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Using Competition Law to Promote Access to Knowledge in *Access to Knowledge in the Age of Intellectual Property*

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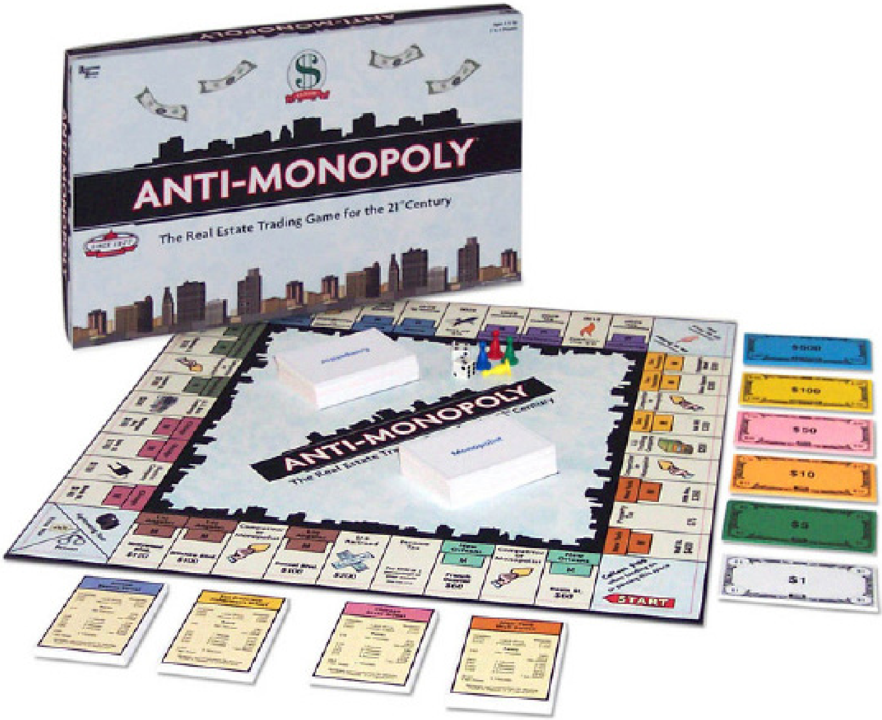
One of the points of convergence among the many strands of the A2K movement is resistance to the one-size-fits-all ratcheting up of intellectual property provisions around the world. The resistance is grounded in analysis showing that intellectual property rules often create social costs that far outweigh their intended benefits. Much of the A2K movement's advocacy for limitations of intellectual property rights is located within the field of intellectual property law—promoting the inclusion and use of balancing mechanisms within the laws granting intellectual property rights. But intellectual property rights are also shaped and limited by their interaction with other fields of law, competition law being a prime example.

Competition laws, often referred to as "antimonopoly" or "antitrust" laws, regulate the conduct of firms that face insufficient competition and thereby have the power to raise prices charged to consumers. Intellectual property laws, on the other hand, grant rights to exclude competition from the subject matter of the intellectual property right to create incentives to invent and produce new products for consumers. The rights to exclude competition that are at the core of intellectual property rights may create the ability to engage in anticompetitive conduct of the kind normally regulated by competition laws. In such instances, policy makers and enforcement agencies are called upon to determine the extent of interaction between the two legal regimes. This determination plays a central role in defining the limit of intellectual property rights and thus is an important site of legal advocacy for access-to-knowledge movements.

The argument of what follows is that competition law can and should be used to promote the goals of access to knowledge. It is a common misconception that competition laws and intellectual property laws are in irreconcilable conflict, necessitating blanket exclusions of intellectual property from competition-law regulation. Competition and intellectual property laws serve similar ends: increasing



Anti-Monopoly game developed by Ralph Anspach (http://www.antimonopoly.com/).

economic productivity and access to new goods. It is only when intellectual property protections fail to serve the end of net increases in economic productivity, for example by creating more barriers to access to current technology and production than they create incentives for additional innovation and creation, that competition law justifiably limits intellectual property rights. In such cases, there is a long history in the United States and other countries of using competition law, including enforcing duties to share access with potential competitors, to limit consumer harm from excesses practiced by holders of intellectual property rights and other property holders. A key example is when intellectual property rights in developing countries prohibit competition in the supply of goods such as essential medicines or access to information essential to the social or economic development of a country. In such instances, profit-maximizing actions taken by the holders of exclusive intellectual property rights will cause far more consumer harm through restricted access than they benefit consumers in the form of incentives for future innovation.

A2K advocates are using competition law to limit the scope of intellectual property rights, including in cases that lay the groundwork for implementing a more robust theory of intellectual property. Their work is shifting the question of *whether* competition law can limit intellectual property rights to *when* competition law should regulate intellectual property, making it possible to recognize a new category of "essential intellectual property" for which open-licensing duties should be frequently required. After describing the theoretical and doctrinal underpinnings of this shift of A2K legal advocacy toward the use of completion law, this part surveys some of the strategic advantages of using competition norms to reframe political debates and shift struggles into new, potentially more hospitable, forums.

THE INTELLECTUAL PROPERTY/COMPETITION INTERFACE

On the surface, the misconception that intellectual property and competition laws are locked in interminable conflict seems plausible. Intellectual property laws grant rights to exclude competition with the rights holder to create incentives and rewards for innovation, including through higher prices to consumers. Competition laws prohibit anticompetitive conduct that creates or abuses a lack of competition in the market to the detriment of consumer interests. Taken at this superficial level, every act to obtain and profit from an intellectual property right could be construed as an act of monopolization in violation of competition law mandates. However, this view of competition and intellectual property laws has been rejected by courts and enforcement agencies in the United States, Europe, and other countries. In such jurisdictions, competition law is used, explicitly or implicitly, as a policy tool to restrict the scope of intellectual property rights without negating them.

Modern competition statutes regulating the use and abuse of monopoly power are of fairly recent vintage, the first such statute being the U.S. Sherman Act of 1890.[1] But the history of circumscribing grants of monopoly privileges with social duties that restrain excessive pricing and other abuses dates back much further.

