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Globalization, Intellectual Property, and Prosperity

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Foreword: Globalization, Intellectual Property, and Prosperity

When a symposium is titled “*The New Global Convergence: Intellectual Property, Increasing Prosperity, and Economic Networks in the Twenty-First Century*,” it could last for ten weeks and one could only scratch the surface of the issue. Before diving into the topic, it is important to introduce some themes and concepts that will permeate this year’s symposium.

I. CONCEPTS

The symposium suggests at least three concepts: Globalization, Intellectual Property, and Prosperity. These three concepts may be analogized to a ship on the ocean trying to get to a particular destination. Globalization is the “ocean”—it is a force that is bigger than any individual country. The destination is prosperity. (It should be determined whose “prosperity” is being discussed. The conversation seems to concern a concept of global prosperity. That may not mean global equality, but rather, on the whole, a more prosperous globe.) The ship—or at least part of the ship—sailing on the ocean is representative of the intellectual property laws and norms around the globe. Intellectual property laws may be a tool to help harness globalization and achieve better prosperity.

Where the symposium’s discussion comes in is to help calibrate the tool—the intellectual property laws—to best achieve prosperity. To be sure, if the tool is not properly calibrated, the ship will sail off course. If we sail off course a little bit, we may still increase prosperity, but fail to optimize it. If we sail off course in a big way, we may actually make things worse than if intellectual property laws did not exist.

Optimization and coordination on a global scale raises myriad questions. How should we accomplish this coordination? Does it require standardization of IP laws? Who should decide these issues? Further, one

must consider the best process for answering these questions.¹ Each presenter during the symposium will address a slice of this very large topic, and will address that slice with depth and rigor. Several themes will run through these presentations.

II. THEMES: TENSIONS IN LAW AND POLICY

1. *Certainty versus Flexibility*

The first theme that needs introducing is the tension between certainty/rigidity and flexibility. Commentators have addressed this tension in intellectual property law² and the law more generally,³ seeking to understand how the law may best achieve justice. Are clear, detailed, and universal rules a realistic and preferable way to organize IP laws, or should we favor flexible standards based on our lack of foresight? Is there some middle ground that provides the best compromise?

The tension between certainty and flexibility is illustrated by individual substantive laws. One example is patent law's patentable subject matter doctrine. Patentable subject matter requires that an invention must be something more than an abstract idea or law of nature to be patented. In this area, the patent bar clamors for a clear rule—they want to know when something is an “abstract idea.” The very nature of the inquiry—the desire to know with clarity the exact boundaries of what is abstract—sends many commentators in the direction of a standard over a rule. Further, some prefer standards in this area since rules may not adapt as well to changed conditions. Since patent law (ideally at least) deals with cutting-edge technology, circumstances will constantly fluctuate, perhaps making flexible standards preferable.

Concerns over patentable subject matter have increased as patents have been granted for genetics-related inventions,⁴ business methods,⁵ tax-

1. See, e.g., David S. Levine, *Transparency Soup: The ACTA Negotiating Process and “Black Box” Lawmaking*, 26 AM. U. INT'L L. REV. 811 (2011) (discussing the need for transparency in international treaty negotiations).

2. Tun-Jen Chiang, *The Rules and Standards of Patentable Subject Matter*, 2010 WIS. L. REV. 1353 (2010).

3. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953 (1995).

4. See, e.g., Andrew Chin, *Gene Probes As Unpatentable Printed Matter*, 20 FED. CIR. B.J. 527 (2011); Christopher M. Holman, *The Impact of Human Gene Patents on Innovation and Access: A Survey of Human Gene Patent Litigation*, 76 UMKC L. REV. 295 (2007).

minimization strategies,⁶ and other non-traditional areas including sports moves.⁷ The patentable subject matter debate rages not only in the United States, but also throughout the world. Countries have flip-flopped on the issue at times. For example, European countries have equivocated over the proper treatment of biotech, software, and business method patents.⁸ No resolution appears in sight.

