EIGHTH ANNUAL TENZER LECTURE 2000*

E-COMMERCE, BUSINESS METHOD PATENTS, AND THE USPTO: AN OLD DEBATE FOR A NEW ECONOMY**

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INTRODUCTION

I am honored to be here today, and honored that you have invited me to become a part of what is a very distinguished program. As everyone here knows, Cardozo has one of our country's finest intellectual property programs. Those of us in Washington are proud to work with, and call upon, Cardozo's resources. Marci Hamilton, your IP program director, was co-chair of a United States Patent and Trademark Office ("USPTO") conference this year, and just a few months ago Professor Hamilton testified before Congress on some important copyright issues.

On our side, Lynne Beresford, our Deputy Commissioner of Trademarks for Trademark Policy and chair of the World Intellectual Property Organization's ("WIPO") trademark committee, was a speaker at Cardozo last year, and Justin Hughes from our office uses his personal time to teach Cyberlaw at Cardozo, which I understand was one of the school's most popular courses in the last academic year. So, I am very proud to have an opportunity to contribute to this cross-pollination of ideas about intellectual property.

I want to start tonight by saying that within the past two decades it has become abundantly clear to most observers that the United States is making an important transition from a mature industrial and manufacturing economy to an emerging entrepreneurial/innovation-driven knowledge based economy.[1] E-

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[1] *See* CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, ET AL., COPYRIGHT LAW 1 (5th ed. 2000).

commerce, the Internet, and business method patents are basic elements of this transition. And when I was approached to give this lecture, I was pleased to be given the opportunity to discuss them. So tonight, I will endeavor not only to talk about business method patents and software, I also look forward to discussing their place in the broader context of the intellectual property issues we are now confronting.

Really, "An old debate for a new economy" is actually a good subtitle of this talk because it summarizes almost all, if not all, of the burning questions in intellectual property today. The intellectual property system, while retaining basic principles, is also dynamic, constantly evolving to respond to changing technologies, changing social norms, and changing business practices.[2] These changes most often take the form of court decisions, international treaties, legislation from Congress, as well as new or revised procedures at the USPTO.

When any one of these changes touches off a policy debate, it is almost always about whether the intellectual property system is drawing the proper balance between two policy goals—the two pillars on which the whole system is built. The first is that economic incentives are needed to get people to invest in the development of new innovations, creations, and information. In our society, we provide those incentives through copyrights, patents, and trade secrets, as well as special forms of legal protection for semiconductor masks, plant varieties, and the like. Some call these rights "monopolies," but that's too strong a word, with its own inherent, negative connotations; what is really granted is a limited property right, a property right whose economic value will be determined by the market, not by government fiat.

Balanced against this need to have incentives to spur creativity, innovation, and investment in information, the other pillar of the intellectual property system is the need for new works and inventions to be distributed as widely as possible, subject to maintaining effective incentives for the works and inventions to be created in the first place. When a group of people disagree about intellectual property policy, they almost always disagree about where to draw the line, how to achieve the optimal balance between distribution and incentives.

That's why tonight I want to talk about a whole variety of changes in the intellectual property system—some exciting, some mundane—to see how they will impact this debate, our informa-

[2] *See id.* at 2.

tion economy, and information society, in which we are going to live. Along the way, one of the things I hope to emphasize about the American intellectual property system, something in which I truly believe, is its progressive nature, flexibility, and adaptability. Let me start with a more mundane area, changes in the day to day functioning of the USPTO.

I. Overview: The USPTO and Recent Reform

A. *AIPA*

No agency of the U.S. Government has to respond to the full range of our society's technological changes more quickly than the USPTO. Other agencies are not under constant pressure to upgrade their computers; other agencies, like the Food and Drug Administration ("FDA") or the Federal Trade Commission ('FTC"), have the *option* to master specific new technologies or business practices. At the USPTO, we don't have that luxury. Every patent application that arrives challenges our existing knowledge—that's the whole idea of a patent being for "new" and "non-obvious" innovations.[3] Needless to say, the "new economy" has compelled us to implement dramatic changes in our agency. The raw speed of technological change has forced us to innovate in every respect.

