the mean (2.19) reduces the odds of voting against
the IP owner by 48%. For the alternative specification of the dependent variable, the same movement decreases the odds of voting LIBERAL by 63%.

Specifically for the Rehnquist Court, moving the ideological distance from Stevens at the liberal end of the Court to Thomas on the conservative end translates to a 51% decrease in the odds of voting against the IP owner. The increase in ideological conservatism from Stevens to O’Connor, the overall median of the Court, translates to a 30% decrease in the odds of voting against the IP owner. Similarly, the increase in conservatism from O’Connor to Thomas at the conservative end of the Court translates to a 29% decrease in the odds of voting against the IP owner.

In sum, we find a strong effect of justices’ ideology on their voting behavior in IP cases, thereby dispelling the exceptionalist notion that ideology does not apply to IP. More ideologically conservative justices are more prone to vote in support of intellectual property rights and against the perennial underdogs when compared to liberal justices.

### 3.3.2 Type of IP

As discussed in Section 2, the various types of IP – patents, copyrights, trademarks and trade secrets – are different in a number of respects, and so it is worth exploring whether the effect of ideology is contingent upon a particular subset of IP cases. Table 2 shows the effect of ideology, using Martin-Quinn scores, on voting against the IP owner (XIPO) after re-specifying the model to include variables relating to the type of IP at issue in each case. We use patents as our default category, since approximately half of the cases in the IP database involve patents.

Table 2 confirms our earlier result showing that IP case outcomes are significantly related to ideology. The coefficient on ideology remains substantively identical to the
result in Table 1, confirming that the effect of ideology is robust even after we account for a variety of potentially confounding factors. While Model 1 in Table 2 shows our results using Huber-White robust standard errors, we also tested these results using standard errors clustered by judge and by case, and they remained substantively the same.

Table 2: Effect of Judicial Ideology (Martin-Quinn scores) on Voting Against the IP Owner, for Type of IP cases, using Huber-White Robust Standard Errors

<table>
<thead>
<tr>
<th></th>
<th>Model 1 XIPO</th>
<th>Model 2 XIPO</th>
<th>Model 3 XIPO</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ideology (ID)</strong></td>
<td>-.13 **</td>
<td>-.12 *</td>
<td>-.13 **</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
<td>(.06)</td>
<td>(.04)</td>
</tr>
<tr>
<td><strong>Copyright</strong></td>
<td>-.74 **</td>
<td>-.74 **</td>
<td>-.63 **</td>
</tr>
<tr>
<td></td>
<td>(.18)</td>
<td>(.18)</td>
<td>(.20)</td>
</tr>
<tr>
<td><strong>Trade Secret</strong></td>
<td>-.16</td>
<td>-.17</td>
<td>.02</td>
</tr>
<tr>
<td></td>
<td>(.37)</td>
<td>(.37)</td>
<td>(.40)</td>
</tr>
<tr>
<td><strong>Trademark</strong></td>
<td>.22</td>
<td>.24</td>
<td>.35</td>
</tr>
<tr>
<td></td>
<td>(.21)</td>
<td>(.22)</td>
<td>(.23)</td>
</tr>
<tr>
<td>ID*Copyright</td>
<td>-.02</td>
<td>.08</td>
<td>-.06</td>
</tr>
<tr>
<td></td>
<td>(.09)</td>
<td>(.16)</td>
<td>(.11)</td>
</tr>
<tr>
<td>ID*Trade Secret</td>
<td>.08</td>
<td>.08</td>
<td>.08</td>
</tr>
<tr>
<td></td>
<td>(.16)</td>
<td>(.16)</td>
<td>(.16)</td>
</tr>
<tr>
<td>ID*Trademark</td>
<td>-.06</td>
<td>-.06</td>
<td>-.06</td>
</tr>
<tr>
<td></td>
<td>(.11)</td>
<td>(.11)</td>
<td>(.11)</td>
</tr>
<tr>
<td><strong>Post1982</strong></td>
<td>.12</td>
<td>.12</td>
<td>.12</td>
</tr>
<tr>
<td></td>
<td>(.18)</td>
<td>(.18)</td>
<td>(.18)</td>
</tr>
<tr>
<td><strong>Author/Inventor</strong></td>
<td>-.12</td>
<td>-.12</td>
<td>-.12</td>
</tr>
<tr>
<td></td>
<td>(.17)</td>
<td>(.17)</td>
<td>(.17)</td>
</tr>
<tr>
<td><strong>Antitrust</strong></td>
<td>.49 *</td>
<td>.49 *</td>
<td>.49 *</td>
</tr>
<tr>
<td></td>
<td>(0.25)</td>
<td>(0.25)</td>
<td>(0.25)</td>
</tr>
<tr>
<td><strong>Lower Court</strong></td>
<td>.87 **</td>
<td>.87 **</td>
<td>.81 **</td>
</tr>
<tr>
<td></td>
<td>(.16)</td>
<td>(.16)</td>
<td>(.17)</td>
</tr>
<tr>
<td><strong>Intercept</strong></td>
<td>1.14 **</td>
<td>1.13 **</td>
<td>1.00 **</td>
</tr>
<tr>
<td></td>
<td>(.14)</td>
<td>(.14)</td>
<td>(.21)</td>
</tr>
<tr>
<td>n</td>
<td>844</td>
<td>844</td>
<td>844</td>
</tr>
<tr>
<td>Log-Likelihood</td>
<td>-505.95</td>
<td>-505.62</td>
<td>-503.57</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01 (two-sided test; standard errors in parentheses). IP Reference Category = Patent