Concerns about certainty transcend specific substantive doctrines and include broader concerns reflecting the realities of globalization. International concerns increasingly affect the way countries make and interpret their laws.⁹ Countries struggle with how much to allow foreign intellectual property law to influence interpretation of domestic laws.¹⁰ Allowing greater international influence may have benefits, but it likely increases uncertainty, at least in the short term. Further, one must ask whether judges are currently well trained to consider United States law in light of international concerns.¹¹

In addition, the desire for certainty has led to a host of international treaties aimed—at least in part—at harmonizing intellectual property laws around the globe. The crown jewel (or chief criminal, depending on whom you ask) of these efforts is the 1994 Trade-Related Aspects of Intellectual Property (TRIPS) agreement,¹² which provided a big nudge in the direction of harmonization. While TRIPS includes some specific baselines, it also

5. See, e.g., Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents*, 43 SANTA CLARA L. REV. 823 (2003).

6. Lucas Osborn, *Tax Strategy Patents: Why the Tax Community Should Not Exclude the Patent System*, 18 ALB. L.J. SCI. & TECH. 325, 331 (2008). The America Invents Act further prevents patents directed specifically to tax strategies by deeming such strategies within the prior art. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 14, 125 Stat. 284 (2011).

7. See John R. Thomas, *The Patenting Of The Liberal Professions*, 40 B.C. L. REV. 1139, 1164 (1999).

8. F. SCOTT KIEFF ET AL., PRINCIPLES OF PATENT LAW 746–47, 811–15 (2011).

9. See Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY L. REV. 2119 (2008) (discussing the erosion of traditional territorial limitations on intellectual property laws).

10. E.g., Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 19–24 (2005).

11. See *id.*

12. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 (1994) (“Article 28 [provides] . . . [a] patent shall confer on its owner the following exclusive rights: . . . to prevent third parties not having the owner’s consent from the acts of: . . . offering for sale.”).

provides a fair amount of flexibility to countries implementing its provisions.¹³

Thus, TRIPS brings some harmonization, but it does not bring uniformity. This leaves additional room for uncertainty, but perhaps the benefits outweigh the costs. Commentators continue to debate TRIPS, other international treaties, and country-specific IP laws.¹⁴ Suffice it to say that the tension between certainty and flexibility will exist for some time to come.

2. *IP Exporters versus IP Importers (or Exclusive Rights versus Progress/Development)*

A second tension in the intellectual property realm is the tension between IP exporters and IP importers.¹⁵ A net IP exporter is a country who, on the whole, makes more money from selling innovation abroad than it spends importing innovation. For example, though it is facing increasing competition, Hollywood has long been the leading innovator in movies, and produces movies watched around the globe. If the United States gen-

13. See CYNTHIA M. HO, ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS 57 (Oxford Univ. Press 2011), available at <http://ssrn.com/abstract=1909320> (“There may also be great diversity in laws because the minimums [required by TRIPS] are often undefined, leaving room for variation. Thus, TRIPS does not contemplate or result in uniform laws.”).

14. See, e.g., Thomas F. Cotter, *Market Fundamentalism and the TRIPS Agreement*, 22 CARDOZO ARTS & ENT. L.J. 307, 309–10 (2004) (analyzing the TRIPS Declaration’s interpretation of the TRIPS Agreement, explaining why the TRIPS Declaration is unlikely to be a panacea for the developing world, discussing background material and relevant portions of the TRIPS Declaration and rejecting three major critiques of the TRIPS Declaration); Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 22 (2004) (arguing that the next round of GATT negotiations should be used to add explicit user rights to the TRIPS Agreement); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT’L L. & ECON. 327, 339 (1993) (“Bilateral agreements provide the most workable vehicle for addressing the contentious issues surrounding intellectual property protection”); Peter K. Yu, Symposium: *The First Ten Years of the TRIPS Agreement: TRIPS and Its Discontents*, 10 MARQ. INTELL. PROP. L. REV. 369, 370 (2006) (exploring what less-developed countries must do to preserve the goals behind enactment of TRIPS); COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 8 (2003), http://www.iprcommission.org/papers/text/final_report/reportwebfinal.htm (“[M]any [developing countries] feel that the commitments made by developed countries to liberalise agriculture and textiles and reduce tariffs, have not been honoured, while they have to live with the burdens of the TRIPS agreement.”).