When King Edward's *quo warranto* campaign in the thirteenth century first required a "letter patent" as proof of a valid exclusive marketing franchise,[2] a central purpose was to regulate those who "take outrageous Toll, contrary to the common Custom of the Realm."[3] Complaints of excessive pricing and other violations of a duty of "reasonable use" could be brought before the king's courts and were grounds for forfeiture of the franchise. Duties to serve public interests were included in the patent grants themselves, which "often required the patentee to produce goods of a certain quality and sell them within certain price limits."[4] The seventeenth-century Statute of Monopolies authorizing letters patent for new inventions, but banning most other franchises, stated the condition that "they be not contrary to the Laws nor mischievous to the State, by raising the prices of Commodities at home."[5]

In the late nineteenth and early twentieth centuries, duties for patent holders to serve the greater public interest took various forms. The Paris Convention for the Protection of Industrial Property of 1883, the first major international treaty on patent standards, instructed that "the patentee shall remain bound to work his patent in conformity with the laws of the country into which he introduces the patented objects."[6] Many countries included within their patent laws general public-interest grounds for compulsory licensing when a patentee has failed to meet the country's demand for the particular item on "reasonable terms." The United States was different in this regard. Unlike most other countries, it does not have a general public-interest compulsory license standard. Public-interest grounds for compulsory licensing and for otherwise limiting the scope of exclusive intellectual property rights instead have been developed in major part through the then uniquely American institution of competition law.

For the first decades after the U.S. Congress passed the Sherman Act of 1890, courts largely interpreted it as placing little restraint on the practices of intellectual property holders. It was commonly considered that the right to exclude others from use of a creation included a right to refuse to license the technology to others and a correlative right to impose unlimited restrictions on the licenses that the holder chose to issue. It was common, for example, for patent and copyright holders to impose minimum price requirements and resale restrictions in intellectual property licenses. Over time, this reasoning lost favor, and a large number of restrictive licensing practices, including minimum-pricing and resale restrictions, tying patent licenses to purchases of other products, and charging royalties not strictly related to the use of the patented technology, were deemed to be beyond the scope of the patent grant and prohibited by competition law.[7] The reach of antitrust law in this area is commonly said to have peaked in the 1970s with U.S. enforcement agencies' use of a "Nine No-No's" list of intellectual property licensing practices deemed to be per se illegal.[8]

Courts often frame the legal analysis as discovering a core of intellectual property rights immune from competition law scrutiny, with the right to exclude others through refusals to license often considered the heart of the core, surrounded by a periphery of restrictive licensing practices regulated by competition law. Courts thus answer the question of whether a particular restrictive practice is prohibited by examining whether it is within the "scope of the patent"[9] and contributes to the "reward which the patentee by the grant of the patent is entitled to secure"[10] or is outside the scope of the grant and by its "very nature illegal."[11]

The line between core and periphery has shifted dramatically over time, and several recent cases in the U.S. and Europe have discarded much of the core/periphery analysis altogether. Some recent cases use use instead competition doctrines to force the sharing of intellectual property in particular cases. These cases in effect transform the core of intellectual property rights from a right to exclude to a liability rule giving the rights holder compensation for use by others.

The genealogy of duties to license leads back to doctrines in real property law. The right to exclude others from the use of real property has long been considered the core of the property right. But competition law has nevertheless been used to invade that core in a number of special circumstances. In a series of cases dealing with the ownership of unique infrastructure resources that are necessary to enable competition, from the only bridge across a river,[12] to electricity and telephone wires needed to promote utility service competition,[13] U.S. courts have propounded what has become known as the "essential facilities doctrine." This doctrine orders companies to share "access to their unique facilities, even to competitors, on a nondiscriminatory basis where sharing is feasible and the competitors cannot obtain or create the facility on their own."[14] U.S. and European courts have begun applying this doctrine to refusals of intellectual property owners to license their rights in special cases.

In the United States, the application of competition law standards to force the licensing of important intellectual property is highly controversial. However, the former chairman of the Federal Trade Commission, a primary competition law enforcement body, has argued that U.S. antitrust law can and should impose antitrust liability for a monopolist's refusal to licence intellectual property, just "as with any other kind of property, tangible or intangible . . . shown to constitute an essential facility."[15] And a small number of courts have concluded that a refusal to license intellectual property may violate antitrust law where the refusal does not sufficiently serve the purposes of intellectual property law in promoting new creation or innovation.[16] Yet an important appellate court for patent law questions has held that such theories may not be pursued and that courts instead are restricted to regulating practices that lie outside of the core right to exclude granted by the patent.[17]

By contrast, legal limits on the refusal to license in intellectual property matters are relatively well established in Europe. In one lead case, referred to as *Magill*,[18] three television broadcasters held copyrights on their respective listings for broadcasts in Ireland and refused to give permission for any firm to produce a comprehensive weekly guide combining the listings. European courts struck down the refusal to license, holding that the exclusion justified compulsory licensing because it prevented "the appearance of a new product . . . which the appellants did not offer and for which there was a potential consumer demand."[19] In another lead case, European courts ordered compulsory licensing of a copyrighted data tool that had become an industry standard and that prevented any other firm from competing in the same market.[20]

APPLYING COMPETITION LAW TO INTELLECTUAL PROPERTY ISSUES

Although many courts and commentators continue to engage in core/periphery thinking and attempt to define sets of practices inside and outside the central scope of the patent, the shifting boundaries between core and periphery over time and between countries expose the policy-laden nature of the task. Competition law can be used to limit intellectual property rights, including invading the core of the rights and prohibiting refusals to license others. Thus, the key question for policy advocates and enforcement officials is when competition law should limit intellectual property rights.

Many modern experts seek to answer the question of when competition law should restrict intellectual property rights by means of an explicit balancing of the costs and benefits of a particular practice. An influential article by Harvard Law School professor Louis Kaplow, for example, argues that enforcement officials should determine whether to use competition law to regulate a particular practice by reference to the net benefit or harm to society that the restrictive practice is causing.[21] According to this line of thinking, the social benefit of allowing intellectual property holders to engage in restrictive practices is that by raising their ability to profit from the intellectual property, the restrictive practices may increase incentives to innovate and create new products for future consumers. The costs of a restrictive practice may be decreased access to the existing technology, as well as other dynamic costs from limiting the diffusion of information and erecting barriers to follow-on innovation. The leading treatise on intellectual property law and competition in the United States similarly describes the question as calling for "balancing the social benefit of providing economic incentives for creation and the costs of limiting diffusion of knowledge."[22]

In the period before implementation of the World Trade Organization (WTO) agreements, including the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement imposing minimum standards on intellectual property laws and terms, countries could respond to a situation where the costs of intellectual property restrictions far exceeded their benefits by shortening the term of years when the restrictions on intellectual property rights could be exploited or by doing away with intellectual property in the particular field of technology. Those options are no longer available to WTO members, who must grant intellectual property rights in all industries, without discrimination and for minimum terms. But under TRIPS, countries may accomplish the same effects by using competition law to reduce the scope of restrictive practices that may be engaged in during the period. By allowing the use of competition mandates, TRIPS offers countries considerable flexibility to adjust both the costs and the benefits of intellectual property restrictions.[23] The two policy tools are interrelated: "The amount of reward provided and the monopoly loss arising in each additional year in which exploitation is permitted (and thus the appropriate length of patent life) depend on what practices patentees may employ during that time period."[24]