Additionally, Table 2 shows that compared to patent cases, in copyright cases the justices were significantly less likely to vote against the IP owner. In Figure 1, we capture these variations by mapping the logit-derived predicted probability of a justice voting...
against the IP owner. This Figure graphs the Martin-Quinn ideological scores for the entire range of that variable’s realized scale on the x-axis and the probability of voting XIPO on the y-axis.

**Figure 1: Predicted Probability of Voting XIPO, by Type of IP**

Figure 1 illustrates the effect of ideology on the probability of voting against the IP owner, by IP type, when the lower court voted conservative. It shows that justices are significantly less likely to vote against an IP owner in copyright cases when compared to others. For instance, at the zero point on the Martin-Quinn ideology score, the probability of a justice voting against the IP owner in patent, trademark and trade secret cases is 75.6%. In contrast, the equivalent probability for the copyright cases is 59.7%. This divergence increases slightly as justices become more conservative.

This observation is open to a number of possible explanations. Copyright and patent law establish private rights of exclusion in order to give authors and inventors an
incentive to create. However, copyright and patent are different in several important respects. First, whereas copying is an essential element of infringement in any copyright suit, many patent defendants are independent inventors. Second, Supreme Court justices are masters of the written word and so are perhaps more sympathetic to the romantic myth of the author underlying copyright than the equivalent myth of the inventor in patent law. Both of these factors suggest that the justices may simply be more sympathetic to the claims of an author against a plagiarist than they are to the claims of one inventor against a second inventor or rival producer. These explanations imply that the justices are more convinced by the incentive theory underlying copyright protection than that underlying patent protection. Another possibility is that the justices perceive no difference in the incentive logic of patents versus copyrights, but are less concerned with over-breadth in copyright law because of its many exceptions and limitations.  

Given the relatively parallel slopes of the effect of ideology for different types of IP, we expect that the effect of ideology is not contingent on the type of case. To verify this empirically, in Model 2 of Table 2 we add interaction terms between our measure of ideology and each type of IP. None of the interaction terms were significant, showing that the impact of ideology on voting against the IP owner is not driven by one particular type of IP case only. The effect of ideology on IP cases holds across all subject areas.  

Taken together, these results show that the effect of ideology exists in every type of IP case to a significant degree and is not amplified or attenuated by type of IP, but the level of the propensity to vote against the IP owner is sensitive to the type of IP dispute. This suggests that while ideology is highly consequential, legal and factual elements may also be highly determinative.
In Model 3 we check that the effect of ideology is not contingent on other major legal and factual elements of IP cases. To do so, we undertake the tests with the Author/Inventor, Antitrust, and Post1982 binary variables added. First, it is not relevant whether a case is brought by an author or inventor, rather than a non-creative owner.

