

Howard University – IP & Social Justice

Friday, March 12, 2010

Under Secretary Kappos' Remarks

[as prepared]

Good morning. It's great to be here. Thanks to Howard University and the Institute of Intellectual Property and Social Justice for inviting me to speak here this morning.

Given the subject of this forum, I am to going to speak about an Intellectual Property [IP] related topic that does not get a lot of attention here in the US, but should: traditional knowledge. I'll also touch on some topics that do, deservedly get considerable attention: competition and copyright law.

Let's start by considering why anyone should care about IP—outside of IP circles. Why is IP coming into contact with social justice issues?

As we move into the second decade of the 21st Century, it has become increasingly clear that innovation is a principal driver of our economy and an engine of social advancement. It is also the only sustainable source of competitive advantage for world economies. And since intellectual property is the vehicle that facilitates the delivery of innovation to market, it follows that inventors who use IP effectively will flourish. It also follows that IP plays a crucial role in advancing social justice.

And, the distance between idea and marketplace is shrinking. Said another way, innovation is moving more quickly from creation to manufacture. This trend is irreversible. The result is that IP is the vessel that captures value as an idea moves to marketplace.

IP is fast becoming the currency of innovation. And innovation matters, so IP matters, even to those who previously did not know what IP was.

At the same time, labor arbitrage will gradually become less the driver of where manufacture occurs. Instead, firms will hire in places where they can find the most talented workers and the best IP protection. This shift reflects an emerging reality; it won't be all about lowest-cost manufacturing. It will be about who is designing the products and services firms produce.

So IP is coming into contact more with other areas of the law because IP is in more things we need, use, see, hear and depend on.

With that as background, let's now turn to some major instances where IP and social issues intersect. Take the critical balance we're working to strike in the area of traditional knowledge, traditional cultural expression, folklore, and genetic resources (TKGR).

In today's knowledge-based economies, many are looking toward traditional knowledge and traditional cultural expressions as a source of revenue. At the same time, with the emergence of modern bio-tech, genetic resources have assumed a greater economic potential and scientific value to a wide range of stakeholders.

We, as an IP community, are wrestling with the challenge of ensuring against misappropriation and misuse of traditional knowledge and traditional cultural expressions/folklore. At the same time, we must pursue sound IP policy, to wit: maximum dissemination of knowledge encourages creativity, helps to preserve, develop and maintain knowledge, and creates value throughout society. In addition, we need to consider the social costs and benefits of recognizing a new right to exclude others from using certain information or resources.

The development of an appropriate balance in these areas leads to many questions. For instance, who should benefit from IP protection or be given IP rights to TKGR? The question raises issues of benefit-sharing, prior informed consent, and many other areas.

In this regard, an interesting question was posed by the Korean delegation to WIPO late last year. The issue was with regard to the famous Korean food "Kimchi."

Naturally, if a foreign company attempted to patent a recipe for Kimchi, the Government of the Republic of Korea would move to invalidate the patent. Even better, they would submit prior art after publication of such an application so that we would be sure not to grant a patent improperly.

The Korean delegation posed the question of whether the government had proprietary rights on Kimchi. Further, would the Republic of Korea have the right to authorize foreign companies' production of Kimchi? If they could, the Delegation continued, consumers would have to pay Italy for pizza and spaghetti, Japan for sushi, and India for curry.

The simple "Kimchi" example is a useful window into the complexities of TKGR issues.

Here in the United States, we are addressing a wide range of TKGR concerns. One issue that has come to light is with regard to Native American TK and TCEs.

The USPTO is working with the Indian Arts and Crafts Board (IACB) in the Department of Interior, to help improve understanding of, and appreciation for, intellectual property among Native American artists and craft persons. The USPTO has made numerous presentations to these groups and is working with IACB to revise and improve its management of IP.

The work of IACB and the USPTO properly places the emphasis on education. And, as we focus on educating our artists and craft persons, so must we focus on the education of consumers. This means making sure that products are marketed truthfully no matter who the producer so that the public may understand the origin of the goods being sold.

Beyond the diversity of arts and cultural heritage, America's Native population has developed deep understandings of the environment. In fact, indigenous populations around the world often have great command of the natural world and specifically, of the medicinal value of local plants and animals.

This knowledge is a particularly interesting flash point because of the great economic opportunity in the bio-tech industries. The vital balance between protecting TKGR and ensuring dissemination is even more delicate when the knowledge in question may be life-saving.

As we move toward solutions for TKGR issues, we must endeavor to strike the proper social balance that ensures life-saving medicines reach the hands that need them, while ensuring the people and culture responsible for their discovery are not exploited.

So, it is clear that Intellectual Property and the need for IP protection is expanding. As this happens, IP will continue to bump up against new and different areas of the law.

And that brings us to the issue of competition and patent policy. Patents and competition share the overall purpose of promoting innovation. In order to achieve their complimentary goals, they must be carefully calibrated.

For purposes of promoting innovation based on competition, the existing patent regime can be a double-edged sword. On the positive side, high-quality patents provide an

incentive to invent and to disclose inventive results. Conversely, the prospect of large numbers of issued or pending patents with ambiguous boundaries reading on a new product can pose barriers to innovation.

The backlog at the USPTO creates additional uncertainty, both for patent applicants, who do not know what rights they will have *vis a vis* a particular technology, and for others trying to determine what freedom-to-operate challenges they may face when introducing new products.

