

Presentation for Texas A&M Law School “Creativity and Innovation Is Local” Symposium

Delivered March 31, 2023

Panel on Glocalization

The World Keeps Turning: IP Rules for the Age of Deglobalization

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1. Both from a geopolitical and IP governance standpoint we have moved back into the 1960s. The North-South conflict is revived, the Communist bloc is re-forming, the non-aligned movement has taken hold in India, South Africa and elsewhere. And, while up through the pandemic we were careful to observe that over including countries into different blocs risked oversimplifying their economic and strategic positions, we are at the moment looking at global economic and social circumstances that suggest a real gap between the haves and the have-nots sufficient to encompass large groupings.
2. Perhaps I need not remind you that the push for a New International Economic Order finding a champion in UNCTAD and making demands in WIPO did not result in a dramatic realignment of economic well-being or in the reform of laws the way that the demanders envisaged. The world ended up with the WTO and the TRIPS Agreement, the Washington Consensus, and ultimately landing us where we are today.
3. And, it is hard to overstate the impact of the COVID-19 pandemic in terms of setting back progress in the developing world. Although we have seen the beginnings, we have not yet witnessed the full consequences of the damage done to national balance sheets, foreign exchange reserves, etc. We happen to be sitting in Texas where we can view this comfortably from afar. But finding countries where we might say things are going really well -- perhaps with the exception of Singapore -- is a challenge.
4. Well, of course you are asking, but what does this all have to do with intellectual property? A realistic answer is, I'm not sure. But, there are a few areas we can look at for signs of emerging trends. And, before moving forward in a somewhat macro-economic way, let me start by acknowledging the title to my presentation which I gave to Peter Yu before I had any idea what I would talk about, which may in fact remain true, which is “the world keeps turning”. This means

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a few things. One is that whatever is happening in the world of economics, politics, war and peace, social unrest, death and disease, the large rock we are living on continues to revolve in space. And as it revolves, human beings keep waking up in the morning and going out to buy and sell things. Absent a breakdown into complete chaos, they need rules by which to conduct business, and IP is naturally a part of those rules. So, as long as this rock keeps spinning, businesses will look to IP to protect their positions in the marketplace, and the rules need to reflect the realities of the time.

5. Have businesses become less dependent on IP as international tensions have mounted? Well, to begin with, the core IP demanders of the 1980s have not really changed. Pharmaceuticals, electronic goods, software, entertainment/media and a few heavy industries. Recall that it was IBM that was among the leaders of the vanguard for stronger international rules. Computers have changed dramatically in terms of capacity and utility, but the place in the industry pantheon has not. We can make an argument that all these industries and sectors are somewhat less dependent on IP today than they were in the 1980s because technologies have become so advanced, and encryption and other defensive technologies have become so much stronger, that anyone that can rely on physical security will do that. Moreover, the rate of change has gotten so rapid that first mover advantage undoubtedly plays a bigger role today than it did in the 1980s. So, IP remains important and largely to the same industries, but they may not remain so dependent on it as in the 1980s and 1990s.
6. We should add cybercrime to the factors that are shifting perspective about the role and value of IP. Cyber criminals have become adept at using different forms of IP to engage in fraudulent activity, and this is not a minor, economic matter, but threatening to the conduct of day-to-day business for many companies involving many billions of dollars. The impact from the standpoint of IP, and International IP is that we may become somewhat less tolerant of the “fair user” who may be testing the limits of IP protections, but gets caught up in efforts to prevent and redress cybercrime. This is a potentially large topic, which I won’t go into further, but it has risen on the agenda.
7. We have more than one elephant in the room, but certainly one of the largest is the breakdown in US - China relations which appears to get progressively worse. It seems the U.S. Congress has now mandated that no member can say anything good or positive about China, and news of China suggests that things are not much different there in relation to the US. This ties into the narrative of re-nationalization, re-shoring, de-globalization, etc.

This is complicated because the United States continues to have a major presence in China, and China continues to be a major source of exports to the United States. This connects to the world keeps turning narrative, yet it is hard to imagine that the ratcheting level of political conflict will not eventually lead to some type of breakdown in IP relations. The question is: what will that look like?

If and as the United States continues to adopt measures restricting China's access to advanced high-income country technology, this puts pressure on China to act more radically. One solution of course is to increase subsidies and use other mechanisms to promote more rapid domestic innovation. But, the other may well be enhancing efforts to secure technology by other means, including direct extraction from its creators. This will reinforce the narrative of movement away from using patents and infringement lawsuits to protect new technologies, and toward use of encryption, physical security, and so forth. In the end this could lead to a less technologically, transparent world where matters are increasingly treated as trade secrets, or even state secrets. This may raise new obstacles to technology transfer.

8. One area where we have some pretty concrete indications of the direction of travel is negotiations at the WHO over a proposed Pandemic Accord and revisions to the IHR. There elements of the 1960s are replaying themselves, with a large number of proposals coming mainly from the developing world to change the way we approach IP, technology transfer, manufacturing, and so forth, at least insofar as vaccines, therapeutics, diagnostics and so forth are concerned. And perhaps it is of interest that the term "countermeasures" has been adopted to refer to these subject matters, suggesting a type of armed conflict.

I believe it is fair to say that the sheer number of agenda items, and their duplication into different WHO negotiating groups, suggests that these negotiations may go on indefinitely. There is absolutely no doubt that some reforms of the WHO system, and the mechanisms for addressing pandemics are required, but unless we have really come full circle to realizing the and NIEO conception of the 1960s, the results are unlikely to look like what has been placed on the table. I am involved in these negotiations in a variety of different contexts, including on 2 WHO technical advisory groups and working closely with WIPO, and just yesterday a group that I Co-Chair for the International Law Association published a Note on potential mechanisms for improving the negotiating processes for the Pandemic Accord, and the IHR amendments.

9. Peter had asked me to address institutional questions, and in addition to what is going on at WHO, I will allude to what may be a “subtle shift” back from the WTO to WIPO as the preferred forum for IP negotiating. And perhaps this is all consistent with the turning back of time to the 1960s. Mind you, it’s fine with me. Recall that the main differentiation between WTO and WIPO is the ability to reach less than consensus conclusions at WIPO, along with an absence of enforceable dispute settlement among members. Perhaps the experience of developing members with the TRIPS waiver is part of the reason for this redirection, though it started before that.
10. I was never a fan of the waiver proposal, for a different set of reasons than the industry resistance. This was countries asking the WTO for permission they did not need. India knew very well it could grant compulsory licenses, or for that matter override IP entirely. It decided not to, and the WTO was set up as the obstacle. Were 165 countries going to agree to a meaningful waiver? Was the US statement of support anything more than political expedient? The process did not help the cause of the WTO as a forum sympathetic to realization of public health objectives. And, the WTO accepted its role, continuing to do that. It is frustrating to having spent 20 years explaining how the IP system works and the availability of mechanisms to address public health needs to have governments that should have known better suggesting they did not know how to address IP obstacles. It is as if India forgot the period between 1970 and 1989.
11. I have to come back to the question you are undoubtedly waiting impatiently for me to answer, which is what does any of this have to do with IP and de-globalization? Well, if things like the Inflation Reduction Act are any indication, I think we can look toward a gradual winding down of the national treatment principle in favor of preferred nationalities of right holders. Holding that back right now is the level of US investment in China. If those links are further frayed, we may be talking about a different kind of international IP system in a few years.

These trends are not the result of anything the IP community did or did not do. They are the consequence of problematic political decision-making and abuses of power. The IP system continuously adjusts to changing realities, and this is where we stand now.