Using cost-benefit balancing tests, the interface of competition and intellectual property law in a country generally or for a particular industry or practice can be charted along a spectrum. At one end, the most dominant competition laws invade the core of intellectual property rights with enforceable duties to license competitors under the "essential facility" and related doctrines. At the other end, the most dominant intellectual property rights grant owners nearly total exemption from competition mandates. If restrictive practices cause particularly egregious social harm while creating relatively slight increases in reward to the intellectual property rights holder, then an expansion of the realm of competition law in restricting intellectual property rights is a WTO-compliant policy measure justified by the purposes of each doctrine. As described below, economic analysis suggests that the application of intellectual property law to essential goods and services in developing countries with high income inequality is just such a situation.[25]

THE ECONOMICS OF EXCLUSION

Just as there are public and consumer interests served by the recognition in competition law of the existence of "essential facilities" and the attendant doctrine requiring the sharing of some real property among competitors, public interests can be served by the recognition of the existence of what may be called "essential intellectual property" for which enforcement of exclusionary rights demonstrably and predictably causes far more social harm that it creates benefits. The fact that intellectual property rights are granted for essential goods and services in a highly unequal society is a key example of intellectual property becoming essential in this regard. In such a situation, as described more fully below, the legal right creates rational economic incentives to price the vast majority of consumers out of access. This lack of access, in turn, creates demonstrable losses to society that far exceed the minimal incentives to innovate that the owner of intellectual property receives for engaging in the socially harmful activity. Using the basic policy balance between costs and benefits articulated by modern commentators, it becomes eminently justifiable to apply the strongest competition law and other duties to share such essential intellectual property.

Monopoly economics teaches that profit-maximizing monopolists will serve a smaller segment of the consumer population (limiting output) at a higher price than would be the case under a competitive market. Absent some form of government price regulation or threat of entry by competitors, the only restraint on the monopoly's pricing will be a function of the willingness and ability of consumers to pay higher prices. The rational monopolist will keep raising prices until so many people cannot or will not pay the price that the loss of consumers eats into the firm's aggregate profits.

Economists illustrate the effect of consumer demand choices on monopolist pricing behavior through the shape and slope of a demand curve. A flat horizontal demand curve (see figure 1) would indicate that the seller has no discretion to raise prices. A small price increase would lead to all consumers foregoing purchases. Take, for example, a commodity such as wheat being sold at an exchange with a nearly infinite number of buyers and sellers. In such a market, the demand curve will be essentially flat—a small raise in price by a seller would result in all buyers shifting to another seller. Nearly flat demand curves also result when there is very limited discretionary income in a market, so that a small price increase will exclude all buyers from the market.

A vertical demand curve would yield no restraint on prices at all, referred to as a perfectly inelastic market (see figure 2). Consumers will purchase the amount of goods they require, regardless of the price set. Necessities without substitutes, such as utilities, food staples, and fuel, tend to be very inelastic, at least in the short run. One real-world example is the behavior of some electricity markets in the U.S. during the so-called "Enron scandal." The problem with markets that Enron and other companies exploited was that at certain times when energy demand is particularly high (for example, hot days in the summer), demand reaches the limits of supply, but cannot decrease on a short-term basis. The electricity producers thus achieve nearly absolute market power—they can charge any price they want without demand decreasing. During some of these crises, there were reports of electricity sales that cost $35 per unit the day or hour before spiking up past $10,000 per unit.[26]

Demand curves have a shape, as well as a slope. The shape of the curve is affected by how different consumers react to a price increase. If there is a large group of consumers that is very price sensitive and another group that is very price insensitive, then the curve will have a convex character, with part of it approaching vertical and another part nearly horizontal. This, too, will affect pricing behavior. If the number of consumers in the steeper section of the curve is large enough and willing to pay

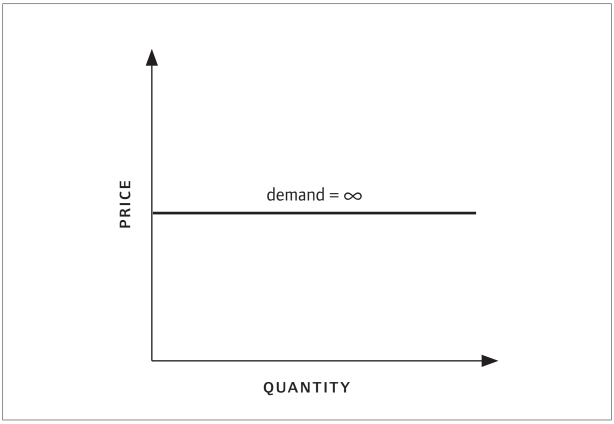


FIGURE 1 Perfectly elastic demand curve.

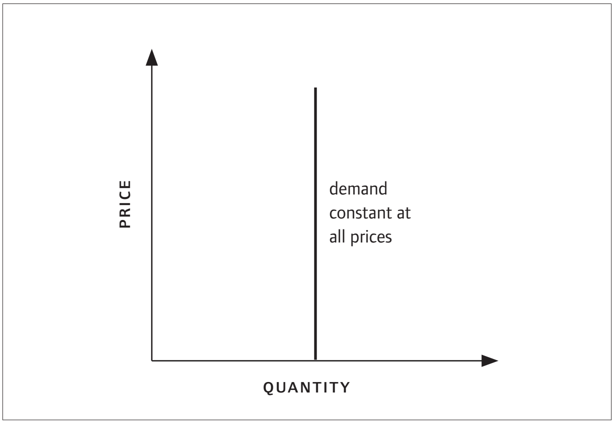


FIGURE 2 Perfectly inelastic demand curve.

high enough prices, then the monopolist may make more money by serving only that segment of the population than by serving all of the potential demand.

If a monopoly-provided good is an essential product with no substitutes, people will be willing to pay a very high portion of their income to enjoy access to it. Thus, the real restraint on pricing will be a function of ability to pay. This, in turn, means that the shape and slope of the demand curve will be a function of how income is distributed in a given society. In countries with very high income inequality, with a small number of superrich people living on First World incomes and a large number of superpoor people with very little discretionary income, the demand curve will be highly convex. And this will predictably lead to the monopolist pricing to the nearly vertical section of the curve, where large price increases can be implemented with very little additional loss of sales.

FIGURE 3 South Africa ARV demand if price = 5% income.

