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Troubling times are ahead for 'green' patents

By Doris Estelle Long

It is no surprise that the latest round of international conferences on climate control ended in Cancun, Mexico, this month with few tangible advances concerning the treatment of intellectual property rights.

Despite several recent studies demonstrating the pivotal role patents play in the development and distribution of clean energy technologies, and a session sponsored by the European Patent Office on the issue, the Cancun Agreements established at the end of the UN Climate Change Conference this month contain only a single oblique reference to patents in the agreed-upon need for continued work on "Technology Development and Transfer."

This reference, in Part IV. B of the Draft Decision on the Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, is woefully silent about the precise relationship between technology transfer and patent protection for energy and emissions control technology. If history is any indication, that silence could ultimately create the same international protection problems for "green technology" that patent owners face in protecting pharmaceuticals.

And if history is any guide, the reference in the Cancun Agreements to "technology transfer" in connection with green technology could become code for the reduction or elimination of patent protection for green technologies.

In fact, similar to the claims made for drug patents internationally, many are already advocating the elimination of patent protection for such technologies, or their forced dedication to the public in the form of compulsory, royalty-free, open-source licenses.

International standards for patent protection prohibit the exclusion from patentability of green technology per se. Under Article 27 of the Agreement on

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Trade Related Aspects of Intellectual Property Rights (TRIPS), patents must be available "in all fields of technology."

If green technology follows the international path of pharmaceuticals, the potential availability of patent protection for such technologies will not resolve the problem. To the contrary, innovators can expect developing countries to either buy pirated versions of their inventions or issue compulsory licenses.

Where tangible products are a focal point of the technology, similar to international protection for pharmaceuticals, trademark protection may serve as a stopgap to combat the flow of counterfeit green technologies. Unlike patented goods, counterfeit trademarked goods are subject to international obligations regarding their seizure at the border.

To further reduce the lure of cheap pirated technology, innovators should consider reconfiguring their investment and marketing models to allow for differential pricing between developed and developing countries.

Internationally, discussions about "technology transfer" have become synonymous with attempts to impose royalty-free, compulsory licenses.

Article 31 of TRIPS allows member countries to grant compulsory licenses to fill domestic market needs or in cases of national emergency. Such licenses, however, are supposed to include "reasonable compensation" to the patent holder, an obligation countries have historically failed to meet. In the pharmaceutical arena, differential pricing has been used successfully to reduce the perceived need for compulsory licenses. Such pricing may prove equally useful for green technology.

Beyond differential pricing, however, is the need to craft a new compulsory license standard for green technologies similar to the one created for pharmaceuticals under TRIPS. Under Article

31bis, developing countries may grant compulsory licenses for the importation of patented drugs so long as such countries lack the ability to manufacture the drug domestically.

The provision is far from perfect, but it could serve as a useful starting point for international discussions regarding a similar right for green technology.

While the Ad Hoc Working Group under the Cancun Agreements could serve as a potential venue for such discussions, given its uncertain transparency, innovators should begin creating model rules and best practices now that could form the basis for future international standards.

Although the news from Cancun raises several red flags about future international protection for green technology, the Agreements have established a framework for financial support for developing countries in meeting the challenges of global warming.

Though the details of financial support have not been established yet, innovators can take advantage of several patent registration systems that move green technology to the front of the line.

The United States Patent Office Green Technology Pilot Program not only grants preferential review status to inventions relating to alternative energy and environmental quality, it also guarantees a significantly shorter review process and has been renewed for another year. Similarly, the European Patent Office has adopted new classification categories for alternative energy and emission control-related applications that make it easier for innovators to stay abreast of current developments.

Although special review systems can expedite the dissemination of new technologies, concerns over the "anti-green" effect of products or systems may slow or eliminate patent protection for other innovations. Article 27 of TRIPS expressly allows member countries to decline patent protection to "avoid serious prejudice to the environment."

The Cancun Agreements represent a significant step forward in the global community's willingness to take positive steps to deal with the effects of global warming. They also pose a potential threat to the viability of intellectual property rights in green technology. The future challenge is to craft the right balance between protection and access.

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