15. This tension can also be described as the tension between the grant of exclusive rights versus the need for flexibility to attain progress and development. Even within a country, IP “importers” and “exporters” exist, as companies and individuals can be both importers and exporters. In practice, individuals will be net IP importers, and thus the debate is framed in terms of the exclusive rights holders versus the public.

erates much more money by exporting movies than it spends by importing them, the United States will be more likely to advocate for strong international standards for intellectual property rights governing movies.

Conversely, a net IP importer is a country that spends more money acquiring innovation from abroad than it makes by exporting innovation. Such a country will have little direct incentive to strengthen or enforce IP rights since such rights add to the costs of its imports without overriding gains in its exports.

Although the United States is now a leading innovation exporter, it is no stranger to the dilemma of an innovation importer. In its early years, America imported the vast majority of its literature from England.¹⁶ Instead of paying for those imports, America was a nation of pirates, frequently “stealing” the writings of Charles Dickens and other English authors.¹⁷ From the beginning, United States copyright law only extended copyright protections to “citizens” and “residents” of the United States, allowing citizen and resident authors to mature while continuing to blatantly discriminate against foreign authors until passage of the Chase Act in 1891, after which the United States still made life burdensome for foreign authors.¹⁸

The issue quickly gets more complex. For instance, the medium-to-long term best interests of an innovation importer may depend on many factors. In the United States’ early years, the lack of recognition of foreign copyrights provided a bonanza for American *publishers*, who could print British books cheaply. Yet, the policy was not so kind to American *authors*, who failed to be as widely read and compensated since they had to compete against much cheaper imports.¹⁹ Would strong American authors have developed more rapidly if the United States had granted foreign copyright protection sooner?

Aside from the complex economics, intellectual property rights give rise to moral dilemmas. The United States is a leading net exporter of medicine and agricultural technology; as such, how should the United States balance national economic interests against the moral desire to provide sick people with medicine and hungry people with food?²⁰ In addition, to con-

16. Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U. J. INT’L L. & POL. 255, 257 (1997).

17. *Id.*

18. *Id.* at 257–68; see also Dreyfuss, *supra* note 14, at 29–30 n.42.

19. Bender & Sampliner, *supra* note 16, at 257–68.

20. Several periodicals illustrate the tension between the promotion of national economic interests furthered by protecting intellectual property and the worldwide moral interest in providing easy access to food and medical care that may be the subject of intellectual property rights. See, e.g., World Trade Organization (WTO)–DOHA Ministerial 2001, *Declaration on the TRIPs Agreement and Public Health of 14 November 2001*, 41 I.L.M. 755 (2002)

tinue innovation in medicines, wealthy, multinational companies are combing the globe for genetic resources and traditional medicinal knowledge; but how should host countries be compensated for their contribution to scientific advancement?²¹

So we have a host of questions. Let's add to these questions by asking another. Specifically, "how should the international community address these economic, developmental, and moral questions?" Is the solution a single, multi-national treaty? If so, should such a treaty provide rigid rules or flexible standards? If not, should countries negotiate multiple, bi-lateral treaties? Various approaches have been taken. For example, the TRIPS agreement was a multi-national agreement that, at least somewhat, accommodated competing views.²² The TRIPS agreement established baselines, but provided countries some flexibility in implementation of intellectual property laws.²³

Yet soon after TRIPS was signed many innovation exporters, led by the United States, began a binge of bi-lateral and multi-lateral treaty mak-

(recognizing the need for TRIPS to contribute to improvement of worldwide public health); Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L L. 317 (2005) (considering the United States' limited flexibility regarding TRIPS and public health, and discussing how developing countries can address it); Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 CARDOZO J. INT'L & COMP. L. 247 (2003–2004) (surveying debates over "intellectual property rights of germplasm"); Srividhya Ragavan, *Of the Inequals of the Uruguay Round*, 10 MARQ. INTELL. PROP. L. REV. 273 (2006) (suggesting that policies prioritizing national responsibilities should be revisited); Susan K. Sell, *What Role for Humanitarian Intellectual Property? The Globalization of Intellectual Property Rights*, 6 MINN. J. L. SCI. & TECH. 191 (2004–2005) (addressing the appropriateness of patent protection for agricultural advancements that could aid developing countries if placed in the public market); Debra M. Strauss, *The Application of TRIPS to GMOs: International Intellectual Property Rights and Biotechnology*, 45 STAN. J. INT'L L. 287 (2009) (suggesting that IP rights be transformed to promote international trade and "innovation for the public benefit"); Peter K. Yu, *Access to Medicines, BRICS Alliances, and Collective Action*, 34 AM. J.L. & MED. 345 (2008) (exploring how increased collaboration among BRICS countries and developing countries can promote access to medicine in those developing parts of the world).