Second, our Post1982 variable is significant at the 0.05 level when not controlling for lower court direction, but is not significant in Model 3 with this control. The fact that this result is not sustained once we control for the direction of the lower court decision is consistent with the view that Supreme Court review of Federal Circuit cases is motivated by the perceived need to rein in the Federal Circuit’s excessive formalism, rather than to change the rights of IP owners *per se.*

Finally, our Antitrust variable is significant at p=0.054 using robust standard errors, but not when clustering by case or by judge. This result suggests that there may be some ideologically relevant difference between IP cases – which typically focus on issues of validity and infringement – and IP-Antitrust cases – which focus instead on the legitimacy of the exercise of IP rights – but our confidence in the reliability of this difference is marginal.

Overall these results raise interesting doctrinal implications for IP: some elements common to IP cases that might be thought to be determinative in case outcomes have been shown to be at best marginally significant. The creation of the Federal Circuit, the interaction between IP and antitrust, and the status of the owner of the IP rights all fall to an insignificant level when ideology and the direction of the lower court’s decision have been accounted for. This suggests that ideology is not only significant in IP cases, as a predictor of case outcomes, it appears to dominate the central legal elements that are
commonly thought to be important in IP. The only legal distinction of consistent and strong significance is that between copyright and patent. Justices across the entire political spectrum are significantly less likely to rule against the intellectual property owner in a given copyright case than in a given patent case. We have proposed a number of possibilities as to why this difference arises: differences in judicial attitudes to patent and copyright’s restrictive incentive systems, or to the nature of authorship and invention, or to the balance between IP protection and its limitations. The most striking result is that the effect of ideology remains highly significant when many other potential predictors of justices’ voting are accounted for. Next we test the possibility raised in the theoretical discussion of IP exceptionalism, that the effect of ideology may be different for conservative as opposed to liberal justices.

3.3.3 Differences between liberal and conservative justices

The theoretical ideological ambiguity of IP addressed in Section 2 also raises the question of whether we should expect the effect of ideology on IP cases to be uniform across the ideological spectrum. The theoretical discussion suggested that the various subfields of IP raise different ideological implications – since they differently balance ideologically salient issues, such as free speech, free competition and market freedom. It was hypothesized that these differences could differentially impact liberals and conservatives in the extent of the role of ideology in intellectual property cases.

To address that question, we test whether liberals and conservatives have the same level of relationship between ideology and voting in IP cases. We use a spline regression specification (Johnson 1984) to create two ideology splines: conservative and liberal. The conservative spline was recoded to equal the Martin-Quinn score if the
justice’s score was greater than or equal to zero, and was set to zero if otherwise.
Likewise, the liberal spline was set equal to the Martin-Quinn score only if the justice’s score was below zero, and constrained to zero otherwise.\(^\text{13}\) The Martin-Quinn ideology variable, therefore, is no longer restricted to a single slope, and has the slopes for liberal and conservative ideology estimated separately. Spline decomposition is preferred to split-sample analyses because it enables us to retain the full sample and its concomitant statistical power, and also allows for a more straightforward comparison of the effects of liberal and conservative ideology.

**Table 3: Effect of Judicial Ideology on Voting Against the IP Owner and Voting LIBERAL for Liberal versus Conservative Justices**

