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Compulsory licensing of green technology: positive development or positively disastrous?

March 24, 2010 by Jonathan Odumeru

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The group of 77 developing nations (G77), led *de facto* by China, has called for the implementation of a compulsory licensing system to facilitate the transfer of green technologies. These nations posit that such a system would fulfill vital international obligations established under the UN Framework Convention on Climate Change (UNFCCC) and the WTO Agreement on the Trade Related Aspects of Intellectual Property (TRIPS).

Those spearheading the negotiations, namely Brazil, India, China, and South Africa argue that a declaration on climate change should be similar to the Doha Declaration on Public Health, which creates a mechanism for WTO members to issue compulsory licenses for the production and export of generic versions of patented drugs to countries with insufficient capacity to manufacture or access those drugs.

The legal bases on which this group of nations relies are Articles 4.3 and 4.5 of the UNFCCC, which demarcate a clear obligation by developed nations to provide financial resources to enable developing countries to reduce their emissions and to take "all practicable steps" in promoting technology transfer. The G77 also relies on 45 declarations of the October 2007 WIPO General Assembly, which relate to technology transfer.

The bulk of the commentary that I've come by passionately disapproves of this proposed approach to green technology transfer. The obvious criticisms to such an approach are that compulsory licenses will stifle innovation in this sector, and that major players in R&D will focus on the inane and frivolous in pursuit of higher profit margins. Less obvious is the difficulty that is posed in attempting to define what in fact constitutes green technologies. Given this, the potential uncertainty that a policy of "forced sharing" could pose to innovators is stifling, as innovations such as watches that tick longer from a single battery, might be the subject of compulsory licensing. Moreover, what would this mean for industries hit hard by the economic crisis, such the already floundering North American automotive industry? If large developing nations could appropriate their patented green technologies, such as those relating to improved fuel economy, mandatory licensing could be spell economic disaster.

Some critics contend that what is in fact at stake is millions if not tens of millions of jobs in developed countries. It has been contended that the EU would likely lose its ability to reinvigorate its economy, create jobs, and lead the world in green technologies, unless compulsory licenses are avoided. Others cite the

additional bureaucratic burden that would be the cost of negotiating, implementing and regulating a Doha Declaration on green technologies. Essentially, the sum of the critiques weigh strongly in favour of financial assistance as being the primary, if not only, option in the facilitation of green technology transfer.

Despite the vehement opposition to this approach in the literature, I would like to take this opportunity to play devil's advocate, and suggest that aspects of this proposal may indeed be meritorious. In Canada, and I suspect most other nations, the public interest is at the core of the justifications for establishing a patent law system. **What could be more fundamental to the public interest than the health of the planet?** I ask this rhetorical question not to imply that compulsory licensing is the magical solution to climate change, but to suggest that the Doha Declaration on Public Health is a diplomatic acknowledgement of the power vested in the international patent system in relation to human rights and development.

To write off this attempt by the G77 as "hopelessly naive or foolishly greedy," as some critics have, is farcical. As with most natural disasters, it is the poorest in society, and certainly the developing nations that will bear the burden of climate change. G77 countries argue that exceptional measures are urgently required to speed up technology diffusion to combat climate change, and on this basis invoking the "flexibilities" of the TRIPS agreement is justifiable.

Given appropriate limitations, I tend to agree that the significant challenges posed by climate change could be attacked to some degree by exercise of the flexibilities of TRIPS. In truth, this would require significant international cooperation, such that compulsory licensing would be appropriately regulated to: 1) ensure that reasonable prices are paid for the licenses; 2) ensure that the technologies are truly only diffused on this basis to areas that would otherwise not have even been in the market for these technologies; 3) require licensees not to compete with involuntary licensors; and 4) set out clear limits on what green technologies may be the subject of compulsory licenses. Whether or not such cooperation and regulation is achievable, is an entire other blog topic.

For more information see:

International Centre for Trade and Sustainable Development, "Lobby Group Opposes Proposed Changes to Green Technology Patents," (2009) 9:21 Bridges Trade BioRes , online: < http://ictsd.org/i/news/biores/62272/>

Kogan, Lawrence, "Climate Change: Technology Transfer or Compulsory License?" (2010) presented at The American National Standards Institute (ANSI) Monthly Caucus Luncheon on January 15, 2010. Online: <http://www.itssd.org/LKogan%20-%20Climate%20Change%20-%20Technology%20Transfer%20or%20Compulsory%20License%20-%20ANSI%20Luncheon%201-15-10.doc>

Parliament of Australia, "The object and purpose of the United Nations Framework Convention on Climate Change (UNFCCC)," online: <http://www.aph.gov.au/library/pubs/climatechange/governance/international/unfccc/unfccc.htm>

Rosenzweig, Sidney, "Compulsory Licenses & Green Technology," (2009) The Progress and Freedom Foundation Blog, online: <http://blog.pff.org/archives/2009/03/i_just_wrote_a_lengthy.html >