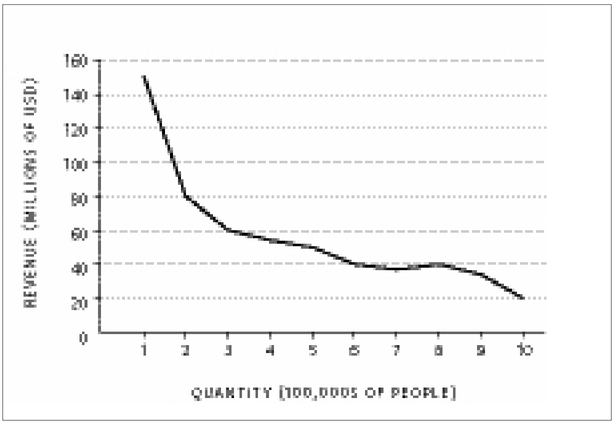


FIGURE 4 South Africa revenue per quantity sold.

Consider the case of South Africa, a country among the worst in terms of income inequality. Figure 3 is a demand curve constructed according to the assumption that people needing AIDS treatment in South Africa will purchase an antiretroviral if the cost is 5 percent of their income. If a firm prices its antiretroviral at $1,481 per patient per year, 100,000 people in the top income decile will buy it. In order to sell to a greater proportion of the population, the price must fall considerably—200,000 people with HIV/AIDS will buy the medicine if it is priced at $396, and half of the people in need of treatment can purchase an antiretroviral if it is priced at $92. In order to sell to all people with HIV/AIDS who need treatment, the price would have to be lowered to $18 per patient per year.[27]

Figure 4 shows the total sales revenue a firm will gain if it sells at each price on

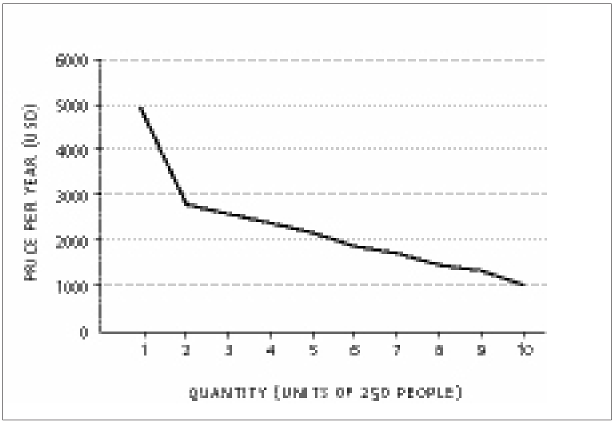


FIGURE 5 Norway ARV demand if price = 5% income.

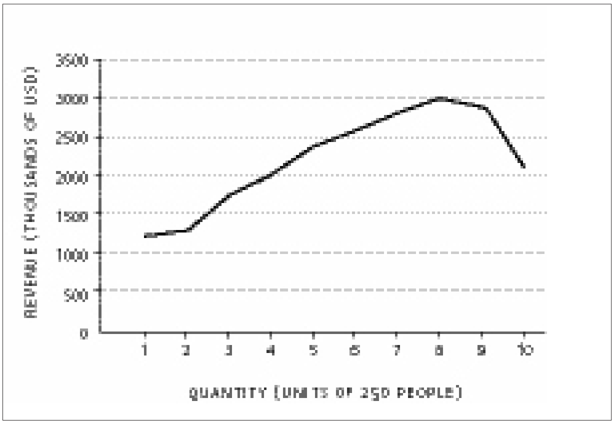


FIGURE 6 Norway revenue per quantity sold.

the demand curve. The firm maximizes its sales in South Africa by selling at the price that only the top 10 percent can afford. If the firm lowers its price to what 20 percent can afford ($396), it will sell twice as many at a price far less than half the profit-maximizing price, earning substantially less ($79.2 million compared with $148.1 million in total revenue). If the monopoly firm continues to cut prices to raise sales volume, revenues fall further. In other words, at this level of wealth inequality in a society, the firm maximizes profit by setting a price that at least 90 percent of people in need cannot afford.

To understand the effect that inequality in income distribution has on the pricing and output decisions of a monopolist, compare the South African case with that of Norway, which has one of the most equitable income distributions.[28] Here, the demand curve would be much flatter, as shown in figure 5.

As shown in figure 6, under the same assumptions as the South Africa case above, that is, that a person will buy the essential product at 5 percent of income, the firm makes more money in Norway by selling more products at lower prices at each step along the income distribution until the firm serves between 80 percent and 90 percent of the population.

The lesson is this: The more unequal the distribution of income is in a country, the more people will be excluded from the market (what economists call "deadweight loss") when a monopoly practices profit-maximizing pricing strategies for an essential good. At the same time, because sales in such a country are likely to be so few (making sales only to the very top income earners), the monopoly does not enjoy very high levels of overall profits. In other words, in countries with high income inequality, unrestrained monopoly pricing of essential goods is very likely to cause large social harms and comparatively small incentives to invest in innovative activities. In this context, it becomes an incredibly persuasive economic argument that whatever duties to promote competition and restrain monopoly pricing power exist, they should have their strongest application.

POST-TRIPS COMPETITION LAW ADVOCACY BY THE A2K MOVEMENT

In September 2002, the access-to-medicines movement took a decisive turn when, in South Africa, A2K advocates began to use competition law to advance their cause. South Africa's Treatment Action Campaign (TAC) shifted the focus of its advocacy for access to medicines to the South African Competition Commission. At the time, TAC and other access campaigners around the world were working to increase access to an important first-line AIDS drug regime commonly used in developing countries at that time. The cocktail—composed of the drugs AZT and 3TC, both patented by GlaxoSmithKline (GSK), and Nevirapine, patented by Boehringer Ingelheim (BI)—was being priced in the late 1990s in South Africa and around the world for over $10,000 per patient per year. That price was about three times the GDP per capita in South Africa. By the time of the complaint, prices in South Africa had fallen to about $3,000 a year for the same cocktail, compared with under $300 a year for generic versions from Indian firms. Indian companies also produced the medicines in a single-pill format, which was unavailable from the patent holders.

There had been previous requests for licenses by Indian pharmaceutical producer Cipla and from the medical services NGO Médicins Sans Frontières (MSF), both of which were rejected by the companies. BI admitted in documents filed in the South African Competition Commission that it had a general policy to refuse licenses for the generic supply of its products. The health minister had authority to issue authorizations for the use of generic versions of patented medicines for public-health purposes, but the Department of Health refused requests to use the law, leaving TAC searching for a new forum in which to bring its advocacy.