<table>
<thead>
<tr>
<th></th>
<th>XIPO</th>
<th>LIBERAL</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ideology-Conservatives</strong></td>
<td>-.19** (.08)</td>
<td>-.26** (.08)</td>
</tr>
<tr>
<td><strong>Ideology-Liberals</strong></td>
<td>-.08 (.07)</td>
<td>-.21** (.08)</td>
</tr>
<tr>
<td><strong>Copyright</strong></td>
<td>-.69** (.19)</td>
<td>.22 (.20)</td>
</tr>
<tr>
<td><strong>Trademark</strong></td>
<td>.28 (21)</td>
<td>-.09 (.36)</td>
</tr>
<tr>
<td><strong>Trade Secret</strong></td>
<td>-.18 (.38)</td>
<td>-.31 (.20)</td>
</tr>
<tr>
<td><strong>Post-1982</strong></td>
<td>-.17 (.17)</td>
<td>.13 (.17)</td>
</tr>
<tr>
<td><strong>Lower Court</strong></td>
<td>-.81** (.17)</td>
<td>-1.06** (.17)</td>
</tr>
<tr>
<td><strong>Intercept</strong></td>
<td>1.26** (.17)</td>
<td>.99** (.16)</td>
</tr>
<tr>
<td><strong>n</strong></td>
<td>844</td>
<td>844</td>
</tr>
<tr>
<td><strong>Log-likelihood</strong></td>
<td>-504.91</td>
<td>-508.66</td>
</tr>
</tbody>
</table>

* p<0.05, ** p<0.01 (two-sided test; standard errors in parentheses)

Table 3 shows our results when comparing the effects of liberal and conservative ideology on voting against the IP owner and on voting LIBERAL. We used simultaneous estimation on the two logit equations, which relies on a joint variance-covariance matrix to account for possible correlation among structural errors.
The results in Table 3 show that there is a difference between how conservatives and liberals are affected by ideology in IP cases. The role of ideology in voting against the IP owner is significant only for conservatives; the effect for liberals is not differentiable from zero. The conservative spline effect continues to hold when using robust standard errors clustered by case (p < 0.01) and holds marginally when clustering by judge (p = 0.07). The liberal spline, in turn, is indistinguishable from zero in all model specifications. In contrast, when running the same analysis with respect to the effect of voting LIBERAL, both liberal and conservative splines are significant in the negative direction, and the difference between the two LIBERAL splines is consistently insignificant. Thus, the difference in the effect of ideology on liberal versus conservative justices is not driven by liberal justices generally being non-ideological.

These results suggest that ideology differentially impacts liberals and conservatives in IP cases in relation to voting XIPO, but not in relation to voting LIBERAL. For a secondary robustness check on these results, we ran tests of whether the differences between the significant effect of ideology on conservatives and the insignificant effect for liberals in voting XIPO, and the lack of difference between conservatives and liberals in voting LIBERAL, are themselves significant. These results were more ambiguous. Comparing the difference between the two conservative splines consistently showed no difference, as expected from the results in Table 3. The difference between conservatives and liberals in voting XIPO was of marginal significance (p = 0.09) only when clustering by case and without controls. Similarly, the liberal spline for XIPO is significantly different from its counterpart for LIBERAL at p=0.06, but once again only when clustering by case and without controls.
This analysis, then, gives some support to the intuition that liberal and conservative justices are differently affected in the extent that ideology influences their tendency to vote against the IP owner. Only conservatives can be shown to be significantly affected by ideology in IP, but the difference is not sharp enough to rely on with certainty. It may be that there are better tests for determining the extent of the seemingly differential effects between liberal and conservative justices. We discuss this in greater detail in the implications section.

3.3.4 Comparing the extent of the effect of ideology on IP cases to Supreme Court cases in general

Having established that ideology has a significant effect on the probability of voting against the IP owner – albeit an effect that itself is differentiated somewhat by ideology – the final element of our inquiry is to determine whether ideology shapes IP to the same extent that it shapes other cases. We do this through two means: First, using the entire population of cases in the general database, we estimate a regression with ideology, a dummy variable indicating IP cases and an interaction term between IP and ideology. A significant interaction effect would indicate that the effect of ideology is distinct in IP cases when compared to that in non-IP cases.14 Second, we estimate the effect of ideology on voting LIBERAL separately on two samples: IP cases and on non-IP cases from the general database. We estimate the two equations using simultaneous estimation to allow for correlation of structural errors and compare the coefficients for ideology. Each method provides robust measures of the existence and extent of any difference.

Our first test was to run a regression with LIBERAL as the dependent variable and with ideology, an IP dummy, and an interaction term between the IP dummy and ideology as the independent variables on the entire population of cases. If the coefficient
on the interaction term is significant, then there is a significant difference between the role of ideology in IP cases and other cases. Table 4 shows the results.

