

America's Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters

By Robert J. Rando



Robert J. Rando is a Fellow of the Academy of Court-Appointed Masters. Since 2004, he has enjoyed the privilege and honor of judicial appointment as a special master in numerous cases involving complex patent law issues. Rando is the founder and lead counselor of The Rando Law Firm P.C. He is the current chair of the FBA Intellectual Property Law Section, a chapter member and past president of the FBA Eastern District of New York, and a current member of the FBA Government Relations Committee. © 2016 Robert J. Rando. All rights reserved.

“There is a Chinese curse which says ‘May he live in interesting times.’ Like it or not we live in interesting times. They are times of danger and uncertainty; but they are also more open to the creative energy of men than any other time in history.”

—Senator Robert F. Kennedy¹

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual prop-

erty law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))²; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, genocidal maniacs and natural disease) and some are new (manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a

non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA³ and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.⁴ Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings' strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS⁵. The 2014-15 term occupied almost ten percent of the Court's docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts' Court⁶.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit's pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized

parlance "patent trolls," the intersection of patent and antitrust laws in Hatch-Waxman so called "pay-for-delay" settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause⁷, in addition to Author's writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the "sciences" referred not only to fields of modern scientific inquiry but rather to all knowledge. And the "useful arts" does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has crept into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive

and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: *uniformity* of the protection of IP rights, *securing those rights* for the individual rather than the state; and, *incentivizing* innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in *Marbury v. Madison*.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology

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where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (*i.e.*, uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual's rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual's intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these "interesting times," both within and without the laws affecting intellectual property rights, depends upon the "creative energy of man" which must prevail. An achievable goal which depends on the strong, stable and sound protection of intellectual property rights.

Thus, here is my plea to the both chambers of the United States Congress, the prospective candidates for the Presidency in the 2016 election cycle, and the members of the federal bench from the District and Circuit Courts to the Supreme Court, whether you are a Member or staffer of a Member that is proposing or voting on intellectual-property-related legislation, the occupant of the Oval Office rendering pronouncements to the people from the bully-pulpit of 1600 Pennsylvania Avenue, and/or promulgating executive branch agency directives, or you are the apolitical honorable jurist or his/her judicial law clerk rendering decisions in cases between competitors, individuals or any other party to intellectual property disputed matters, abide this: Begin with, and find your guidance in, the fundamental principle behind the Framers of the constitutional provision, Article I, Section 8, Clause 8, by asking the basic question whether the result or consequence of your enterprise will "promote the progress of the sciences and useful arts" and, if so, whether it is directed

to the purpose of maintaining the incentive to innovate, will achieve uniformity in its application and implementation and will remain in fidelity with securing for the individual intellectual property rights unencumbered by factious governance or desire by the Sovereign for benefits of reservation of power and tribute to the Sovereign, which was unequivocally declared by James Madison, in Federalist Papers Number 43, as the self-evident purpose of the Patent and Copyright Clause. ☺

Endnotes

¹Senator Robert F. Kennedy's address to students at Day of Affirmation ceremonies at the University of Capetown, South Africa, June 6, 1966.

²See S. 1890 and H.R. 3326.

³See The CNN Wire Staff, Obama Signs Patent Reform Bill, CNN.COM (Sept. 16, 2011, 12:02 PM), www.cnn.com/2011/POLITICS/09/16/obama.patent.reform/ ("We have to do everything we can to encourage the entrepreneurial spirit wherever we find it," Obama said at [the AIA] signing ceremony at a high school in Arlington, Virginia. This measure "cuts away the red tape that slows down our inventors and entrepreneurs.").

⁴See Kate Tummarello, President Calls for Patent Reform in SOTU, THE HILL (Jan. 28, 2014, 09:37 PM), thehill.com/blogs/hillcon-valley/technology/196754-obamacalls-for-patent-reform ("President Obama repeated his calls for reform patent law during his State of the Union address Tuesday ... [and] called on Congress to 'pass a patent reform bill that allows our businesses to stay focused on innovation, not costly and needless litigation.'").

⁵In the thirty-year period from 1966 through 1995, the Supreme Court decided approximately twenty-one patent cases. In the seventeen years since *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), the Court decided approximately twenty-eight patent cases through the 2012 Term and granted certiorari in six more patent cases for the 2013 Term.

⁶Since 2006 (the year Chief Justice Roberts became the Chief Justice), the Court has granted certiorari in twenty-three patent cases while decreasing its overall docket significantly. See Ryan J. Owens & David A. Simon, Explaining the Supreme Court's Shrinking Docket, 53 WM. & MARY L. REV. 1219, 1225 (2012) ("Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century."). The number of cases decided by the SCOTUS has decreased from an average of 200 per Term to approximately eighty per Term (a decrease of sixty percent). See *id.* at 1225 ("Since the 2005 Term, the Court has decided an average of 80 cases per Term, far fewer than the roughly 200 cases it heard earlier in the twentieth century."). The average number of patent cases decided by the SCOTUS per year from 1966 through 2005 is less than one (32 cases in 39 years or 0.8 per year out of an average total number of 200 cases decided by the SCOTUS per year). Since 2006, the number of patent cases decided has jumped almost threefold to approximately 2.20 per year out of an average total number of 80 cases decided by the SCOTUS per year.

⁷U.S. Constitution Article I, Section 8, Clause 8 ("The Patent and Copyright Clause") empowers Congress: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."