The complaint filed by TAC with the Competition Commission in 2002 alleged that the use of the patents by multinational pharmaceutical companies to demand prices that only a sliver of South Africa's population could afford violated section 8(a) of the South African Competition Act, which states that it is prohibited for a dominant firm to charge an "excessive price," defined as a price that is higher than the "reasonable economic value" of the good and that is to the detriment of consumers. In essence, this was a core/periphery complaint, asking the commission to leave the basic right of the company to refuse to license intact, but defining a periphery of pricing excess that is beyond the scope of the patent grant. A subsequent submission by the Consumer Project on Technology (CPTech) (now known as Knowledge Ecology International) encouraged the commission to adopt the concept of essential intellectual property. CPTech argued that whenever "(1) the number of people who need access to the medicines to prolong their life or improve their health significantly exceeds those with access to the drug, and (2) a substantial barrier to access is price," a legal burden "shift[s] to the pharmaceutical company to prove that it has promoted competitive pricing by issuing licenses of right to all qualified suppliers on reasonable terms."[29]

In October 2003, the commission announced that it found three abuses of dominance under Article 8 of the Act: excessive pricing, refusing to give a competitor access to an essential facility when it is economically feasible to do so, and engaging in exclusionary conduct if the anticompetitive effect of that act outweighs its technological, efficiency, or other procompetitive gains. Menzi Simelane, commissioner at the Competition Commission, explained:

> Our investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. We believe that this is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned. We further believe that granting licenses would provide for competition between firms and their generic competitors.
>
> We will request the Tribunal to make an order authorising any person to exploit the patents to market generic versions of the respondents patented medicines or fixed dose combinations that require these patents, in return for the payment of a reasonable royalty.[30]

Soon after the Commission's announcement, the two pharmaceutical companies settled the complaints through agreements requiring the issuance of multiple licenses to South African and Indian generic producers who now supply dramatically cheaper versions of the medications in South Africa, including in fixed dose combinations. The licenses also authorized exports to all of sub-Saharan Africa.

Other access campaigns have used competition law to achieve other objectives. In February 2007, Knowledge Ecology International filed a complaint in the U.S. Federal Trade Commission alleging that Gilead Science Incorporated was illegally using restrictive licensing policies, including banning licensees from serving some countries and charging royalties for countries where it did not have patents.[31] In Thailand, treatment activists filed a competition complaint against Abbott Laboratories for refusing to supply new drugs in the country to punish the government for issuing a compulsory license on the AIDS drug Kaletra.[32] In the West, competition-law cases were used successfully to open access to Microsoft's application programming interfaces for Internet browsers, and complaints have been filed to open access to the digital-rights-management software used to prevent iTunes music from being played on competing players.[33]

In these and other cases, the A2K movement has used the forum and language of competition law for strategic advantage. Some of these advantages exist regardless of the end result of the complaint. Rhetorically, the move allows A2K campaigns to shift the dominant frame for analyzing the issue from one of the protection of the intellectual property holder's "rights" to one of monopoly regulation. Institutionally, competition law strategies allow the A2K movement to shift into regimes with investigative resources and institutional cultures that are often wary of barriers to competition. Doing so also is a way to alter the terms of the political debate over access-to-knowledge issues.

REFRAMING POLITICAL DEBATE

Research from the cognitive and social sciences shows us that people interpret ideas and issues through existing frames and concepts that are culturally constructed and historically situated. This research suggests that it is important for policy advocates to focus on how people are thinking about a particular issue, rather than attempting only to change the amount of information they are using to reach conclusions. Social movements often engage in advocacy that reflects these teachings by reframing issues, that is, by "conscious, strategic efforts by groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action."[34]

The communications strategies of the dominant intellectual property industries show great attention to the importance of framing in their campaigns to ratchet up intellectual property protection around the globe. As discussed above, historically, patents and other intellectual property were viewed by the public and government officials as a form of monopoly that needed to be regulated to prevent abuse and to serve the greater public interest. The intellectual property industries very deliberatively and strategically shifted this frame to one of "property rights." Susan Sell explains:

> The language of rights weighs in favor of the person claiming the right. The language of privilege weighs in favor of the person granting the privilege. By wrapping themselves in the mantle of "property rights," they suggested that the rights they were claiming were somehow natural, unassailable and automatically deserved. They were able to deploy "rights talk" effectively in part because they were operating in a context in which property rights are revered. In that regard "rights talk" resonated with broader American culture. . . . The advocates of highly protectionist IP norms expressed indignation at those violating these "rights" and claimed that so-called violators were "pirates."[35]

Filing complaints in competition tribunals shifts the discourse back to the monopoly frame, where consumers hold an advantage. While the language of rights suggests deserving protection from state regulation, modern culture continues to be highly distrustful of monopolies. The term is synonymous with exploitation and abuse. Monopolies are entities to be regulated, not freed from state intervention.

The use of competition forums to shift the framing of intellectual property issues is evident in some of the A2K movement's advocacy documents and explanations of their strategies. In a statement on the day it filed complaints against GSK and BI, Action for Southern Africa (ACTSA) explained that the TAC submission showed that "largely as a result . . . of monopoly abuse, the pharmaceutical industry remains the most profitable industry in the world" and that "GSK continues to expand their profit margins by charging excessive prices for life-saving medicines in markets in which many people living with HIV/AIDS [have] little or no income."[36] Similarly, one of TAC's attorneys explained that the use of a competition law strategy was selected in part because of a perceived "need to revive the public debate about patent abuse and profiteering,"[37] which the competition forum enabled. Using competition law is thus important not only for the potential remedies one may achieve there, but because it helps a movement communicate to the greater public about an issue.

Another discursive advantage of using competition law is that it is punitive. Other TRIPS flexibilities, for example a general public-interest license, are often discretionary and do not necessarily brand the intellectual property holder as a bad actor. Using competition laws shifts the inquiry from whether the government should use its discretion to limit patent rents to whether the company deserves punishment for its abusive actions.

The importance of a punitive framework proved particularly evident in the Thai case against Abbott Laboratories. In that case, Abbott withdrew drug-registration applications for several drugs after the Thai government issued a compulsory license to authorize generic purchases of one of Abbott's AIDS drugs. Abbot claimed in the press that the Thai compulsory license was illegal. Health activists responded with a competition complaint against Abbott for the withdrawal of needed supplies for the Thai market, thus branding Abbott as the true illegal actor. Treatment campaigner and law professor Brook Baker explained in *The Nation* newspaper: "Instead of Thailand breaking the law, it is Abbott that has engaged in an unprecedented and probably illegal withdrawal from the Thai market, taking seven important medicines, including a heat-stable form of Kaletra, out of the drug registration process."[38]

Another framing advantage of competition proceedings is that they commonly provide a calendar of proceedings around which media and advocacy events can be staged. Unlike general public-interest licenses, which often lack set procedures or precedents, competition procedures are normally defined by regulations with set points for decision and input. The filing of a complaint, the filing of a response by the companies, a public hearing, the decision by the agency, a formal complaint or appeal to a tribunal, and so on, all become moments when public attention can be brought to bear on the complaint and focused on the story of illegal action and abuse told by activists. The proceedings may also produce documents and statements through the investigation that can be obtained through freedom of information laws and used in subsequent campaigns to explain industry dealings in the country.

