Plotting intellectual property strategy in an anti-free trade era

Global IP

By Doris Estelle Long

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The stunning evidence of voter anger against globalization with Brexit and the election of anti-free trader Donald Trump have roiled the international community. These events may be clear signals that a new trend toward economic protectionism is here. But withdrawal from free-trade areas including the Trans Pacific Partnership, at such a sensitive time in the development of international IP protection standards, could prove a Pyrrhic victory.

The United Kingdom and the United States are not the only countries reconsidering the desirability of free-trade agreements. The recently signed Comprehensive Economic and Trade Agreement between Canada and the European Union was nearly derailed by the initial rejection by two regional parliaments in Belgium.

It is still not clear whether the Canada-EU agreement will finally be approved by the European Parliament, a necessary step for its provisional application to member states.

The World Trade Organization's recent report on "Regional Trade Agreements" counted 267 existing bilateral and multilateral trade agreements among organization members. The U.S. alone has signed free-trade agreements with 20 countries. The TPP would add six more countries.

The agreements negotiated during the 21st century, including all U.S. agreements, contain chapters on intellectual property protection that uniformly raise the standards under the Agreement on Trade-Related Aspects of Intellectual Property Rights (often referred to as "TRIPS Plus" protection).

Such heightened protection is generally achieved because countries are willing to accept higher IP standards in exchange for greater trade opportunities.

agreement focused on preventing cross-border trade in pirated and counterfeit goods. It collapsed in the face of an organized internet campaign against it.

U.S. withdrawal from free-trade agreements will not stop other countries from securing protection for their favored IP rights. The EU has been particularly ambitious in promoting protection for its geographical indications, or GIs. Thus, for example, free-trade agreements with China, Canada and South Korea all require absolute protection of such well-known European GIs as "champagne," "feta" and "chablis." The ultimate impact will be to prevent American-made equivalents from being sold in the affected markets without changing their names.

U.S. withdrawal from free-trade agreements could result in the adoption of greater access rights for end users. For example, a Regional Comprehensive Economic Partnership is under negotiation between the members of Association of Southeast Asian Nations, including many of the signatories of the TPP.

Referred to as the "TPP alternative" because it includes China and India, the present draft of partnerships lacks many TRIPS Plus provisions contained in the TPP. These include, for example, obligatory patent protection for qualifying new uses. If the TPP disappears because the U.S. withdraws its support, the remaining multilateral IP agreement in Asia will be under Regional Comprehensive Economic Partnership.

It is possible that bilateral investment treaties, or BITs, could take the place of free-trade agreements in creating heightened international IP protection standards. Over the past decade, BITs have included IP rights as covered "investment assets," protectable against a sovereign's "interference." Investor-state arbitration under BITs is increasingly being used to seek stronger domestic IP enforcement.

It is not clear if President-elect Trump includes BITs as part of his anti-free trade strategy. But stepping away from a participatory role in the evolving standards regarding IP and BITs at this critical juncture could put U.S. IP owners at a significant disadvantage in the future.

The U.S. does not have to be a signatory to a multinational treaty to find its protection options limited. For example, the U.S. has never ratified the Convention on Biodiversity. This treaty has served as a focal point for countries seeking to challenge patent protection for innovations utilizing the traditional knowledge of indigenous peoples. With more than 195 member countries, including Canada, Japan, the EU and China, it undeniably establishes international standards that apply to many U.S. trade partners.

The scope of any new U.S. anti-free trade policy is uncertain. But it will be applied in an international environment where the forces seeking increased access to U.S. IP for virtually non-existent compensation are growing.

establish express access rights to copyrighted works by libraries, archives and educational institutions and a potential treaty that protects indigenous innovation in the form of “traditional knowledge.”

One critical component of such protection would be the obligation to disclose the use of indigenous knowledge in the creation of patentable inventions. Such disclosure could form the basis for subsequent rejections based on the lack of an inventive step (obviousness).

Domestic copyright reforms globally, based on the altered nature of copyright in the global digital market, are largely expanding fair use/fair dealing rights to copyrighted works, including reducing protection for technological protection measures.

The ultimate impact of these domestic efforts will provide authors with less control over the exploitation of their created works. In economic terms, uncompensated uses will increase in nature and frequency.

The boundaries between creator and end users’ rights are undergoing tremendous transition in the global, digital environment of today’s marketplace. Access to medicines (for patents) and to culture (for copyright) are supported by strong human rights concerns that are gaining increasing traction among developed and developing nations alike.

Even Special Rapporteurs to the UN Human Rights Council have identified patents and copyrights as inhibiting, respectively, access to food and medicines and the freedoms of opinion and expression.

If the United States wants to assure that its innovators, entrepreneurs and end users receive balanced protections in the future, it must not withdraw from forums where it could influence future norms. The path between economics, innovation and human rights is not a clear one. But changes, even in the treatment of free trade agreements, must be nuanced to assure that IP rights are not sacrificed in the process.