

**Transcript of Presentation
International Law, Intellectual Property and Power**

Tai-Heng Cheng

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Good morning. I plan to discuss the global intellectual property system from an international law perspective, even though I am keenly aware that this is an audience of intellectual property (“IP”) experts. I see many friends in this room, and if I fall between the interstices of international and IP law, I hope that some of you will extend a virtual hand to me.

I. Power Matters

Power matters. It matters because it plays a part in deciding whether HIV sufferers in Africa get the drugs they need. At a more personal level, power matters because it plays a part in determining whether the books that you and I write are pirated in China, or whether we receive royalties when these books are translated into fifteen languages and sold around the world.

Sociologists and international law scholars have proposed many definitions of power. Let’s adopt for our purposes a generally accepted notion of power: power refers to the capacity of a participant in the international system to deploy resources in support of its preferred outcome. Power has many dimensions, including military, economic, diplomatic and psychological power. A state may, in trade negotiations, use its economic power to offer trade incentives in exchange for stronger IP protections. A non-governmental organization (“NGO”) may harness psychological

power by drawing attention to human rights catastrophes that may result from a lack of access to patented medicines.

II. How Power Matters

A. Power Controls International IP Decisions When There Are No Laws.

Power matters in three ways. First, power controls international IP decisions when there are no laws or legal norms are weak. By laws or legal norms, I refer to hard laws or legal rules, as opposed to soft laws or social norms. In situations without laws or where existing laws are of limited application, such as in the negotiation of new IP rules, power plays a prominent role in decision-making.

Take, for example, the WTO trade talks leading to the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”). Using transnational networks, IP producing states, their corporations and the NGOS representing these corporations coordinated their efforts and pooled their power to place IP on the trade agenda, and then to negotiate for IP protections. IP consuming states and NGOs in favor of greater access to drugs and technology likewise pooled their power to oppose the inclusion of IP in the WTO trade talks. Power also played a significant role in the final negotiated outcome. The IP producing states deployed their economic power to offer trade incentives to the IP consuming states in exchange for their agreement to include IP protections in TRIPS.

B. Power May Overcome the Authority of Applicable Laws.

Second, even where there are clearly applicable laws, power may overcome the authority of those laws. In 2001, the United States government brought a lawsuit before the WTO Dispute Settlement Panel, alleging that Brazil had violated

TRIPS rules by imposing compulsory licensing of HIV drugs in Brazil. A scholar or practitioner attempting to anticipate the outcome of that lawsuit without accounting for power would have failed in his endeavor. Such a scholar may have assumed that the outcome of that dispute would have been determined by applying the facts to the relevant TRIPS rules. In fact, the legal rules had nothing to do with the outcome of that IP dispute. NGOs deployed their power to draw attention to the plight of HIV victims in Brazil and the consequences of preventing Brazil from providing them with affordable HIV drugs. This strategy applied sufficient domestic and international pressure on the U.S. government that the United States withdrew its claim from the WTO within four months of filing its claim. As a result of power, and in spite of the applicable IP rules, Brazil was effectively permitted to continue its compulsory licensing regime to produce affordable HIV drugs.

C. *Power May Modify Existing IP Laws.*

The third way that power can matter is in the deployment of power to affect not just outcomes, but to modify existing international IP laws themselves. Where there is a potentially cataclysmic IP conflict, decision-makers can deploy power to change the relevant laws or norms. In 1999, the spread of HIV in South Africa had reached epidemic proportions. Nevertheless, U.S. pharmaceutical corporations filed a lawsuit in South African courts against South Africa to force South Africa to accept patented and costly HIV drugs. Such a result would have caused a cataclysmic public health crisis. NGOs and AIDS activists mobilized domestic constituencies to apply pressure on the U.S. government to withdraw its support for U.S. corporations that had filed the lawsuit. Under such pressure, the U.S. government at the WTO conference in

1999 announced that it would accept weaker IP protections in public health emergencies. In May 2000, President Clinton issued an executive order accepting compulsory licensing to increase access to HIV medication in sub-Saharan Africa. Because of the power of the United States, these acts helped to increase global-acceptance of a norm favoring access to drug technologies in public health emergencies.

