

# script

“Securing access to climate change technologies: insights from the intellectual property/human rights interface”

“Climate Change in the Courts: Emerging Patterns”

University of Edinburgh  
13 November 2009  
Dr Abbe E. L. Brown  
abbe.brown@ed.ac.uk



Arts & Humanities  
Research Council

# Overview

- Climate Change and Intellectual Property
- Lessons from IP, human rights and essential medicines
- Possible routes forward



Arts & Humanities  
Research Council

script

# IP and Climate Change

- IP is NOT the same as technology
  - trade secrets, expertise
- BUT technology can be the subject of IP
  - gives the IP owner the right to control the use of the technology
  - reward for innovation
- **EVEN IF WIDE ACCESS TO THE TECHNOLOGY IS IMPORTANT FOR UNFCC GOALS**



Arts & Humanities  
Research Council

script

# Limits of IP

- NOT an unfettered right
- Patents
  - novel and inventive
  - 20 years
  - national
  - controls the invention, nothing else
- Patent litigation often very boring...
- BUT if there are no other options, problem for climate change
  - Agenda 21
  - Chatham House
  - Barton, RIS, ICTSD



Arts & Humanities  
Research Council

script

# Power of IP

- TRIPS – must have patents
- **MAY** have more limits
  - compulsory licensing, research exemption, import
  - TRIPS
    - IP should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge (article 7)
    - members may adopt measures necessary to .... promote the public interest in sectors of vital importance to their socio-economic and technological development, **provided that such measures are consistent with the provisions of this Agreement.** (article 8)
- Limited exploration
  - US opposition - eg Jordan Free Trade Agreement
  - US Special 301
  - what does it mean...fuels WTO challenge to legislation
    - Canada



Arts & Humanities  
Research Council

script

# Conflicts

- Private power and public obligations
- NOT THE FIRST TIME



Arts & Humanities  
Research Council

script

# IP and essential medicines

- Never the twain shall meet....
- Post TRIPS, the battle for access
  - South African legislation (1997)
    - settled case
  - Oxfam et al
  - WTO declaration (2001) and decision (2003)
  - WHO Commission (2003-6)



Arts & Humanities  
Research Council

script

# Working around IP

- Confirms there can be restrictions on it
  - but not mandatory
- Seeks other forms of encouraging innovation
  - eg Malaria Project
- Conflict not addressed
  - a new tool?



Arts & Humanities  
Research Council

script

# The human rights contribution

- International, regional and national instruments
  - life, health
  - property, reward
  - most have own limits
- UN Sub-Commission resolutions 2000/7 and 2001/21
  - limited legal teeth
  - call for engagement with WTO
  - General Comment article 15(1)(c) ICESCR
- A new angle in WTO challenges
  - Shrimp
  - cf Biotech



Arts & Humanities  
Research Council

script

# More courts – more direct contribution?

- International human rights monitoring..
  - limited teeth
  - limited interest so far
- ECtHR: Budweiser and Smithkline (ECHR)
- National IP actions
  - Levi (IP win) and Ashdown (more open) (England, HRA)
    - balance in IP, and two sets of human rights (with limits)
  - Harper & Row (IP win) cf Wind Done Gone (expression win) (US, constitution)
  - Laugh it Off (expression win)(South Africa, constitution)



Arts & Humanities  
Research Council

script

# Lessons from Health

- IP owners have power and supporters want to keep it that way
  - Bangkok, Barcelona
  - Senate letter
  - ACTA
- If there is no other technology, consider competition
- A Declaration on Climate Change technologies?
  - teeth only in WTO cf regime shift
  - need compulsory licensing mandatory
  - health experience suggests this is unlikely



Arts & Humanities  
Research Council

script

# Lessons from Climate Change

- Health has no equivalent to EGTT
  - eg proposed Multilateral Fund, new forms of innovation, arrangements for transfer
- A more public focus - Aarhus
- Much greater interaction
  - EPO/ICTSD/UNEP
- Persist....



Arts & Humanities  
Research Council

script



- THANK YOU



Arts & Humanities  
Research Council

script