Many such changes were realized by the passage of the American Inventors Protection Act[4] ("AIPA"). The transformations we are seeing at the USPTO as a result of that law are manifold, but it was certainly the Performance Based Organization aspect that gives us the greatest hope for significant reform of the day to day operations of the United States intellectual property system. Changing from a regular government agency to a "performance based organization" has freed us to utilize the same kinds of practices that American businesses use in order to compete effectively in the information age. In fact, we now enjoy full autonomy in decision-making about the management and administration of our operations in areas such as budgeting, personnel, and procurement.

There are other substantial changes that AIPA has brought to the USPTO. For example, AIPA provides for the publication of patent applications eighteen months after a patent application is filed, a change that will have a great impact on our internal opera-

[3] *See* Michael A. Epstein, Epstein on Intellectual Property § 5.02 (4th ed. Supp. 2001).

[4] American Inventors Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (codified in scattered sections of 35 U.S.C.).

tions.[5] These published applications will be electronic and full text searchable. Because patent applications represent the cutting edge of any technology, what this means in practical terms is that applications will likely become the predominate form of prior art used by examiners.[6] This will help us in ensuring that high quality patents are consistently issued.

But notice that the publication of patent applications after eighteen months also affects that fundamental balance between incentives to innovate and dissemination of information. These published patent applications will disseminate vast amounts of technological information even before the patent system issues any property rights in the form of patents. The published applications will help companies determine where they should invest research dollars and, to some degree, avoid the problem of "submarine patents," patents that are issued after a long examination process and threaten to slow down or unduly burden an industry that has already grown up around a set of innovations. The law also protects the published application through the grant of provisional rights, actual damages for actual notice of infringement of a published claim.

Another critical aspect of the pregrant publication that is especially important in the debate over business methods is the possibility of additional art finding its way to the examiner through Rule 99,[7] either in paper or even on Internet sites. Another important feature of the recent patent law reforms[8] is new reexamination provisions. We now provide for optional inter-parties reexamination for reviewing patent validity, allowing third parties to participate fully in reexamination proceedings. This is a change that will give us the chance to respond to new prior art, overlooked or unavailable on first examination. Although, considering today's topic, I'd like to mention that since we've broadened reexamination, there have only been three third party requests in Class 705,[9] the group responsible for technology and business method patents.

Partnering with private sector, a point I'll return to later, is another significant part of the AIPA initiative, and a vital compo-

5 *See* 35 U.S.C. § 122(b)(1)(A) (2000).

6 *See id.* § 102 (e)(1).

7 37 C.F.R. § 1.99 (2001).

8 *See, e.g.*, Scott Erickson, *Patent Law and New Product Development: Does Priority Claim Basis Make a Difference?*, 36 AM. BUS. L.J. 327-28 (1999) (discussing the 1992 Advisory Commission on Patent Law Reform).

9 *See Class 705*, United State Patent and Trademark Office, *available at* http://www.uspto.gov/web/menu/busmethp/class705.htm (last modified July 27, 2001) (citing statistics as of June 2001).

nent of the USPTO's activities as we continue to keep pace with new technologies. We've established opportunities to work with varied members of the IP community through the creation of two new USPTO advisory panels, the Patent Public Advisory Committee and the Trademark Public Advisory Committee. These panels advise the USPTO on agency operations, goals, performance, budget issues, and user fees. And it is our hope that continued work with these two committees will help us see "around the corner," or do a better job of anticipating challenges that the new economy will throw at us.

These are just some of the ways in which the USPTO is handling the demands of the new economy. Our organization is simply enacting reforms much as any other business would in this day and age. We, too, have been affected by the Internet and the possibilities of e-commerce. We, too, see that if we want to continue having the best intellectual property system in the world, it is our responsibility to recognize the realities of the future.

B. *Globalization*

Those are some of the ways the intellectual property system is changing domestically, but "e-commerce" is one of the points on which we are focusing today. Before we get to a specific topic like business method patents, we should talk about some of the broader legal trends being fueled by the Internet and the rise of e-commerce. The broader legal trend spurred by the Internet can be described by the same word used to describe real world commerce in the past twenty years: globalization. While in some quarters a pejorative term, in the case of the legal system, "globalization" means the need to develop international norms for all kinds of laws—ranging from the protection of personal privacy to contract law to the laws by which national courts exercise jurisdiction, in order to meet the demands of the globalized economy.[10]

With the technological and commercial advances of the past few years, we've seen an unprecedented integration of intellectual property in trade treaties, practices, and agreements. For example, the last four years alone has seen a total of five treaties: the Trademark Law Treaty,[11] the Patent Law Treaty,[12] the two WIPO Copy-

10 *See* Christopher W. Rudolph, *Globalization, Sovereignty, and Migration: A Conceptual Framework*, 3 UCLA J. INT'L L. & FOREIGN AFF. 325, 328 (1998) (stating that "[g]lobalization, as its name suggests, refers to structural and other changes manifest in the international system, and as such, operates largely beyond the domestic sphere").