REGIME SHIFTING INTO COMPETITION FORUMS

The concept of framing focuses on the strategic use of discourse to alter public perceptions of and reactions to an issue. By contrast, regime shifting, a concept from political science and international relations, is a strategy that attempts to alter the status quo ante by moving law-making initiatives and standard-setting activities from one venue into another.[39] Here, advocacy groups seek out forums that may be more hospitable to their cause. Regime shifting and framing often go hand in hand. One benefit of effectively reframing an issue is that it may open the possibilities of action in new forums. Reframing intellectual property issues as trade issues enabled the dominant intellectual property industries to shift the forum for international intellectual property law-making initiatives from the World Intellectual Property Organization (WIPO) into the WTO. Access campaigners responded by reframing pharmaceutical patents as a public-health issue, enabling the engagement of the World Health Organization (WHO) in intellectual property debates.

Framing intellectual property as a monopoly-regulation issue opens the potential for advocacy in competition law forums. These forums offer potential institutional advantages in developing countries, where laws are new and undefined.

The opportunities for competition law advocacy in the Global South arise from the flip side of economic liberalization that is exporting intellectual property restrictions and deregulation to much of the developing world. Based on the dominant Western model of liberalization, the "free markets" created by contract and property rights and by deregulated industries are supposed to be regulated to serve public interests primarily by competition law. Only a handful of developing countries had such laws before 1990. In the decade between 1990 and 2000, the same decade that witnessed the globalization of substantive intellectual property laws through the TRIPS Agreement (1994), fifty countries (most of them developing) added competition laws to their books. (See table 1.)

Although competition law is rapidly globalizing, it is not doing so in a uniform way. Unlike in intellectual property law, where binding minimum standards are established by the TRIPS Agreement, in competition law, countries remain largely free from any international obligation to draft, interpret, and enforce standards in any particular manner. Indeed, although U.S. and European Union laws are the obvious models for the substantive doctrines contained in most of the world's competition statutes, there are very noteworthy differences in the interpretive norms and policies that animate the laws of many developing countries.

Competition laws in developing countries often explicitly incorporate developmental objectives. For example, the South African Competition Act expresses the intent to create a competitive economic environment "focussed on development" in order to "advance the social and economic welfare," "to correct structural imbalances and past economic injustices," and "to reduce the uneven development, inequality and absolute poverty which is so prevalent in South Africa." The South African Competition Commission found these norms persuasive in determining the outcome of the complaint against GSK and BI, explaining: "Indeed the very goals of our Competition Act—promoting development, providing consumers with competitive prices and product choices, advancing social and economic welfare and correcting structural imbalances—have been made difficult in this context by the refusal of the respondents to license patents."[40]

Injunctions to consider equity objectives in the interpretation and enforcement of competition law may be heightened in countries that have adopted social and economic rights in their constitutions. To take South Africa as an example again, the constitution obligates the state to "promote the achievement of equality" and to "take reasonable legislative and other means" to realize the rights of everyone to access to health care. The constitution specifically delineates one key means of

1900–1969

Brazil (1945)
Brunei (1930)
Colombia (1962)
Chile (1963)
Germany (1909)
Haiti (1964)
Holland (1956)
India (1969)
Israel (1959)
Japan (1947)
Lebanon (1967)
Liechtenstein (1946)
Mexico (1934)

1970s

Australia (1974)
Austria (1972)
Bahrain (1970)
Cote D'Ivoire (1979)
El Salvador (1970)
France (1977)
Great Britain (1973)
Greece (1977)
Mauritius (1979)
Pakistan (1970)
Argentina (1980)

1980s

Canada (1986)
Gabon (1989)
Korea (1986)
Kuwait (1980)
Luxembourg (1986)
Malawi (1987)
Mali (1986)
New Zealand (1985)
Spain (1989)
Sri Lanka (1987)

1990s

Albania (1995)
Algeria (1995)
Belarus (1992)
British Virgin Islands (1990)
Bulgaria (1998)
Burkina Faso (1994)
Cameroon (1990)
China (1993)
Costa Rica (1994)
Croatia (1997)
Cyprus (1999)
Czech Republic (1991)
Denmark (1997)
Estonia (1998)
Finland (1992)
Hungary (1996)
Indonesia (1993)
Ireland (1991)
Jamaica (1993)
Kazakhstan (1991)
Kenya (1990)
Latvia (1997)
Lithuania (1999)
Malaysia (1991)
Malta (1994)
Mauritania (1991)
Norway (1993)
Oman (1990)
Panama (1996)
Peru (1992)
Poland (1993)
Romania (1996)
Russia (1991)
Slovak Republic (1991)
Slovenia (1993)
South Africa (1998)
St. Vincent and the Grenadines (1999)
Sweden (1993)
Switzerland (1995)
Taiwan (1992)
Thailand (1999)
Trinidad and Tobago (1996)
Tunisia (1991)
Turkey (1994)
Ukraine (1996)
Uzbekistan (1996)
Venezuela (1996)
Vietnam (1996)
Zambia (1994)

TABLE 1 Globalization of competition law.

promoting these rights, enjoining every court and agency to "promote the spirit, purport and objects of the Bill of Rights" whenever "interpreting any legislation, and when developing the common law." In the context of structural market problems that create incentives for providers of essential goods to exclude the majority of people in need from their products, promotion of the right to access to health care and the achievement of equality may counsel for interpretations of competition law favorable to access to intellectual property rights.

Making use of competition commissions is another regime-shifting strategy that is particularly well suited to promoting access to knowledge in developing countries. One of the very helpful attributes of Western competition laws that has been exported to many developing countries is the competition-advocacy agency. The role of these agencies is to receive complaints from competitors and consumers about potentially illegal practices, to investigate them using professional staffs and special legal authority (such as subpoena power), and to litigate complaints on behalf of the consumers or the state, often in a specialized tribunal.