Table 4: Effect of Judicial Ideology on Voting LIBERAL, for all cases, with IP and IP-Ideology, using Huber-White Robust Standard Errors

<table>
<thead>
<tr>
<th></th>
<th>LIBERAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ideology</td>
<td>-.33 **</td>
</tr>
<tr>
<td></td>
<td>(.00)</td>
</tr>
<tr>
<td>IP</td>
<td>.71 **</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
</tr>
<tr>
<td>IP*Ideology</td>
<td>.10 **</td>
</tr>
<tr>
<td></td>
<td>(.04)</td>
</tr>
<tr>
<td>Intercept</td>
<td>-.06 **</td>
</tr>
<tr>
<td></td>
<td>(.00)</td>
</tr>
<tr>
<td>N</td>
<td>105,670</td>
</tr>
<tr>
<td>Log-Likelihood</td>
<td>-67,605.75 **</td>
</tr>
</tbody>
</table>

*p<0.05, ** p<0.01 (two-sided test; standard errors in parentheses)

As expected, the ideology coefficient is significant and negative, as previously established. The interaction term has a positive and highly significant coefficient, showing that the effect of ideology is weaker in IP cases compared to other cases, since the positive interaction term weakens the negative effect of the ideology term. The interaction term is significant at $p = 0.019$ with robust standard errors ($p = 0.068$ with robust errors clustered by judges and $p = 0.039$ with robust errors clustered by cases).¹⁵

Interestingly, the coefficient on IP is highly significant and positive, suggesting that IP has a strong positive effect on the direction of the vote, independent of ideology. This suggests liberal votes are more likely in IP cases than in other cases.

The most significant element of Table 4 for our purposes is that it confirms our prior results, showing that there is a significant effect of ideology in IP, but also a significant difference between the role of ideology in IP cases and all other cases.

We find a similar disparity in relation to the second question, comparing the probability of voting LIBERAL in the two separate databases. The effect of ideology on
voting LIBERAL in IP cases is lower than the effect of ideology on voting LIBERAL in non-IP cases. The difference is statistically significant at the 0.05 level.

We ran simultaneous equations for IP cases and for non-IP cases, predicting the probability of voting LIBERAL with ideology. The difference between the coefficient of ideology for IP cases (-0.24) and all other cases (-0.33) is highly statistically significant using robust standard errors (p = 0.019). Substantially similar results arise using robust errors clustered by judge (p = 0.068) and robust errors clustered by case (p = 0.039). Moving from one end of the historical ideological spectrum to the other (-6.33 to 4.31) decreases the odds of voting LIBERAL in the general database by nearly 97%. Whereas in the IP database, that move shifts the odds of voting LIBERAL by 92%.

In sum, both tests provide strong evidence that ideology is statistically significant in its effect on IP cases, but at significantly lower levels than in non-IP Supreme Court cases. Thus in answer to our question of whether ideology shapes IP, or conversely IP is exceptional, we have seen that ideology has a statistically and substantively significant effect on the probability of voting for or against the IP owner. These last results show that while it is true that ideology is highly determinative of IP outcomes, there is still merit to the claim that IP is different to other cases, if not entirely exceptional.

4 Extensions and Implications

Our analysis has shown that ideology is a significant determinant a whether an individual justice will vote for an IP claim. As the Attitudinalist logic would predict, attitudes about IP are part of the liberal-conservative ideological continuum, not an exception to it.

Ideology in fact seems to dominate any impact from proposed legal factors: the creation of the Federal Circuit and differences between the creators of IP and mere owners. The
only legal factor we found to be consistently significant was the difference between patent and copyright: across the political spectrum, justices are less likely to rule against an IP owner in copyright than in patent. Antitrust was also marginally significant.