11 Oct. 27, 1994, Hein's No. KAV 5200, *available at* World Intellectual Property Organization, www.wipo.int/treaties/ip/index.html (last visited Aug. 6, 2001).

right Treaties,[13] and the Hague Agreement on Industrial Designs.[14] All are hallmarks of the trend towards global IP integration. And this trend is continuing. In December, the USPTO will take part in another Diplomatic Conference to negotiate a treaty that protects the rights of audio-visual performers.[15] The protection of these rights is particularly relevant because, in the digital era, a performer's image can be altered and exploited in ways over which they have no control or involvement. We also continue to work on the Madrid Protocol,[16] which will streamline trademark practice. In the fall of 2000, we were very close to ratifying this treaty, but once it reached the Senate it was caught in the crossfire over the "Havana Club" dispute, a trademark disagreement involving the Government of Cuba. However, when the United States is finally able to join the Protocol, a U.S. trademark owner may apply to register its mark in any of the sixty-five Madrid counties by filing a single application, in English, in the USPTO.

Operationally, our Office and IP offices around the world have also responded to globalization. Our embrace of automated systems, for example, is not only about improving service. It's also an acceptance of the fact that at some point IP offices will cease to be independent units only equipped to deal locally with IP rights; they will instead become smaller units of a greater whole as economies become increasingly service-based and need an integrated IP network with which to work. This is an exciting concept. The potential for almost instantaneous, global protection of intellectual property rights through harmonization and automation is a reality that would revolutionize the way IP offices conduct business and the way we view IP rights entirely.

We are on the right path; electronic filing of patents have begun, and we already offer electronic filing for trademarks and implementation of on-line systems that allow our customers to check on the status of their patents and trademark applications, or trade-

[12] May 11 – June 2, 2000, 39 I.L.M. 1047, *available at* World Intellectual Property Organization, www.wipo.int/treaties/ip/index.html (last visited Aug. 6, 2001).

[13] World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65, *available at* World Intellectual Property Organization, www.wipo.int/treaties/ip/index.html (last visited Aug. 6, 2001); World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76, *available at* World Intellectual Property Organization, www.wipo.int/treaties/ip/index.html (last visited Aug. 6, 2001).

[14] Nov. 6, 1925, 74 L.N.T.S. 348, *available at* World Intellectual Property Organization, www.wipo.int/treaties/ip/index.html (last visited Aug. 6, 2001).

[15] *See Diplomatic Conference on the Protection of Audiovisual Performances*, World Intellectual Property Organization, *available at* http://www.wipo.org/eng/document/govbody/index.htm (last visited Aug. 6, 2001).

[16] *See* James N. Palik, *Failure by U.S. to Join Madrid Protocol Proves Costly*, N.Y.L.J., June 23, 1997, at 84.

mark registration. There is also the Electronic Filing System in Biotechnology, or EFS-BIO. EFS-BIO is our response to the advent of genomic inventions and gives us the capability to handle gene sequence listings that typically are hundreds of thousands of pages long.

Increased availability to the public of our automated systems in Public Search Facilities is also a part of this movement we're making towards complete access.[17] As it stands, we are the first national intellectual property office in the world to offer this depth and breadth of automation—digitized, networked access to information. We are working on two levels, with both domestic and international activities and policies working towards a global system that will be a virtual requirement in the twenty-first century. For example, it is clear to me that we need to see a substantive patent law treaty during the next decade if we are to recognize the full potential of our intellectual property.