In many countries, these agencies are relatively well funded. Aid programs from the United States and Europe support the institutional capacity of competition authorities as part of packages aimed at promoting the liberalization of economies. The agencies often have the capacity to hire top lawyers, economists, and other professionals. And because the laws themselves are often relatively new, these staffs may not be too overburdened with work to do a professional job in their investigations.

The availability of an advocacy agency may enable an access campaign to mount a highly technical legal campaign against a well-resourced intellectual property owner without the kind of legal war chest that such a battle would require on their own. Resources must still be spent on convincing the agency to act and on educating the agency about technical, medical, and intellectual property topics with which it may not be familiar. The mobilization of political resources may also be necessary to convince leaders with influence over the agency to prod it to act with sufficient determination. But where competition authorities are inclined to act in the greater public interest, their professional lawyers and staff can be extremely valuable additions to the resources of an access movement.

Finally, the decisions of competition courts and commissions may have a lasting precedential effect, altering the assumed background rules in the industry. This is evident in South Africa. Where BI once openly proclaimed a policy of not licensing generic companies to provide its products, industry lawyers now counsel that blanket refusals to license patents on AIDS drugs are legally suspect and open to challenge.[41] The precedent has similarly been relied upon by treatment activists, including a subsequent complaint against the pharmaceutical giant Merck, alleging that licenses granted for the AIDS drug efavirenz do not license the lowest-cost suppliers and do not allow new fixed-dose combinations.[42]

CONCLUSION

Courts and agencies can and do use competition law to help strike the balance between the aims of intellectual property laws to promote investment and innovation and competition law goals to maximize consumer welfare through competitive markets and lower prices. Where a developing country chooses to strike this balance may—and should—differ markedly from how the balance is struck in the Global North. Economic analysis suggests that rules should be drawn in developing countries to much more heavily favor open access to intellectual property on essential goods and services where the welfare implications of allowing exclusive dealing appear enormous.

No strategy is without risks, and there are significant risks to pursuing competition law strategies to open access to intellectual property. Many of the risks involved with competition law strategies are the flip side of the benefits. The fact that competition strategies can create legal precedents that will affect later cases means that losses in this forum can have lasting negative repercussions. The indeterminacy of law that provides opportunities for progressive legal movements also provides a fluid medium within which industry lawyers can work. The institutional structure of the dominant model of competition law, with a well-resourced advocacy agency as a gatekeeper to courts, may be a barrier to progressive use of the law if it is staffed with conservative bureaucrats. Finally, the opportunities for relying on Northern precedent should not be overstated: no Northern court has held that essential drug patents are subject to open-licensing duties.

The experiences in South Africa and other countries are showing that competition agencies can be valuable sites for political struggle over how intellectual property will be regulated. Such sites offer many advantages for access communities and should certainly be considered in any access campaign. But as with any site of struggle, the likelihood of success will depend on contextual circumstances: who will make the decision, what leverage movements have over the decision maker, and how successfully tactics are executed to leverage ideological and political power toward a favorable result.

NOTES

Mike Palmedo and Parva Fattahi provided valuable research assistance and helpful comments.

1 *Sherman Act*, 26 Stat. 209 (1890), current version at 15 *U.S. Code*, §§ 1–7 (2004).

2 See William Blackstone, *Commentaries on the Laws of England*, 4th ed., Robert M. Kerr (ed.) (1768; London: J. Murray, 1876), pp. 316–17, describing a letter patent as "so called because they are not sealed up, but exposed to open view, with the great seal at the bottom." See also Adam Mossoff, "Rethinking the Development of Patents: An Intellectual History, 1550–1800," *Hastings Law Journal* 52 (August 2001): pp. 1255, 1259.

3 The First Statute of Westminster, Chapter XXXI (1275), quoted in Charles M. Haar and Daniel William Fessler, *The Wrong Side of the Tracks: A Revolutionary Rediscovery of the Common Law Tradition of Fairness in the Struggle against Inequality* (New York: Simon and Schuster, 1986), pp. 63–64, explaining that charging an "outrageous Toll" was grounds for the king to "seize into his own hand the Franchise."

4 Oren Bracha, "Symposium: Intellectual Property at a Crossroads: The Use of the Past in Intellectual Property Jurisprudence: The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care," *Loyola of Los Angeles Law Review* 38 (2004), pp. 188–89, citing as "typical" examples: a clause voiding a manufacturing patent if the patentees "prove extortionate in their charges" and another requiring the patentee to "serve the same smalt as good and as cheap as the like brought from beyond seas."

5 An Act Concerning Monopolies, 21 Jac. I, c. 3 (1623) (Eng.), quoted in Mossoff, "Rethinking the Development of Patents," pp. 1272–73. See also Edward Coke, *Institutes of the Laws of England* (1644; London: E. and R. Brooke, Bell-Yard, near Temple-Bar, 1797), p. 184, where he describes the conditions for a valid monopoly patent as including "it must not result in the raising of prices."

6 International Convention for the Protection of Industrial Property, Article V, Paris, March 20, 1883, in Roger William Wallace, *The Law and Practice Relating to Letters Patent for Inventions*, appendix III (London: William Clows and Sons, Ltd., 1900).

7 See *Motion Picture Patents Co. v. Universal Film Mfg*., 243 U.S. 502 (1917), banning tying the purchase of patented projectors to film purchases.

8 The Nine No-No's banned the following:

1. Royalties not reasonably related to sales of the patented products.
2. Restraints on licensees' commerce outside the scope of the patent (tie-outs).
3. Requiring the licensee to purchase unpatented materials from the licensor (tie-ins).
4. Mandatory package licensing.
5. Requiring the licensee to assign to the patentee patents that may be issued to the licensee after the licensing arrangement is executed (exclusive grantbacks).
6. Licensee veto power over grants of further licenses.
7. Restraints on sales of unpatented products made with a patented process.
8. Postsale restraints on resale.
9. Setting minimum prices on resale of the patent products.

Richard Gilbert and Carl Shapiro, "Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties," Brookings Papers on Economic Activity: Microeconomics (1997).

9 *Motion Picture Patents Co. v. Universal Film Mfg*., 243 U.S. 502, 510 (1917).

10 *United States v. General Electric*, 272 U.S. 476 (1926).

11 *Bement v. Harrow Co*., 186 U.S. 70, 91 (1902).

12 *United States v. Terminal Railroad Association*, 224 U.S. 383, 411 (1912).

13 *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1982).

14 Brett Frischmann and Spencer Weber Waller, "Revitalizing Essential Facilities," *Antitrust Law Journal* 75, no. 1 (2008): pp. 1–2.