But, competition policy must also be carefully calibrated to ensure that it promotes innovation. For example, where antitrust laws are unclear or where the threshold for antitrust violations is set too low, innovation can be stifled.

In the context of standard setting, questions raised by the intersection of patent policy and competition become even more complex. This is because patents that are essential to practicing a standard become far more valuable once the standard is adopted and the relevant technologies are commercialized. For both standard setting bodies and individual firms involving in standard setting, it is thus critical to identify relevant patent rights, ensure that those patents are available on reasonable terms and conditions, and take necessary and appropriate defensive steps to address “patent hold-up” scenarios.

To evaluate which issues at the intersection of patent policy and competition most merit attention, the PTO, DOJ and FTC are sponsoring a workshop called: “The Intersection of Patent Policy and Competition Policy.” This workshop will seek to understand the issues in the current systems that affect the competition strategy of American Innovators.

As we work toward a better understanding of these issues, it is critical that we remain mindful of the effects of IP and competition law throughout society.

Now let's turn to another IP area of particular concern to us at the USPTO: copyright protection. As a civics reminder, the role of the Under Secretary of Commerce for IP—my role—is to advise the President and the Administration on all areas of IP. In this capacity, our team is devoting major energy to copyright issues in the digital age.

Specifically, the USPTO is working within the Commerce Department and the Administration to help shape policy affecting IP in the Internet era.

As the U.S. expands its broadband infrastructure, we are working with colleagues throughout the Administration to ensure that broadband in the U.S. is used for legal purposes only.

In the next few days, the FCC will be releasing to Congress its comprehensive national broadband plan. It is also working on a proceeding to determine the scope of network neutrality, and the Administration is expecting to file comments in that proceeding.

We look forward to engaging further with the FCC on this process. In the meantime, the USPTO, in cooperation with NTIA, is convening a series of consultations on the topic. The output of the consultations will be used to formulate IP policy recommendations.

Of course, any Internet 3.0 strategy requires that attention be paid to several areas.

It requires developing technology that prevents illegal content from flowing on the internet.

It requires the aggressive prosecution and punishment of egregious, professional infringers.

It also requires looking at IP protection as a balance that makes appropriate exceptions and exemptions where called for.

Improving copyright exceptions and establishing and enforcing strong intellectual property rights are complementary rather than contradictory tasks.

Improving exceptions and limitations for blind, visually impaired, and print-disabled persons is a question of both legal and moral urgency for the international IP community as it is here in the States.

At the last session of the SCCR, we were gratified that so many delegations rallied behind U.S. leadership and expressed a strong willingness to work toward an international consensus on this complex issue.

The USPTO will continue to engage with our trading partners to ensure the proper policy balance is struck around copyright and all other forms of IP rights.

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Well, I began this morning by saying that IP is the currency of innovation. In contemplating the nexus between Intellectual Property and social justice, I'm struck by the opportunity IP, as currency, can provide: it can ensure that information reaches the hands of all Americans—and people throughout the world.

But the responsibility is ours. Whether it's a young poet on U Street or an engineer in his garage in Oakland, CA, it is our responsibility to educate Americans on IP, and on the innovation future of our country.

Right now, our economy is struggling. The manufacturing jobs that allowed parents and grandparents of people in this room to buy a house, put food on the table, and provide hope to the next generation of Americans are gone.

The jobs of tomorrow will be innovation and technology driven. While we work to level the playing field in the United States for all Americans, people outside this country are being empowered to compete. Our children and our children's children aren't going to compete only with the kids in the next town or the next State—they'll compete with their peers around the world.

That means we need to get our children—all of our children—we need to get them excited about math and science, about learning, and about innovation.

That's why we need to ensure all Americans have access to the internet, not 28.8K modems in the cities and Internet 3.0 in the suburbs—no—we need an internet that will allow all Americans to learn and compete with colleagues all over the world.

That's why we need to recognize great ideas, no matter where they come from, and we need to cherish and foster those ideas.

That's why we need—and now I'm talking about everyone in this room—we need to work with our young people, we need to mentor them in math and science, we need to encourage their curiosity in engineering.

It's why we need to share the stories of our successful innovators and inventors: The folks who will be the heroes of America's next innovation revolution.

So let me conclude this point, and my comments, with a short story. A true story.

A few months ago I had the opportunity to award the 600,000th Design Patent. The award marks a significant milestone for both the USPTO and the inventor community.

The design patent chosen for the ceremony represented a wonderful invention—the “go-be solar charger.” The charger is pretty cool—it is a briefcase-sized solar panel that produces energy which can be used to charge a wide range of electronic devices.

But it wasn’t just the invention that stuck with me. It was the story of the person behind the machine.

Mr. Robert Workmen may not have known it, but for a moment, he personified the future of IP: a balance of innovative thinking and IP protection with an emphasis on the moral imperative of helping others.

Mr. Workmen had the idea for the “go-be solar charger” while doing aid work in the Democratic Republic of the Congo; where the constant power shortages frustrated his teams’ ability to be productive.

Mr. Workmen’s idea—and the company Mr. Workmen has built around it—are now responsible for 900 jobs right here in the United States. Importantly, his invention provides a low cost solution to power shortages in Africa and around the world.

His story—and stories like his—demonstrate the potential of IP in maximizing tech diffusion and opportunity toward improving social justice.

I want to again thank Howard University for taking a leadership role in working on these critical issues. I’d like to open up the floor for questions or comments.

Thank you.