HARVARD INTERNATIONAL LAW JOURNAL

SYMPOSIUM: DECEMBER 2011

Online Volume 53

Three Ways of Thought About Enforcement of Intellectual Property Rights

An Article from the Symposium: Developments and Challenges in International Intellectual Property Law

Stanford K. McCoy*

For more than two decades, the Office of the U.S. Trade Representative (USTR) has been using the tools of trade policy to encourage U.S. trading partners to provide adequate and effective protection and enforcement of intellectual property rights (IPR). That effort has both involved and inspired considerable discussion by governments and private actors on the meaning, determinants, and importance of adequate and effective IPR protection.

This essay explores one aspect of that discussion—the determinants of effective protection—by considering three commonly held beliefs about the path to

* The author serves as Assistant U.S. Trade Representative for Intellectual Property and Innovation. All views expressed are his own. The title of this essay was inspired by ARTHUR WALEY, THREE WAYS OF THOUGHT IN ANCIENT CHINA (Stanford Univ. Press 1982).

overcoming the failure of a country's intellectual property laws to provide adequate and effective protection. Each of these ideas posits a determinant of effective IPR enforcement: The first is *domestic economic interest,* the second is the *rule of law,* and the third is *political will.* I aim to briefly critique each of these ideas, propose a way of fitting them together, and extrapolate a general prescription.

I. THE SPECIAL 301 EXPERIENCE

Twenty-three years ago, the U.S. Congress set out a new mission for the nation's trade negotiators. Concerned by "the absence of adequate and effective protection of United States intellectual property rights," and finding that such absence and related market access barriers "seriously impede the ability of the United States persons that rely on protection of intellectual property rights to export and operate overseas, thereby harming the economic interests of the United States,"[1] Congress mandated that the U.S. Trade Representative identify acts, policies, or practices[2] that would stand in the way of the Congressional purpose "to ensure adequate and effective protection of intellectual property rights."[3]

Over the ensuing two decades, the statutory standard of "adequate and effective" protection has been applied, and judged effective,[4] against a backdrop of rapidly evolving challenges. In its early years, the resulting "Special 301" report (first issued in 1989) frequently cited as a problem, or praised steps to remedy, the *absence* of intellectual property laws sufficiently modern to meet Congressional expectations for adequacy and effectiveness.[5] In more recent years, as governments have filled gaps in

---

[1] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303(a)(1)(B). *See also id.* § 1301 (adding "Special 301" provisions to the Trade Act of 1974).

[2] 19 U.S.C. § 2411 (1996).

[3] Omnibus Trade and Competitiveness Act § 1303(a)(2).

[4] For commentary on the effectiveness of the Special 301 process, see, for example, Mark Young, *The Case for the Special 301 Reports*, 14 WORLD TRADEMARK REV., July-Aug. 2008, at 14, *available at*
http://www.cov.com/files/Publication/7f62e998-5b78-4003-a2ff-71ab559bbd26/Presentation/PublicationAttachment/014cecb2-8397-4a66-ae1e-2c04667df2be/The%20Case%20for%20the%20Special%20301%20Reports.pdf

[5] *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET: "SPECIAL 301" ON INTELLECTUAL PROPERTY 2–4, 6–9 (1992) (noting *inter alia* deficiencies in existing or proposed intellectual property laws of Brazil, Egypt, Hungary, Korea, Philippines, and Poland, and praising *inter alia* the enactment in the preceding year of patent and/or trademark laws in Chile, Japan, Mexico, Thailand, and the United Arab Emirates, and of an European Community directive on computer software); OFFICE OF THE U.S. TRADE REPRESENTATIVE, FACT SHEET: "SPECIAL 301" ON INTELLECTUAL PROPERTY 2–4 (1990) (noting approvingly the passage in the previous year—the year following the first Special 301 report—of Indonesia's first patent law, patent law revisions in Chile and Yugoslavia, a new copyright law

legal protections to implement the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights and for numerous other reasons, the report has often focused not only on the absence of modern laws, but also on the *unfulfilled promise* of laws that are poorly enforced.[6]

At the same time, technological change has tested the adequacy of intellectual property regimes around the world, demanding both new legislation and responses to new enforcement challenges. Already in 1976, the same year that Sony released its Betamax format VCR, a prescient U.S. official commented, in the context of then-pending U.S. copyright reforms, on the challenges that technology posed to intellectual property rights.[7] More such challenges lay ahead. For example, the benchmark for a modern copyright law evolved considerably with entry into force of the 1996 World Intellectual Property Organization (WIPO) Internet Treaties,[8] just as the challenges of enforcing laws against copyright piracy and trademark counterfeiting evolved in parallel with the growth of online commerce in copyright- and trademark-protected products.