We have indeed, already addressed the harmonization of patent formalities under the Patent Law Treaty; now the international community needs to come together and enact substantive harmonization, instituting a treaty that encompasses all aspects of patent application and postgrant procedure. This is the kind of reform[18] that will be necessary if we are to remain true to our mission of helping spur innovation and, thereby, improve the well being of people's lives.[19]

II. Greater Appreciation of IP in Developing Countries

We also see a greater appreciation of intellectual property in developing countries. Again, this is another place where the new, global economy provides a stage setting for the old debate about the proper balance between incentives to create new knowledge and, on the other hand, unfettered distribution of knowledge. The Trade-Related Aspects of Intellectual Property Agreement[20] ("TRIPS") requires developing countries to improve their intellectual property protection as part of their joining the World Trade Organization. In the early days of TRIPS, many people criticized

[17] *See generally* United States Patent and Trademark Office, *at* http://www.uspto.gov (last modified July 16, 2001).

[18] *See generally* Erickson, *supra* note 8.

[19] *See* U.S. Const. art. I, § 8, cl. 8 ("Congress shall have Power . . . 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.")

[20] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

this as "too much" IP protection[21]—that intellectual property laws would stifle growth in developing countries and would only amount to royalties checks being sent from economically poorer societies back to U.S., Japanese, and European companies.

But that view is changing—changing rapidly in the last few years. In their desire to move away from economies grounded in unreliable commodities and their concern that they not be left behind in this new phase of economic growth, leaders in many developing economies are increasingly recognizing the important role IP protection plays in economic development.[22] Serious, empirically based economic studies have now shown that properly calibrated intellectual property rights—again, properly balancing incentives to create with the need to distribute information widely—have positive effects on a developing country's economic advancement.[23]

The USPTO has been committed to assisting countries to improve their intellectual property systems. We have sponsored regional conferences in countries like Senegal and Kenya in order to teach and learn from foreign governments, governments that are equally as committed to bringing their IP systems up to speed. We've met with the top leaders of IP offices throughout Asia, including China and Vietnam. In the last two years, we've sent experts to provide technical assistance to Egypt, Albania, China, Namibia, Nigeria, Botswana, and Uzbekistan—just to name a few places. Very recently, we sponsored special symposia on intellectual property enforcement, one in Washington D.C., which was geared toward our trading partners in the Western Hemisphere, and one in Thailand, where we partnered with WIPO. Of course we can still do more. We have to make a promise to all developing nations that we will support them in their efforts to create a strong intellectual property rights system and, in doing so, contribute to

21 *See, e.g.*, Eric J. Schwartz, *The Impact of Technological Change in the Canada/U.S. Context: Protecting and Exploiting U.S. and Canadian Intellectual Property Abroad in a Technologically Changing World Economy – A U.S. Perspective*, 25 CAN.-U.S. L.J. 97, 102 (1999) (commenting that the most important part of the TRIPS Agreement was the addition of enforcement standards in Articles 41 through 61.)

22 *See, e.g.*, Jeffrey Lax, Note, *A Chile Forecast for Accession to NAFTA: A Process of Economic, Legal, and Environmental Harmonization*, 7 CARDOZO J. INT'L. & COMP. L. 97, 110 (1999) (discussing that, among Latin American countries, Chile is the prime candidate for joining the North American Free Trade Agreement).

23 *See* Robert M. Sherwood, *Human Creativity for Economic Development: Patents Propel Technology*, 33 AKRON L. REV. 351, 352 (2000) (noting that the economic development in developing countries is largely a function of the availability of protection for intellectual property).

their socio-economic growth and competitiveness in the marketplace.

III. INTELLECTUAL PROPERTY: AT A CROSSROADS

Now I want to return to my original point regarding intellectual property in the new economy. If nothing else is clear, it's at least obvious that new technologies demand new responses. Internet technologies and business method patents, like gene patents, have engendered controversies that are, in many ways, but new chapters in the old debate about whether the intellectual property system properly balances incentives to creators with distributional goals, whether it optimally fuels innovation and the diffusion of innovation or, whether, as some critics charge, it actually slows down innovation and imposes unnecessary costs on people and institutions.

But I think that there are some "atmospherics" we have to recognize too. The innovations we are dealing with today are almost unimaginable, and that people assume the *unimaginable* must therefore be *unmanageable.* Not too long ago, a concept like the Internet was unimaginable. Genetics, an unexplored terrain.

So people have become concerned that our government, through the USPTO, is ill-equipped to handle the special concerns these unimaginable creations have spawned. Will we stifle innovation as we try to protect it? Will we kill competition even as we claim that we are encouraging a diverse marketplace? Do we have the expertise to handle these inventions? These are serious concerns in any economy, but even more so in the United States, a country literally built upon the ideal and ideas of the American dream.