Thus our primary hypothesis was consistently supported in all of our tests: ideology strongly impacts outcomes in IP cases. At the same time, our hypotheses concerning more nuanced elements of the effect of ideology were also supported. First, while most other legal factors were shown to not be significant, type of IP was significant, at least between copyright and patent. Second, ideology is different for liberals and conservatives: the effect is statistically significant for conservatives, but not for liberals – although the significance of this difference could only be partially confirmed. Third, there is a significant difference between the extent to which ideology shapes IP cases and the extent to which it shapes other areas of the law. These results provide the first broad-based empirical evidence of the role of ideology in IP cases before the Supreme Court. As well as delineating the role of judicial ideology in IP cases, these findings have broader implications for other areas of law.

The ambiguity in the effects found by empirical studies of judicial ideology in economic cases is echoed by our results that there is a significant difference in the extent of the impact of ideology in IP cases and other areas. Our findings suggest that the variety of results seen in studies of economic cases may not arise from differences among testing techniques or between the specific areas of the law among economic cases, but rather they may be a result of an inherent difference between economic and social cases.

Our results also provide one theory of why this might be so. We found that the effect of ideology is not uniform across the ideological spectrum. Once we differentiated
between liberal and conservative justices, the effect of ideology was shown to be significant only for conservatives. In contrast, the effect of ideology arises consistently for liberals and conservatives in social cases. Although this result could arise because IP cases are different from social cases, the mixed results in other economic studies suggest that this difference may in fact arise because researchers have not tested separately for effects on liberal and conservative judges. This raises a challenge to determine whether results in securities, taxation and other economic areas demonstrating ambiguity in the effect of ideology would show similar ideological disjunctions when scholars utilize splines, as we did here.

It may be the case that a different cut-point is needed to differentiate liberal judges from conservative judges in economic cases than in social cases. We chose the zero cut-point because in the Martin-Quinn measure of ideology, the prior for each justice’s ideal point is a mean of zero; but exploring theoretical bases for a prior that the cut-point was more or less conservative in the category of economic cases opens opportunities for future research in economic cases generally, and may also enable further confirmation of the difference suggested in our results for IP. This analysis also presents a potential extension for general studies of the effect of ideology: to use liberal-conservative splines to differentiate the effect of ideology in the two ideological camps, and to give thought to where the cut-point should be in the given study.

Some extensions of this study that would be beneficial for IP specifically include undertaking similar analysis in the Federal Courts of Appeal and the Federal District Courts, particularly in the Federal Circuit, given its narrow jurisdiction. There is currently no equivalent for the Martin-Quinn scores for appellate and district court judges, however
our analysis indicates that a cruder measure of ideology, such as Party of the Appointing
President, should yield similar results, albeit with less nuance.

One possible conclusion from our results of a strong relationship between
intellectual property protection and conservative ideology is that the status of IP rights as
private property trumps other competing values. This suggests a further extension of our
analysis in future work: a direct comparison of the voting behavior of the justices in real
property cases and intellectual property cases. This has the advantage of providing a
comparison between two economic areas of the law, which would shed further light on
the question of whether the varied results among studies of the effect of ideology in
economic cases is a product of a systematic difference between economic and social
cases.
References


Crowley, Donald. 1987. “Judicial Review of Administrative Agencies: Does the Type of Agency Matter.” 400 Western Political Quarterly. 265


Johnson, J. 1984. Econometric Methods

Econometrics 391


______________. 2004b. Free Culture: How Big Media Uses Technology and the Law To Lock Down Culture and Control Creativity.


Neyman, J and E. Scott. 1948. “Consistent Estimates Based on Partially Consistent Observations.” 16 Econometrica 1


Segal, Jeffrey A. and Harold J. Spaeth, 1993. The Supreme Court and the Attitudinal Model.

____________. 2002. The Supreme Court and the Attitudinal Model Revisited


Endnotes


2 We found the subject matter coding in the general database to be under-inclusive. For example, Markman v. Westview Instruments, 517 U.S. 370 (1996) is coded as “jury trial” rather than patent and thus falls under the general issue heading of criminal procedure rather than economic activity. We excluded non-IP cases, grants of certiorari, and cases dealing solely with the recovery of attorney fees.