The continuing evolution of legal regimes and the challenges that they seek to address suggests that absent or outdated laws will remain a concern. However, the more interesting problem for present purposes is that of intellectual property laws that make it onto the books, but fail to live up to their promise due to a lack of effective enforcement.

---

in Saudi Arabia, legislation relating to computer software in Colombia and Italy, and protection of plant varieties in Spain).

[6] *See, e.g.*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2010 SPECIAL 301 REPORT 9 (2010), *available at* http://www.ustr.gov/webfm_send/1906 (noting that "[a]lthough many trading partners have implemented IPR legislation, the lack of criminal prosecutions and deterrent sentencing has left effective IPR enforcement to languish in many regions. Lack of knowledge regarding IPR law and policy on the part of judges and enforcement officials, and a lack of enforcement resources, are repeatedly cited as primary reasons for this growing concern.").

[7] In 1976, former U.S. Register of Copyrights Barbara Ringer observed that "[t]he basic human rights of individual authors throughout the world are being sacrificed more and more on the altar of . . . the technological revolution." Matt Schudel, *A Local Life: Barbara A. Ringer, 83: Force Behind New Copyright Law*, WASH. POST, Apr. 26, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/25/AR2009042502917.html.

[8] WIPO Performances and Phonograms Treaty, *opened for signature* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 203. WIPO Copyright Treaty, *opened for signature* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 2186 U.N.T.S. 121.

II. THREE POSSIBLE DETERMINANTS OF IMPROVED ENFORCEMENT

Looking at the range of countries listed in the Special 301 Report, and having heard from critics of diverse viewpoints and from governments, I would hypothesize that although the specific explanations one hears for overcoming enforcement challenges in each individual country vary, they often posit one or more of three determinants of improved IPR enforcement:[9]

> *First determinant: Improving IPR enforcement is a matter of the country's* ***domestic economic interest****. As the economy of the country in question develops and domestic industries grow and generate more intellectual property of their own, its authorities will respond to domestic interests by providing a better enforcement climate. This improved climate will also benefit foreign IP owners.*

Perceived economic interest is a major determinant of government policies, and IPR is no exception. However, economic interests related to IPR are not unidirectional; the push-and-pull of diverse interests can help to calibrate the balance that is essential to a well-functioning system.

More troublingly, perceived economic interest might lead a government to provide effective IPR enforcement to some industries but not others. For example, a country with both a thriving creative sector but no semiconductor industry (and no interest in ever developing one) might promote effective enforcement for copyrights, but not for semiconductor layout designs. Even within sectors where countries perceive a national interest in supporting innovation or creativity through IPR enforcement, authorities may be perfectly capable of distinguishing indigenous from foreign right holders.[10] Thus a rising tide of enforcement might not lift all boats; economic interest could incentivize selective improvements that would fall short of genuine effectiveness.

Another potentially serious shortcoming of the economic interest theory is that it posits development of domestic economic interests as the horse and reform as the cart, when in reality reform often helps to pull development. IPR reforms, coupled with other factor endowments, can have the effect of driving investment and development.[11] A growing body of empirical data bears out that specific IPR reforms

---

[9] In fact, one sometimes hears all three of these prognoses offered together, to explain the path to overcoming the same set of poor outcomes.

[10] *See generally* U.S. INT'L TRADE COMM'N, CHINA: EFFECTS OF INTELLECTUAL PROPERTY INFRINGEMENT AND INDIGENOUS INNOVATION POLICIES ON THE U.S. ECONOMY (2011), *available at* http://www.usitc.gov/publications/332/pub4226.pdf.

[11] *See* Edwin L. C. Lai, *International Intellectual Property Rights Protection and the Rate of Product Innovation*, 55 J. DEV. ECON. 133, 147 (1998).

do in fact contribute to growth in high tech industries.[12] This may hold true for enforcement of IPR laws as well, particularly in societies that cultivate other endowments, such as a well-educated workforce, that contribute to innovation- and creativity-driven growth.

> *Second determinant: Improving IPR enforcement is a matter of* ***rule of law****. IPR laws are complicated and so is the proper enforcement of those laws. Moreover, the entire legal system of the country is still in its adolescence. As rule of law capacity develops, so will respect for, and enforcement of, sophisticated laws like those protecting intellectual property rights.*

The rule of law theory satisfyingly links IPR enforcement to overall rule-of-law development, of which it is undoubtedly a part. Property rights without rule of law are no more meaningful for patents, copyrights, and trademarks than they were for pioneers claiming physical property in the old West. Without a good sheriff and a fair judge, the pioneer's paper rights can mean little.

However, the rule-of-law explanation could be somewhat tautological. If the development of a rule of law infrastructure involves the strengthening of a society's capacity to enforce law and adjudicate alleged violations, then saying IPR enforcement will improve when rule of law improves almost amounts to saying that X will happen when X happens. True, but not terribly revealing.

