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U.S. retreat from international bodies hurts our IP infrastructure

Global IP

By Doris Estelle Long

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President Donald J. Trump's recent infrastructure initiative requiring states to create new private-public partnerships to pay for improvements in physical structures such as roads, bridges and airports triggered fast and furious debates. Yet there is another critical infrastructure, not covered by Trump's initiative, that requires equally urgent repair — the infrastructure of the U.S. intellectual property system.

This repair can only occur at the federal level since most U.S. intellectual property laws and policies are solely federal in nature. Such repair does not need a pot of money. To the contrary, it needs something perhaps even less available in today's political economy. It needs action *now*.

The disrepair of the crumbling IP infrastructure did not occur overnight. But its decay has been hastened by recent developments that signal that the system is rapidly heading beyond the point where it can be healed in the needed time.

The United States has already lost international enforcement protections due to its ill-advised withdrawal from free trade agreements such as the TransPacific Partnership Agreement and NAFTA. (See my column of Dec. 5, 2016).

It has exacerbated this damage by similarly withdrawing from active participation before the World Trade Organization in IP matters. This lack of participation not only reduces the ability of the U.S. to influence the structure of future global IP protection standards, but has also left a void that is being rapidly filled by those who advocate for greater access to intellectual property, with even less right of compensation than currently exists.

IP enforcement infrastructure is increasingly being replaced by national innovation strategies in countries to pressure multinationals to surrender valuable technology transfer rights in exchange for the right to do business in the country. (See my column of June 12, 2017).

broader problem of others adopting the same policies. Only active participation in the multinational forums where such policies are made can do that effectively.

Other portions of the IP infrastructure are crumbling rapidly because we have increased U.S. exceptionalism in ways that are actually harmful to future innovation. Previously, unique features of U.S. patent law, such as first to invent, patent protection for business methods and software, and strong presumptions of validity contributed to a U.S. edge in innovation.

In the past several years, however, these exceptionalist features have been expressly abandoned, seriously eroded or are under sustained attack. There is growing concern that the United States could lose its innovation edge as a result of these changes.

This loss is particularly acute in the critical areas of artificial intelligence and data analytics, which already revolutionizing industrial and scientific development. While other countries, including China and the European Union, are increasing their patent protection in the area of software and algorithm-based innovations, the United States has reduced its protections as a result of Supreme Court decisions in cases such as *Alice Corp*.

What qualified originally as U.S. exceptionalism because of strong patent protection in areas unprotected by other countries has now become exceptionalism because of a markedly weaker scope of protection.

Detrimental U.S. exceptionalism in not limited to substantive issues. To the contrary, it includes the adoption of international exhaustion norms for both patents and copyrights that remove a multinational's ability to plan regional releases of products or engage in differential pricing. Not even the European Union, known for its open trade borders, has adopted such a broad exhaustion standard.

Perhaps, most critically, the United States still lacks a national artificial intelligence policy. Worse, despite a recent plethora of public hearings on AI, intellectual property issues remain virtually ignored. Even recent proposed legislation to establish a Federal Advisory Committee on the Development and Implementation of Artificial Intelligence in the Department of Commerce (HR 4625 and S2217) does not mention intellectual property.

Some infrastructure repair is a simple question of updating outdated laws to reflect the impact of new technologies and new communications media on intellectual property protection norms.

Admittedly, such updates may not be easy to achieve. For example, since 2013 numerous U.S. entities, including the Copyright Office, the Department of Commerce and Congress, have considered revisions to the Digital Millennium Copyright Act.

2015. To date, no proposed draft legislation has been advanced.

As heated debates and litigation over the proper functioning of the post grant review process, created in the last major patent law revision in 2011 under the American Invents Act demonstrates, law and policy revisions do not always resolve infrastructure problems. But doing nothing is even worse.

As we are making our bucket list of fixes to U.S. infrastructure, we cannot afford to ignore the need to shore up our IP system. We do so at the peril of future U.S. innovation and continued sustainable growth.