Let us now touch upon the controversy surrounding subject matter and patentability. Plainly speaking, there are many people who think that patents should not be issued on methods of doing business on the Internet, that is, on computer and/or network-enabled business systems or processes. My view on this specific question must be understood in a broader context. Part of that context is a patent system specifically designed to absorb new technologies. Our patent system has responded to wave after wave—some small waves, some tidal waves—of new technologies. It has provided patent protection for these new technologies without seeming to slow America's economic progress. Would the people who oppose patenting a method of shopping on the Internet also have opposed, a century ago, a patent on a cash register, since it is just a way of

using a machine to do a well known activity—adding purchase prices? If we have no empirical evidence to show that patents retard progress in a particular field of endeavor, then shouldn't the presumption, as a matter of policy, be in favor of providing patent protection? In fact, the evidence is that our patent system stimulates research and new products; one only has to compare the United States biotech industry with that of Europe.[24] Further, it has been demonstrated that expanding subject matter, and the introduction of new products based on these changes, is something that our IP system, with its flexibility and ability to adapt to new technologies, is well equipped to handle.

The second part of my answer is not a policy perspective, but a perspective on the law. Today I want to say this regarding business method patents: the USPTO is following the *State Street* decision[25] and accepts the patentability of business methods and software. In the *State Street* decision, the Federal Circuit concluded that § 101 of the patent law does not encompass an exception from patentability of "business methods."[26] Since the Supreme Court decided not to review the *State Street* decision,[27] that is the interpretation of the law that the USPTO must follow.

Now let me say that we are not hiding behind the robes of the Federal Circuit judges. It is not just that *State Street* is law, it is that the *State Street* decision is a reasonable and proper interpretation of § 101's statutory language.[28] Section 101 states unequivocally that "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter" may obtain a patent if he or she meets the standards of novelty and non-obviousness.[29] There is nothing in the statute that says methods of doing business should be excluded.[30] If an Internet-enabled method of selling widgets is a "new and useful process" *and* it meets the law's required levels of "novelty" and "non-obviousness," it is appropriate matter for a patent.

Now the USPTO's job with business method patents, as with all patents, is to issue quality patents—to do the best we can to

[24] *See* Michael J. Malinowski, *Legal Development: Globalization of Biotechnology and the Public Health Challenges Accompanying It*, 60 ALB. L. REV. 119, 123-24 (1996) (noting that the British biotechnology industry is not as developed as that of the United States).

[25] *See* State St. Bank & Trust Co. v. Signature Fin. Group, Inc. 149 F.3d 1368 (Fed. Cir. 1998).

[26] *See id.* at 1375.

[27] *See* State St. Bank & Trust Co. v. Signature Fin. Group, Inc., 525 U.S. 1093 (1999) (denying writ of certiorari).

[28] *See State Street*, 149 F.3d at 1372.

[29] 35 U.S.C. § 101 (2000).

[30] *See id.*

ensure that patents issue only when the innovation is useful and truly new and non-obvious in relation to all that was known before. To address concerns, including our own, about business method patents being issued by the office, we launched a Business Method Action Plan in March 2000. The program is explained in great detail in our White Paper, which, of course, is online.[31] This initiative included revised examination guidelines and a business methods roundtable, another example of our work on fostering partnerships with the private sector.

One of the components of our revised procedures for business method patents is that we have instituted a second-level review of all allowed applications in this area by an additional examiner beyond the Primary Examiner signing the case. This "second pair of eyes" will be very helpful in ensuring the quality of these patents. The USPTO has also doubled the size of end-product quality review sampling of these applications.

On the issue of genomics, there are also few brief points that I need to make. One, under United States law, and this is identical to our position on business method patents, gene patents are allowed. When the USPTO issues patents on genomic inventions, we are following precedent set by the U.S. courts, specifically 1980's *Chakrabarty* case,[32] which firmly established the legitimacy of gene patents, in this case for a new strain of bacteria.[33] And, number two, the USPTO does not issue patents on *raw genetic data*. The USPTO is not in the business of issuing patents on this basis; we demand actual invention. We can look to history and see the same standards applied to numerous other naturally occurring chemicals. One of my favorite examples is penicillin—originally starting life as a mold, but eventually generating an entire generation of patentable antibiotics. This is just one obvious example. But it's important for people to understand that the USPTO's approach has been consistent. We follow United States patent law; we insist on innovation; and we work to make sure that the highest of standards are met when we issue a patent.