The argument might be subtler than that, however. If, as expressed above, this idea relies on the assertion that IPR is a newer or particularly specialized area of law, then perhaps it makes more sense to think of basic rule of law development as a predicate for initial development of effective IPR enforcement, and then to think of the enhancement of rule of law specific to IPRs as one goal of, rather than a driver of, broader rule of law reform.

> *Third determinant: Improving IPR enforcement is a matter of* ***political will****. The government of the country in question has demonstrated its ability to stop blatant infringement when it chooses to do so (e.g., when a major event brings international visitors, when the victim is sympathetic, or when the IPR belongs to a major domestic stakeholder). IPR enforcement could be accomplished broadly and consistently, if only the political will existed.*

Turning to the third theory, the elusive "ghost in the machine of politics,"[13] political will, is tough to define well. An adequate (albeit contestable) definition for present

---

[12] Lee Branstetter et al., *Does Intellectual Property Rights Reform Spur Industrial Development?*, 83 J. INT'L ECON. 27, 28 (2011).

[13] Craig Charney, *Political Will: What is it? How is it Measured?* (May 2009), http://www.charneyresearch.com/pdf/09May5_Charney_Newsletter_Political_Will.pdf.

purposes is "support from political leaders that results in policy change."[14] As applied to IPR enforcement, it means the political support necessary to ensure that such enforcement functions well in practice.

One possible flaw in the political will theory lies in the very fact (already inherent in the theory itself) that political will comes and goes. As has been observed in a different context, once a change happens, "you need enough support from political leaders in order to sustain the change, especially given the near-certainty that counter-reform efforts will be launched once vested interests see what you are trying to do."[15] Thus, if the desired outcome is sustained, effective IPR enforcement, then it will require not just enough political will to run a campaign of street-sweeping raids, but *sustained* political will to provide civil, criminal, and administrative adjudication and enforcement mechanisms that produce consistent results.

If in fact IPR reform is a driver of economic development, then IPR enforcement may itself help to renew and sustain political will. On the other hand, inertial forces that hamper rule of law development, such as corruption and local protectionism, may have an equal or greater ability to hamper development of IPR reform, which is one manifestation of the rule of law.

III. A TRIPLE PROGNOSIS

Each of the three ideas discussed above has some explanatory power. But all are oversimplifications. Synthesizing them into an integrated "triple prognosis" could help guide a prescription for effective IPR enforcement.

According to this prognosis, the process begins with establishment of a threshold level of rule of law, sufficient to support some economic development. At this stage enforcement of intellectual property rights probably takes a back seat to more basic goals, like safeguarding public safety.

However, as the economy develops, IPR reform has the potential to both contribute to attracting development driven by foreign investment, and to contribute to driving reform to attract more investment and serve the interests of increasingly innovative and competitive domestic industries. This momentum is not necessarily self-sustaining however, due to inertial forces or countervailing economic interests.

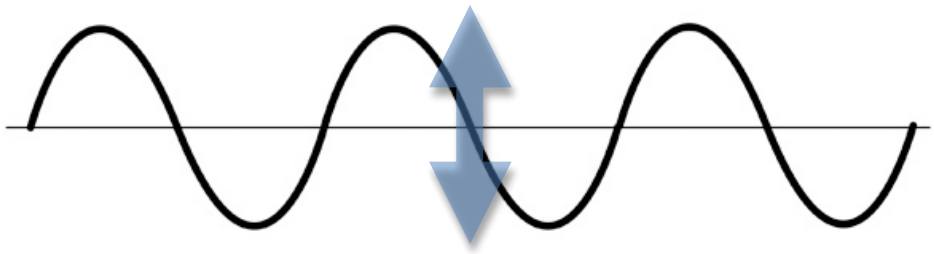
---

[14] Lori Ann Post et al., *Using Public Will to Secure Political Will*, *in* GOVERNANCE REFORM UNDER REAL-WORLD CONDITIONS: CITIZENS, STAKEHOLDERS, AND VOICE 113, 114 (Sina Odugbemi & Thomas Jacobson eds., 2008).

[15] Sina Odugbemi, *Whose Will Constitutes 'Political Will'?*, PEOPLE, SPACES, AND DELIBERATION (Apr. 6, 2009, 12:34 PM), http://blogs.worldbank.org/publicsphere/node/5018.

One could thus imagine IPR enforcement settling into a pattern of peaks and valleys (as demonstrated in Figure 1), in which the curve itself represents the effectiveness of rule of law with respect to IPRs, and the peaks and valleys represent the periodic strengthening or weakening of rule of law in response to countervailing economic interests.

Figure 1: Strength of IPR Enforcement



Short-term political will, such as might be manifested in temporary enforcement campaigns, would sometimes exert an extra upward pull. Inertial forces like corruption and local protectionism would sometimes act like negative political will, exerting a downward pull. The amplitude and frequency of the waves might vary depending on the strength of upward and downward forces and the variability of the overall rule-of-law climate.