Even in non-cataclysmic conflicts, power can also adjust laws or norms through the repetition of similar outcomes in different conflicts. One such example is the repetition of international IP transactions negotiated by a small number of elite law firms that use their proprietary model agreements as the basic framework for each of their transactions. This hypothesis requires empirical testing to prove. However, anecdotal evidence suggests that IP transactions do tend to be structured similarly. I obtained from a leading law firm two very different IP transactions. One set of closing documents established an international licensing agreement for drug patents. The other set of closing documents established an international joint venture to use a fashion designer's trademark in a new line of clothing. Both transactions repeated three structural decisions: (1) they both used national systems of registration around the world to register and protect the IP at issue; (2) they both obliged transacting parties to use "all commercially reasonable" methods, including litigation in national courts, to enforce IP protections globally; and (3) they both determined that IP disputes between the transacting parties should be resolved by arbitral tribunals: the International Chamber of Commerce and the Arbitration Institute of Stockholm. It is conceivable if these three structural decisions are repeated in other transactions, they could eventually configure the structure of global IP decision-making to mirror those transactions.

III. Policy Recommendations

What are some practical applications of my analysis of why and how power matters? Different policy-makers take different views on whether the current global IP protections are too high or too low. For the purposes of demonstrating how an analysis of power can help policy-makers, let's assume that we think current levels of IP protection, either in general, or as regards a specific area, such as drug patents, are too high. Policy-makers can deploy three power strategies to lower IP protections.

A. *Promote and Coordinate the Power of NGOs Opposing IP Protections.*

Policy makers could promote and coordinate NGOs that oppose IP protections. As discussed earlier in this presentation, some NGOs have significant power. Policy-makers seeking to lower IP protections should harness the power of NGOs that champion greater access to IP, such as drug patents or crop technologies. These policy-makers can fund such NGOs, connect NGOs with each other so that they can coordinate their strategies, and provide NGOs with infrastructural and legal support domestically.

B. *Leverage Groups within IP Producers that Seek Greater Third-Party Access to IP.*

Policy makers could also leverage groups within IP producers that seek greater access to IP. Participants in the global IP system are rarely monolithic. Participants that are, in aggregate, IP producers, may have internal constituencies or internal decision-makers that favor greater access to IP. In 1995, even as the United States government threatened China with sanctions unless China strengthened its IP protections, U.S. aerospace companies urged their government soften its IP posture.

These companies sought access to the Chinese market aerospace and were concerned that their government's tactics would provoke the Chinese government to limit their access.

Additionally, divisions within companies may have opposing IP goals.

While divisions in music conglomerates representing musicians tend to favor stronger IP protections, other divisions marketing recording technology might well support greater third-party access to copyrighted artistic works.

Policy makers could mobilize these internal constituencies within IP producers to moderate the overall goal of IP producers promoting stronger IP protections.

C. Capitalize on Events in which IP Producers Become IP Consumers.

Policy makers could capitalize on events in which IP producers become IP consumers. After September 11, 2001, the United States and Canada were concerned that they might be the target of Anthrax attacks. The German company, Bayer, held the patent to Ciprofloxacin or "Cipro," the drug used to treat Anthrax. Because the patented drug was costly, Canada breached Bayer's patent of Cipro and produced the generic version of the drug. The United States threatened to also breach the patent. Bayer then agreed to supply Cipro cheaply. When powerful IP producers become IP users and deploy their power in favor of weaker IP protections, there can be long-lasting effects. Just last month, I purchased a prescription of Cipro for 87 cents, in contrast to the \$ 25 I have to pay for other prescription drugs under my health insurance plan.

IP producing companies may also depend on the IP of other parties. In 2005, Microsoft lost an appeal before the Federal Circuit in a lawsuit that AT&T brought against Microsoft for its use of AT&T computer codes in Microsoft software assembled overseas. A Supreme Court decision on this case is pending. If Microsoft loses its

appeal to the Supreme Court, it may well have to moderate its efforts to protect IP so that it does not become a victim of its own success when it needs access to third-party IP.

While policy-makers may not often have the opportunity to engineer events in which powerful IP producers become IP consumers, they can certainly capitalize on such events when they occur. As a result of such events, policy-makers may be able to persuade IP producers to reconsider some of their demands for stronger IP protections because these producers have themselves required, and will continue to require, access to IP owned by other parties.

IV. Conclusion

Lest you think that I believe that international law is concerned only with power and interests, I should clarify that my preceding analysis has shown that in the international IP system, policy-makers and corporate officers have to consider both power and its relationship to legal rules when planning strategies. Power matters; but it is not all that matters, all of the time.

With the chairman's indulgence, I now will take questions for as long as I am permitted to hog the floor. Thank you.