Still, the controversy remains, and we want to respond to that, always. There will probably be controversies of this nature as long as there exists an inventor, an idea, and an intellectual property system. That is to be expected when we are dealing with emerging

[31] *See White Paper*, United States Patent and Trademark Office, *available at* www.uspto.gov/web/menu/busmethp/index.html (last visited Aug. 2, 2001).

[32] Diamond v. Chakrabarty, 447 U.S. 303 (1980).

[33] *See id.* at 309.

technologies, and we welcome the opportunity to work with the IP community on these questions.

A. *Domain Name/Privacy*

Those of you interested in trademarks and Internet issues are no doubt quite familiar with the challenges posed by domain name registration and privacy issues. One viewpoint on obtaining information from the Whois database, the database that contains ownership and contact information for all of the domain names in the generic top-level domains (for example, dot com, dot net, and dot org), is that, in order to protect privacy, ownership information should not be readily available to trademark and copyright owners.[34] However, access to this information is vital. Only by obtaining such information can the trademark and copyright owner effectively pursue remedies against infringers and cybersquatters.[35]

Clearly there is a conflict here; and, although protecting the privacy of individuals is extremely important, the United States believes that it is also important to allow the owners of copyrights and trademarks to have quick and effective means to stop cybersquatting, infringement, and unlawful copying.[36] Owners of valid trademarks and copyrights must be able to obtain accurate and current ownership and address information in order to stop those who are using the Internet to infringe valid trademarks or unlawfully copy protected material.[37] Hopefully, further international cooperation will be able to remedy diverging philosophies while at the same time respecting privacy appropriately.

B. *Database Protection*

Additional legal protection for databases, beyond what is provided by copyright law, is another area where the new economy has rekindled the old debate over where to draw the line between adequate incentives and adequate access.[38] There is no question that digitization and the Internet environment make it possible for large databases that are the result of substantial investment to be

[34] *See Register.com Seeks End to Alleged Misuse of Whois Database*, 18 (No. 2) ANDREWS COMPUTER & ONLINE INDUSTRY LITIG. REP. 12 (2000).

[35] *See* Dale M. Cendali & Rebecca L. Weinstein, *Intellectual Property and the Internet*, 1998 A.B.A CENTER FOR CONTINUING LEGAL EDUC. A-137-38.

[36] *See* Navin Katyal, *The Unauthorized Dissemination of Celebrity Images on the Internet . . . in the Flesh*, 46 CLEV. ST. L. REV. 738, 753 (1998).

[37] *See* Cendali & Weinstein, *supra* note 35, at A-138.

[38] *See* J. Ryan Mitchell, *If at Feist You Don't Succeed, Try, Try Again: An Evaluation of the Proposed Collections of Information Antipiracy Act*, 78 NEB. L. REV. 900, 901 (1999).

pirated in the blink of an eye.[39] But it is also clear that too strong a form of legal protection might stifle the use of information in research, the sciences, downstream commercial applications, and society at large.[40] For that reason, in 1998, the Administration laid out six principles that we believe should govern legal protection of the investment in databases. Those principles both recognize the need for such protection and the need for a wide range of "fair uses" analogous to what is provided in copyright law. I believe that we need to move forward domestically on the basis of those principles to ensure that the global intellectual property community does not move ahead without us.

C. *Ethical Issues: Technology and Culture/Folklore*

There are also many questions regarding globalization, technology, and the effects on traditional cultures.[41] This controversy has spawned a generation of books, lectures, and programs.[42] It's an important question: at what cost progress? This is a particularly sensitive point to developing nations that fear the total Westernization, or more specifically Americanization, of their society, especially as the Internet starts infiltrating even the most closed of cultures.[43] Furthermore, the question of folklore, and how to adequately protect it, still troubles us. There is abuse through commercialization and distortion, and copyright protection as it stands doesn't seem to be the answer. From the Berne Convention[44] to our most recent meetings with WIPO, we are still struggling to find the correct kind of protection for folklore.

D. *Enforcement*

But above all, we need to make sure that effective enforcement is implemented globally. And let me be even more specific: inexpensive methods of enforcement have to be implemented. The widespread embrace of the Internet has made this critical, as

[39] *See id.* at 909.

