

V. Green Technology Transfer and IP

Is technology transfer for climate change different from technology transfer for other public causes? Taubman observes the following distinctive characteristics of green technology transfer: (i) green technologies are highly diverse in character unlike *e.g.*, essential medicines; (ii) countries have specific legal obligations under the Kyoto Protocol depending on economic power;²⁴³ and (iii) climate change policies, rules and systems are still mostly national, thus causing tensions between decision-making processes at the domestic level and those at the international level.²⁴⁴

Noting these unique features, a number of voluntary mechanisms to enhance green technology innovation and diffusion have been conceived,²⁴⁵ such as green technology patent pools, global clean technology venture capital funds, Eco-Patent Commons, technology prizes, and favourable tax treatment in developed countries for private sector R&D performed in developing countries.²⁴⁶ Without delving into details, Chapter V briefly introduces selected initiatives by IP communities and illustrates certain related IP issues.²⁴⁷

A. Initiatives by IP Communities

1. Eco-Patent Commons

In January 2008, the World Business Council for Sustainable Development (WBCSD) launched “Eco-Patent Commons”, a collection of patents which “directly or indirectly protect the environment” and which companies have pledged

243 Antony Taubman, WIPO, The Climate of IP and the IP of Climate: an Overview of the Policy Issues, Speech at the Side Event UNFCCC COP 14 (Poznan, Dec. 1-12, 2008).

244 U.N., Chapter V Technology Transfer and Climate Change in WORLD ECONOMIC AND SOCIAL SURVEY 123-150 (2009).

245 *Id.*

246 *E.g.*, government tax policies can play a role not only in the development of inventions but also in the spread of technology. *See e.g.*, Saber Paik, Assistant General Counsel in IP Law, IBM Asia Pacific, Green Technology and Intellectual Property Strategy, Open Forum at the International Patent Licensing Seminar, INPIT in Japan (Jan. 25, 2010).

247 *See generally* WIPO Standing Committee on the Law of Patents 14th Session, Transfer of Technology, Jan. 25-29, 2010, WIPO Doc. SCP/14/4 (Dec. 11, 2009).

to offer to the public free of charge.²⁴⁸ A patent can join the Commons if it belongs to one of the IPC classes acceptable to WBCSD's Eco-Patent Classification List and is accompanied by a statement describing environmental benefits. Except the so-called "defensive termination" discussed below, a pledger shall not assert the pledged patents against an implementer for making, using, selling and importing machines, manufactures, processes, or compositions of matter that alone, or when in a larger product or service, achieve environmentally beneficial results.²⁴⁹ The non-assertion pledge survives and remains in force even after the pledger withdraws from the Commons. Pledgers may provide technical support, but are not obliged to do so.

The defensive termination option allows a patent pledger of the Commons to terminate its pledge towards a specific implementer when confronted with either of two scenarios: (i) one pledger asserts infringement of a pledged patent against another pledger; or (ii) a non-member of the Commons challenges a pledged or non-pledged patent of a member of the Commons.²⁵⁰

As of August 2010, eleven companies had pledged some 100 patents. One criticism of this scheme has been that participants in the Commons "were not pledging their bread-and-butter patents."²⁵¹ Inclusion in the Commons is flexible as long as patents satisfy the aforementioned requirements, and no mechanism currently exists to measure the usefulness of pledged patents; for example, beneficiaries of pledged patents are not required to report their usage.²⁵²

2. Japan Intellectual Property Association Proposal

Established in 1938, the Japan Intellectual Property Association (JIPA) represents Japanese IP creators and users and presents recommendations on important IP issues. As an alternative to compulsory licensing and an attempt to make transfer of ESTs beneficial to licensors and licensees, JIPA has proposed the so-called Green Technology Package Program (GTPP).²⁵³

The proposal discerns certain potential challenges of a licensing negotiation with developing countries: *e.g.*, difficulties of negotiation, concerns over payment and

248 See generally WBCSD, Eco-Patent Commons, at <http://www.wbcsd.org/web/epc/>. Cf. although pledgers are free to let pledged patents lapse, pledgers nonetheless may choose to maintain pledged patents intact and at the same time keep the defensive termination option available.

249 *Id.*

250 *Id.*

251 Stephen Mulrenan, *Eco-Patent Commons Responds to Critics*, AIPPI CONGRESS News, Sept. 10, 2008, available at <http://www.managingip.com>.

252 *Id.*

253 JIPA, *Proposal of Green Technology Package Program (Executive Summary)*, at <http://www.jipa.or.jp/english/opinion/pdf/GTPP.pdf> (last visited July 17, 2010).