21. Questions of host country compensation have been explored in numerous journal articles. See, e.g., Olufunmilayo B. Arewa, *TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks*, 10 MARQ. INTELL. PROP. L. REV. 155 (2006); Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 219 (2008); Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37 (2009).

22. See *supra* note 14 and accompanying text (indicating that while TRIPS does provide some baseline, it is not uniform and allowed flexibility in accommodating different viewpoints).

23. See HO, *supra* note 13.

ing that mandated stronger IP protection than TRIPS required.²⁴ These free trade agreements offered favorable trade terms and other incentives to innovation importers in exchange for stronger protection of IP rights. Since the TRIPS agreement was signed, the United States has entered into approximately 20 such agreements, each of which includes so-called “TRIPS-plus provisions.”²⁵ The agreements generally call for patent terms to be extended for delay in regulatory approval, multi-year exclusivity for clinical trial data, limitations on compulsory licensing of technology, and restrictions on parallel imports.²⁶ Some criticize these TRIPS-plus provisions as overbearing, and they may be losing some steam. It will be interesting to watch how future international agreements are made.

The disagreements between innovation exporters and importers and the debates about the appropriate balance between the grant of exclusive rights versus the need for access to innovation will continue for the foreseeable future. The ideas discussed in this symposium will shed light on the appropriate way forward.

III. THE ELEPHANT (OR DRAGON) IN THE ROOM

No analysis of globalization, intellectual property, or economics can fail to discuss China. China has and continues to undergo rapid change.²⁷ China’s days as the source for the cheapest labor are long gone—wage rates have been increasing at double-digit rates for over a decade, and other Asian countries are cheaper.²⁸ But it has other advantages, including sophisticated supply chains and a flexible labor market that will keep businesses in China for years to come.²⁹ China has shown signs of becoming a technology exporter:³⁰ successes include medical device companies that

24. See Chu, Yi-Jen, *The Evolution of US and EU Approaches to Intellectual Property Provisions Related to Public Health in Free Trade Agreements: Are They Responding to Public Health Concerns?* 1, 20 (Unpublished Masters Thesis, Munich Intellectual Prop. Law Ctr.) (September 17, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739488.

25. See *id.* at 6–7.

26. See *id.* at 26–30, 33–35.

27. See, e.g., William O. Hennessey, *Sixth Annual Baker Botts Lecture: Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257, 1268–81 (2008).

28. See *Innovation in China: From Brawn to Brain*, THE ECONOMIST, March 10, 2012, available at <http://www.economist.com/node/21549938>.

29. See *id.*

30. See Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE

build devices that are superior to western devices and yet are far cheaper because of improved design.³¹ Huawei, the telecoms giant, and Haier, the biggest seller of domestic appliances, also provide innovation.³²

Yet many signs indicate that it will be a while still before China is a net exporter of innovation. It stands accused of rampant piracy. Although China issues numerous patents, the value of many of these patents is dubious. China's IP laws look similar to many developed countries' laws on paper, but many argue that the enforcement is capricious and tinged with partiality. Are the criticisms of China fair? How can IP laws best help China to become an innovation exporter? Our panelists will address these issues.

IV. CONCLUSION

This foreword simply raises some hard questions, but it does not have to answer them! Now it is time to allow people with impressive qualifications to start offering answers to some of the questions raised by this year's symposium.

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ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 200 (Daniel Gervais ed., 2007) (listing several Chinese companies gaining international prominence).

31. *See Innovation in China*, *supra* note 28.

32. *See id.*; Yu, *supra* note 30, at 200.