15 Robert Pitofsky, Donna Patterson, and Jonathan Hooks, "The Essential Facilities Doctrine Under U.S. Antitrust Law," 70 *Antitrust Law Journal* 70 (2002): pp. 461–62. They cite the relevant components of the essential facility test as control of the essential facility by a monopolist, a competitor's inability practically or reasonably to duplicate the essential facility, the denial of the use of the facility to a competitor, and the feasibility of providing the facility.

16 See *Data General v. Grumman Sys*, 36 F.3d 1147, 1187 (1st.Cir. 1994).

17 *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000).

18 *Radio Telefis Eireann v Commission of the E.C*. [1995] E.C.R. I-743.

19 *Ibid*., para. 54.

20 *NDC Health and IMS Health* Comp D3/38.044 (July 3, 2001); *NDC Health and IMS Health Corp*, 2004 E.C.R. I-5039.

21 Louis Kaplow, "The Patent-Antitrust Intersection: A Reappraisal," *Harvard Law Review* 97 (1984). Kaplow suggests determining the bounds of competition law's interface with intellectual property by examining a "ratio between the reward the [intellectual property holder] receives when permitted to use a particular restrictive practice and the monopoly loss that results from such exploitation."

22 Herbert Hovenkamp, Mark D. Janis, and Mark A. Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*, supplement (New York: Aspen Publishers, 2007), pp. 1–10.

23 Section 8, Article 40 of the TRIPS Agreement specifically instructs that countries may take measures to regulate restrictive licensing practices for patents. Articles 40.1 and 40.2 state that countries can take "appropriate measures" to prevent or control "the abuse of intellectual property rights having an adverse effect on competition in the relevant market" by rights holders, practices that "restrain competition" or that have "adverse effects on trade," and practices that "may impede the international transfer of technology." Article 31 also provides special compulsory licensing flexibilities where the exploitation of a patent is found to be anticompetitive, including authorization of unlimited exports under the license. The TRIPS agreement is available on-line at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last accessed March 22, 2009).

24 Kaplow, "The Patent-Antitrust Intersection: A Reappraisal," p. 1822.

25 A longer version of the analysis that follows is presented in Sean Flynn, Aidan Hollis, and Mike Palmedo, "An Economic Justification for Open Access to Essential Medicine Patents in Developing Countries," *Journal of Law, Medicine and Ethics* 37, no. 2 (Summer 2009).

26 The scandal is that Enron created more of these conditions by strategically limiting supply. Nearly vertical demand curves still occur in some electricity markets today, but are frequently regulated with price caps to prevent the most extreme price spikes.

27 In this example, the price set on 5 percent of income for each decile is derived from real GDP and population figures from the World Bank's World Development Indicators Database for

the year 2000, available on-line via DDP Quick Query http://ddp-ext.worldbank.org/ext/DDPQQ/member.do?method=getMembers&userid=1&queryId=135, and the proportion of income held by each decile from the Income and Expenditure Survey (IES) 2000, Statistics South Africa, available on-line at http://www.statssa.gov.za/publications/earningspending2000/earningspending2000October2000.pdf (both last accessed November 9, 2009).

28 In this example, data for income distribution for the year 2000 is taken from the CIA World Factbook, archived at http://permanent.access.gpo.gov/lps35389/2000/sf.html#Econ. As in the example of South Africa, real GDP and population data for the same year are taken from the World Bank World Development Indicators Database.

29 Statement of Information by Consumer Project on Technology Concerning an Alleged Prohibited Practice in Terms of Section 49B(2)(a) of the Competition Act 89 of 1998, available on-line at http://www.cptech.org/ip/health/cl/cl-cases/rsa-tac/cptech-statement.doc (last accessed November 9, 2009).

30 Quoted in Consumer Project on Technology, "Competition Commission Finds Pharmaceutical Firms in Contravention of the Competition Act," October 16, 2003, available on-line at http://www.cptech.org/ip/health/sa/cc10162003.html (last accessed November 9, 2009).

31 The FTC has privately communicated to KEI that it is not pursuing the complaint.

32 The complaint was rejected by the Commission and is now under appeal.

33 Background and materials for many of these cases can be found on the Web site of American University's Washington College of Law Program on Information Justice and Intellectual Property Competition Project at http://www.wcl.american.edu/pijip/competitionpolicyproject.cfm.

34 Doug McAdam, John D. McCarthy, and Mayer N. Zald, "Introduction: Opportunities, Mobilizing Structures, and Framing Processes—Toward a Synthetic, Comparative Perspective on Social Movements," in Doug McAdam, John D. McCarthy, and Mayer N. Zald (eds.), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures and Cultural Framings* (Cambridge: Cambridge University Press, 1996), p. 6. See also "Topic: Framing Lessons from the Social Movements Literature," *Frameworks EZines*, no. 29, available on-line at http://frameworksinstitute.org/ezine29.html (last accessed November 9, 2009).

35 Susan Sell, "TRIPS and the Access to Medicines Campaign," *Wisconsin International Law Journal* 20, no. 3 (Summer 2002): pp. 489–90.

36 Information from Action for Southern Africa (ACTSA) Concerning Complaint from the Treatment Action Campaign (TAC) on 17 September 2002 Regarding Pharmaceutical Firms GlaxoSmithKline (GSK) South Africa (Pty) Ltd. and Others, available on-line at http://www.tac.org.za/Documents/DrugCompaniesCC/ACTSA_statement.doc. See also "Statement on Competition Commission Complaint Against GlaxoSmithKline and Boehringer Ingelheim," September 17, 2002, available on-line at http://www.tac.org.za/Documents/DrugCompaniesCC/DrugCompaniesCC.htm (last accessed November 9, 2009).

37 Jonathan Michael Berger, "Litigation Strategies to Gain Access to Treatment for HIV/AIDS: The Case of South Africa's Treatment Action Campaign," *Wisconsin International Law Journal* 20, no. 3 (Summer 2002): p. 609.

38 *The Nation*, "The Eight Deadly Lies of Big Pharma," April 23, 2007, available on-line at www.nationmultimedia.com/2007/04/21/opinion/opinion_30032324.php (last accessed November 9, 2009).

39 Laurence Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International

Intellectual Property Lawmaking," *Yale Journal of International Law* 29, no. 1 (2004), p. 14.

40 Quoted in Consumer Project on Technology, "Competition Commission Finds Pharmaceutical Firms in Contravention of the Competition Act."

41 This was conveyed to me in a personal communication with a pharmaceutical industry lawyer from a prominent South African patent law firm.

42 See Sean M. Flynn, "Summary of the South African Competition Complaint against Merck," November 6, 2007, available on-line at http://www.wcl.american.edu/pijip/documents/pijip11062007.pdf?rd=1 (last accessed November 9, 2009).