3 See generally, Spaeth (2005).

4 We adopted this coding scheme to maintain consistency with both the general database’s liberal-conservative coding and with the attitudinal hypothesis that conservatives will favor intellectual property interests. Although IP cases often involve rival producers, only two of the cases in the IP dataset required the Court to choose between conflicting claims of IP protection. See New York Times Co. v. Tasini 533 U.S. 483 (2001) and Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989). In all other cases, the issue before the Court clearly determined which party was the IP owner in the relevant sense of asserting a claimed IP right. The Tasini case centered around a conflict between the copyright claims of freelance journalists under §106(1) of the Copyright Act and the scope of the reproduction and distribution privilege accorded collective work copyright owners, such as the New York Times, by § 201(c). In Tasini we coded the freelance journalists as the IP owner because they were the original authors of the works in question. The issue in the CCNV case was whether the sculptor or the party that commissioned him to make the work of art was the copyright owner under the work made for hire doctrine. In CCNV we coded the artist as the IP owner because he was the original author of the work in question.

5 Martin and Quinn’s measure is similar to Poole and Rosenthal’s (1997) D-NOMINATE congressional scores, in that it is based on a rank ordering of justices and the standard is constant, but the justices can change in their designation on this constant scale. They are different to D-NOMINATE in that Martin and Quinn use Markov chain Monte Carlo methods to fit a Bayesian measurement model to designate ideal points of each Supreme Court justice that are allowed to vary in any pattern imaginable over time without restricting the movements to be linear. Martin and Quinn leverage voting coalitions to make inferences.
about the relative placement of justices. A justice who is often a lone dissenter in conservative cases will be ranked as more liberal than a colleague who sometimes joins her in 7-2 conservative decisions. Furthermore, this measure provides standardized comparisons over time, using the manifold cross-overs between justices’ tenures to compare justices who were never on the Court together. Thus the rank order measure simultaneously accounts for change over time and across justices for all years, and therefore renders the ideal points of the justices a standardized comparison of justices with one another over time. It is essential that a measure of justices’ ideal points rests on a standardized scale for our purposes because our analysis follows IP cases over half a century.

6 We relied on the party identification variables in the general database for our coding of the author/inventor variable, see Spaeth (2005).

7 For similar approaches, see Core and Guay (2001); Agnew, Balduzzi and Sundén (2003). The most effective way to factor our judge- and case-level heterogeneity entirely would be to use fixed-effects estimation. In our data, however, using fixed-effects is not possible as it may lead to a selection bias, since all observations related to cases with unanimous decisions and to judges who voted strictly in one direction would be dropped. Further, given the dramatic reduction in the number of observations and small group sizes, fixed-effects would additionally pose an incidental parameter problem, or the hazard of inconsistent estimates resulting from a small number of cases used to estimate a large number of parameters. See e.g. Neyman and Scott (1948); Lancaster (2000).

8 The effect of Party of the Appointing President on LIBERAL is insignificant when using robust errors clustered on judges (p=0.11) and marginally significant when using robust standard errors clustered on cases (p=0.077). When taken in their entirety, our results however show a strong effect of ideology on judicial voting behavior in IP cases.

9 Based on the tenure average Martin-Quinn scores for each justice.

10 Compare, for example, the broad scope of the fair use doctrine in copyright law with the narrow scope of the experimental use defense in patent law. See Eldred v. Ashcroft 537 U.S. 186, 220 (2003).

11 In a logit model, the marginal effect of the interaction is not equal to that of just the interaction term, which can be easily seen if the interaction is written out as a cross-partial derivative of the interacted terms, see Ai and Norton (2003); Norton, Wang and Ai (2004); Hoetker (2007). Here and throughout the paper we
verified our conclusions regarding the interaction by calculating the precise interaction effect for each observation and analyzing their significance levels.


13 The zero point on the Martin-Quinn ideology scale does not have an inherent meaning; however a mean of zero is the prior for each justice’s ideal point, and so zero provides the most intuitive cut point at which to distinguish liberals from conservatives.

14 We thank Patrick Egan for this suggestion.

15 We verified our conclusions regarding the interaction by calculating the precise interaction effect for each observation and analyzing their significance levels.

16 For this test, we used Martin-Quinn scores including IP cases, to ensure that our results did not arise from measurement error. Since the correlation between the two measurements is extremely high, this should not matter.