[40] *See* G.M. Hunsucker, *The European Database Directive: Regional Stepping Stone to an International Model?*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 700, 706 (1997).

[41] *See generally* Kevin D. Brown, *Globalization and Cultural Conflict in Developing Countries: The South African Example*, 7 IND. J. GLOBAL LEGAL STUD. 225 (1999).

[42] *See, e.g.*, Kevin R. Johnson, *Celebrating Latcrit Theory: What Do We Do When the Music Stops?*, 33 U.C. DAVIS L. REV. 753 (2000); Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV. 1451 (2000); Chantal Thomas, *Transfer of Technology in the Contemporary International Order*, 22 FORDHAM INT'L L.J. 2096 (1999).

[43] *See* Jim Chen, *Globalization and Its Losers*, 9 MINN J. GLOBAL TRADE 157, 162-63 (2000).

[44] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1996, 25 U.S.T. 1341.

industry loses billions to piracy and infringement. All nations need to be able to protect their economies from these violations.

I spoke earlier about developing nations and the trend towards greater appreciation of IP protection and enforcement, but this is a long road, due to the sheer number of countries obligated to comply with TRIPS. On January 1, 1996, all developed countries had to have their domestic intellectual property laws and enforcement regimes in compliance with TRIPS. As of January 1, 2000, over seventy developing countries have had the same obligation to ensure that their laws are TRIPS-compliant, and by 2006 the least developed countries will be obligated to do the same.

Assisting developing countries to meet these obligations will require: (1) a great deal of technical assistance and training by developed countries, private industry, and international and regional organizations; (2) strong public-private sector cooperation; and (3) an ongoing dialogue between developed and developing countries on enforcement issues. Domestic enforcement is also critical. Clearly, the United States is not immune to the violation of IP rights. We must continue to work with the recently-established National Intellectual Property Law Enforcement Coordination Council ("the Council"), which the USPTO co-chairs along with the Department of Justice and which consists of the State Department, the United States Trade Representative, Customs, the Department of Commerce, and the Copyright Office.

With a mandate to coordinate domestic and international intellectual property law enforcement among federal and foreign entities, we look forward to a time when the Council will serve as a vehicle through which federal agencies can partner with industry to develop effective strategies for addressing Internet piracy. The Council has already begun a dialogue with industry to identify ways they can work together to create effective domestic and international enforcement regimes, and in November 2000 we will be holding a public meeting to welcome all opinions concerning this important issue. All in all, we have a full plate. Even if we answer all these concerns, rest assured that there will be different ones for us to deal with, as progress continues and intellectual property continues to lead us into the next century.

Conclusion

Let me close by reminding everyone here what the last few years have meant to the intellectual property community. Our profile, obviously raised, has reached a point where the work that we

do has become the central turning point of the twenty-first century. Globalization, technology, and information have formed an entirely new way of life for every individual, and for every government. The Internet, a driving force behind these changes, has asked us to explore new avenues of management in our IP system. What an opportunity this has turned out to be. We have, as a result, seen how responsive and practical our system truly is, while at the same time we've been able to expand our capabilities in order to push our economy, and those of developing nations, to new heights.

Of course we admit that there are no absolutes here. It will never be our intention to establish a tradition of inflexibility and limited perspective; that would fly in the face of what our founding fathers envisioned when they first created our IP system. Like our Constitution, our system is strong by being flexible; and it is this adaptability that has fostered innovation, and in turn is enriched by it. I ask you to be proud of this tradition, as you are proud of the legal tradition you have chosen to join. By doing this, you are not only contributing to its success, you are also taking the crucial step of bearing responsibility and of taking care that we do not mismanage a system that offers so much to so many.

This is a concept that I cannot overstate. Throughout my tenure at the USPTO, I have stressed, by both word and deed, that our role is to sustain a balance. It is not, as I said earlier, to control terms and hand down edicts; it is to work with the people we serve to make sure that our system helps rather than hinders. The USPTO is not a typical government agency. We are not bureaucratic. We are not reactive. We are instead proactive, responsive, and a leader in government reform, acting as an example to every single IP office in the world. It is in no one's best interest to ignore change and the realities of a new era. We are responsible for far too much. If the twenty-first century is the era of technology, then the intellectual property system of the United States is leading the world into the new century well prepared.