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## New year will put nontraditional IP issues on the center stage

At the time of the year when predictions for 2013 are virtually required reading, I have to confess that my crystal ball is somewhat foggy. Even so, I can't help joining everyone in attempting to discern what the key issues of 2013 will be regarding the international protection of intellectual property rights. Some predictions are routine. Piracy will continue to plague IP owners; technology will still pose challenges to the application of IP rights (and to the enforcement of those rights); "tech transfer" will remain a flash point between developed and developing countries. However, I would like to focus on a number of less routine, but no less critical, challenges IP rights will face in 2013. Here are my predictions:

Industry standards will become the new way to combat digital piracy.

With the spectacular failure of both the Stop Online Piracy Act (SOPA) and Anti-Counterfeiting Trade Agreement (ACTA), content owners have learned an unhappy lesson about the ability to impose top-down controls in the age of easy and growing Internet access. Although the muscle-flexing of Internet giants such as Google and Facebook that contributed to such failures demonstrated the growing political power of end users, it did not signal the final victory of rogue websites. To the contrary, post SOPA's collapse, Google revised its search algorithms to remove direct links to pirate sites and reduce the ranking of a site in search results "based on (the site's) Digital Millennium Copyright Act (DMCA) compliance record." The impact of these controversial changes remains uncertain. Nevertheless, 2013 should see an increase in industry efforts to provide some limited help in combating rogue websites and other unauthorized activities in an effort to stave off even stronger top-down enforcement efforts by content owners.

SOPA and ACTA aren't dead; they're only sleeping.

Although both enforcement

initiatives failed miserably, SOPA and ACTA are not dead. They have merely mutated into new forms. Efforts to follow the money trail of those who earn money from rogue websites — a key feature of both efforts — will continue. But in 2013, such efforts may take new and inventive forms. For example, in Germany, legislation would require websites that post headlines (such as Google and other headline aggregators) to pay a compulsory license fee for such postings. Although not strictly a SOPA derivative, the proposal is illustrative of growing efforts to find other ways to earn money from the unregulated uses of IP-protected works. Regardless of whether the German legislation ultimately survives legal challenge, efforts to craft new ways to take the money out of piracy will continue.

Antitrust lawyers will rediscover intellectual property rights with a vengeance.

Antitrust and intellectual property have always had an uncomfortable relationship but 2013 will become the year when "abuse of an intellectual property right" becomes the new catch phrase for global regulators. From nonpracticing entities (trolls) to the holders of standard essential patents, efforts to use patent rights to gain undesirable competitive advantages will come under increasingly unsympathetic scrutiny by market regulators. Even copyrights will not be immune as mass digitization projects raise increasing concerns over information monopolies. The European Union's current efforts to investigate some of Google's search practices is only the tip of a very large iceberg.

Disability rights will move front and center internationally.

Although efforts to ratify the U.N. Convention on Persons with Disabilities were spectacularly derailed last month, disability rights will remain an increasing focus of international efforts. World Intellectual Property Organization (WIPO) is planning a diplomatic conference regarding express limitations on copyright to permit better access



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for the disabled for 2013. The conference should place these issues on the front burner. It should also lead to additional efforts to craft new express exemptions from copyright protection for other purposes, including teaching and for research facilities and library archives.

Indigenous rights will gain traction for international protection.

WIPO is planning new initiatives in the international protection of traditional knowledge, including a potential diplomatic conference late next year or early 2014. I remain skeptical that any such conference will occur. But we may well see a joint declaration issue from the WIPO General As-

sembly on this issue. Such a joint declaration, recognizing the rights of indigenous peoples to control their cultural traditions, would lay the groundwork for an international obligation necessitating disclosure of inventions which use traditional knowledge. It would also give rise to greater efforts to craft stronger domestic protection regimes to protect such rights. Musicians, motion pictures and the biotech industry will be among the first industries to be affected by such heightened protection.

The shadow Internet will become more problematic.

The Internet Corporation for Assigned Names and Numbers (ICANN) took the spotlight this year with the institution of their new "dot anything" generic top level domains (GTLTLD). The issues raised by the trademark implications of these new GTLDs caused widespread grumbling about the need for another Internet governing body. Others have urged abandonment of the present Internet for a shadow version that avoids ICANN governance altogether. The International Telecommunications Union has stepped into this morass with a new assertion of authority over the Internet that may bring in a new era of unprecedented censorship. The shadow Internet already exists. Next year will see it grow in both popularity and acceptability in response to these developments.

Trademarks are the new copyright.

No area of intellectual property has received greater attention or demands for change than copyright in the digital age. Trademarks will finally catch up. The role of trademarks in the new "dot anything" domain and as information assets in social media (such as in hashtags) will lead to increasing collisions between trademark owners and those who see them as information providers. The outcome is anybody's guess.

One final prediction for 2013: Whatever the outcome of these issues, it is sure to create fireworks.

*“The role of trademarks in the new ‘dot anything’ domain ... will lead to increasing collisions between trademark owners and those who see them as information providers.”*