

To: NYU Colloquium participants
From: Mark McKenna
Date: January 21, 2019
Re: Unfair Disruption draft

Dear Colloquium participants:

What is attached is a working draft of a project Mark Lemley and I have been working on for the past year. It began with an observation that, although we are prone to talk about IP cases in terms of theoretical considerations that relate to “incentives” or “efficiency,” in fact many cases are really about market disruption. We mean by that is that many cases are not really about threats to innovation or creative production overall – predictions about the mortal threats posed by disruptive technologies have nearly always been wrong at this level. But that doesn’t mean that the disruptive entrants don’t have a significant effect on particular industry structures or business models. As a result, many of these cases are really about whether, and when, a new entrant with a disruptive technology or business model is entitled to force an incumbent to alter their business model or leave the market.

Our sense is that courts have no systematic way of thinking about that question, and this draft is primarily diagnostic of that phenomenon. We’d be very interested in other/better examples of courts’ differing approaches, and whether any of you see more of a pattern than we do. And we’re still working on the prescriptive aspects of the paper, which are now fairly tentative. So your comments and questions will be very helpful to us at this time.