However, the role of political will and economic interest in this illustration would not be limited to minor oscillations, pushing the curve back up when it falls too far from the axis. *Sustained* political will, intertwined with *sustained* perceived economic interest would also play a role in setting the overall trajectory of the axis that results. Ultimately, the role of sustained political will in setting the expectations for what a country considers its optimal level of enforcement may be much more important than the oscillations that result from temporary forces.

To summarize, the triple prognosis suggests that the three determinants posited above may interrelate in the following way: First, some rudimentary degree of rule of law is a prerequisite. A threshold level of rule of law must be present, and remain present, for IPR enforcement to be relevant and minimally reliable. Beyond that point, the level of rule of law provided for IPRs may oscillate in response to the push and pull of short-term (or geographically or sectorally localized) shifts in economic interests and political will. However, setting aside these oscillations, what matters most to sustaining an optimal level of rule of law with respect to IPRs over the long-term is the sustained political will present in a country, which is intertwined with the sustained perception on the part of the country's leadership of the country's long-term economic interest in IPR enforcement as a means of driving and sustaining economic growth.

IV. A PRESCRIPTION

Deciding how to optimize IPR regimes in conformity with international norms and domestic priorities is a complex public policy process, making it difficult to generalize.[16] As the discussion above presupposes, it is likely to be driven by domestic economic, legal, and political forces. However, those forces are dynamic and affected by outside forces, such as the interests of foreign firms doing business in the country and foreign governments. The interplay of domestic and international forces influences public policy decisions surrounding IPR enforcement.

The Special 301 statute reflects the will of Congress that U.S. trade officials apprise the Congress of country-specific U.S. expectations concerning the adequacy and effectiveness of IPR protection and enforcement and act on those expectations where appropriate.[17] USTR has explained that its process of making that assessment is

> necessarily conducted on a case-by-case basis, taking into account diverse factors such as a trading partner's level of development, its international obligations and commitments, the concerns of rights holders and other interested parties, and the trade and investment policies of the United States.[18]

It is, moreover, "informed by the various cross-cutting issues and trends" that USTR identifies in its report, from emerging challenges of counterfeiting and piracy to issues arising at the intersection of trade and public health. [19] USTR makes clear that, at the end of the day, "[e]ach assessment is based upon the specific facts and circumstances that shape IPR protection and enforcement regimes in a particular trading partner."[20]

Against the background of USTR's observations about the country-specific nature of its assessments, it is impossible to articulate a one-size-fits all prescription for improving IPR enforcement. However, it is possible from the discussion above to suggest that governments that succeed in improving IPR enforcement may do so through a combination of strategies designed to address the triple prognosis discussed above. Those strategies would entail assessing and giving priority, as a policy matter, to the economic interests associated with innovation and creativity, including their

---

[16] This is true except to the extent that the countries themselves have generalized, for example, in the WTO TRIPS Agreement or the Anti-Counterfeiting Trade Agreement.

[17] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303 (1988).

[18] OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2011 SPECIAL 301 REPORT 1 (2011).

[19] *Id.* at 1–2.

[20] *Id.*

ability to drive investment and economic development, and supporting innovation and creativity in a nondiscriminatory manner consistent with international trade norms.[21] They would also include supporting the rule of law, both as an initial foundation for developing an IPR regime and through the development of practices that are conducive to further developing the rule of law in the specific area of intellectual property rights enforcement.[22] Finally, improving IPR enforcement requires sustained political will to ensure the durability of rule of law reforms related to IPR not only through temporary campaigns, but also by establishing and maintaining appropriate, long-term expectations for adequate and effective enforcement of intellectual property rights.

* * *

More than a quarter-century of international cooperation and norm-setting, complemented by effective U.S. trade policy, has helped to enhance stability in the international intellectual property environment. Private-sector actors can be more confident, in most markets, of the existence of laws to protect IPR. A side effect of this positive development, however, has been the growing prominence of a chronic challenge: Ensuring that laws on the books are effectively enforced. Addressing that challenge will require not just economic interest, political will, or rule of law. It will require sustained and integrated strategies bridging all three of those key determinants of effective IPR enforcement.

---

[21] For examples of such policies, see NAT'L ECON. COUNCIL, COUNCIL OF ECON. ADVISERS, & OFFICE OF SCI. & TECH. POLICY, A STRATEGY FOR AMERICAN INNOVATION, SECURING OUR ECONOMIC GROWTH AND PROSPERITY (2011).

[22] Such practices are reflected, for example, in the "Enforcement Practices" section of the Anti-Counterfeiting Trade Agreement. *See* Anti-Counterfeiting Trade Agreement arts. 28–32, *opened for signature* May 1, 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf.