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## Access to information a hot topic in international IP protection for 2014

Sitting in Shanghai writing this column with the smoggy haze drifting by my hotel window makes me realize that emission control should top anyone's hot topics for 2014.

I would like to add it to my annual international IP to-do list. Without question, the patent issues surrounding so-called "green technology," including what inventions would actually qualify for any special treatment granted such technology, is a critical international issue, not just something for China.

It is also so far down on the current action list that there is little practitioners can do but monitor developments to see when, and if, anything relevant actually happens. Aside from specialized processes in some countries that bump certain innovations relating to energy or pollution control to the front of the patent application line, there is, sadly, little new to report or anticipate in the coming year.

There is, however, another matter of critical public interest that, though not quite as visible from my window, will have a similarly global effect on our profession in the coming year. It is the increasing demand for greater public access to diverse intellectual-property-protected works.

From access to medicines and technology, to free speech, to a generalized right of access to "information," the scope of protection afforded diverse intellectual property rights in 2014 will be increasingly contested under exceptions and limitations granted in support of these rights.

In the area of international patent law, patent protection for biogenetic-based medical innovations will remain hotly disputed

in the face of increasing demands for greater access to critical medicines at affordable prices.

These demands will continue to impact a wide variety of issues, including the fundamental question of the scope of protection afforded gene and brain "mapping" activities. The decision by the U.S. Supreme Court in *Association for Molecular Pathology v. Myriad Genetics, Inc.* this year (569 U.S. 2013) that simple isolation of a gene does not qualify as patentable subject matter is in keeping with this trend of reducing patent protection for biogenetics.

By contrast, in a case involving the isolation of the same BRCA gene in April, the Australian federal court found such activity qualified for patent protection. These differences of opinion will continue to fan the flames of a larger international debate over the relationship between patent protection and access to medicines.

As medical innovations based on biological materials increase in frequency, battles over exceptions to patent protection to secure lower cost access to medicines will become more frequent and less predictable. Cases currently pending in India, China and Australia will need to be monitored as they set the terms of any such "low cost" access.

**“For the first time in a long time, 2014 promises to be an exciting year for trade secrets.”**



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The ultimate outcome of the debates over patent protection for new uses in connection with the negotiation of the Trans-Pacific Partnership Agreement (TPP) will also have a strong impact on future international protection. President Barack Obama's recent promise of U.S. "flexibility" on such matters may well include the abandonment of mandatory protection for new uses.

Patent owners would do well to communicate any concerns they have over such issues directly with the Office of the U.S. Trade Representative. Although the deadline for the creation of the TPP passed in December, the parties are continuing the negotiations. Any position ultimately taken in any resulting agreement will undoubtedly impact protection in other countries.

For the first time in a long time, 2014 promises to be an exciting year for trade secrets. Several countries including China and the European Union will be considering revisions to

current laws.

The most interesting development, and the one which may require the greatest monitoring, is the recently released European Union Directive on Trade Secrets. Similar to international patent regimes, access concerns may well reduce the potential scope of protection currently granted holders of trade secrets.

The draft directive follows the general obligations under the Agreement on Trade Related Aspects on Intellectual Property Rights (TRIPS) for trade secret protection, including the requirement that the information "have commercial value." (Article 2). But it goes beyond TRIPS obligations by providing detailed exceptions to trade secret protection.

These detailed exceptions include when use or disclosure of a trade secret occurs "for making legitimate use of the right to freedom of expression and information." Since the very nature of trade secret protection is to prevent access to information, this exception could be the loophole that eviscerates the promised protection.

Compounding matters, a second exception under the draft further allows unauthorized disclosure "for the purpose of revealing an applicant's misconduct, wrongdoing or illegal activity, provided that the alleged acquisition, use or disclosure of the trade secret was necessary for such revelation and that the respondent acted in the public interest."

Undoubtedly inspired by the revelations of Edward Snowden, this exception, combined with the emphasis on the right to access to information, will most likely trigger more disclosures — an unfortunate result for a directive designed to enhance trade secret protection.

Digital piracy initiatives remain at the top of the international copyright to-do list for 2014. Yet the more critical development may be the increasing focus on strengthening fair use rights internationally — the iconic defense arising from free speech and information access policies. The debates ignited during negotiations for the VIP Treaty, adopted this summer in Marrakesh, Morocco, regarding the need to expand access to copyrighted works through specified exceptions (in this instance for the visually

impaired) will continue.

Treaties involving access for purposes of archival protection and library services are already under discussion. Tethering expanded access rights without the specific obligation of balancing those rights against the prejudice caused to the rights holder (required under TRIPS Article 13) promises to further reduce authorial control over copyright at a time when it is already under siege from the Internet.

Trademarks will not avoid this trend toward access over protec-

tion. From increasing recognition of the general right to use marks as keywords for Internet searches, to greater rights for regulatory control of packaging to inform citizens of the dangers of smoking, trademark owners in 2014 will also find increasing exceptions being created to their ability to control the use of their marks. Developments in the current dispute before the World Trade Organization regarding Australia's plain packaging law may well set the tone for future discussions.

For those who want to become

more actively involved in shaping the access debates, the obvious first stops are the U.S. Copyright Office and the U.S. Patent and Trademark Office. However, I would also urge increased communication with the Office of the U.S. Trade Representative, as they are responsible for evaluating critical exceptions in the area of trade negotiations.

Here in Shanghai, there is a well-known curse: "May you live in interesting times." For IP owners that curse will definitely hold true in 2014. The times will be very interesting indeed.