

Is IP Standing in the Way of a Green Planet?

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The potential of intellectual property rights to impede the cleantech revolution has sparked a lively debate full of heated rhetoric. Secretary of Energy Steven Chu jump-started this discussion last year during a discussion of the Obama administration's goals to promote development of green technologies.

Addressing the importance of international collaboration, Secretary Chu said "we should work very hard in a very collaborative way - by very collaborative I mean share all intellectual property as much as possible." This suggestion, extreme on its face, reminds us that IP rights play an important role in the climate change debate and must be meaningfully addressed at a global level.

The fundamental importance of IP is a maxim of U.S. business echoed throughout the cleantech industry. The ability to acquire and enforce IP rights allows innovative green start-up companies to spur discovery, attract financing, defend growing markets, and increase revenues. A new World Economic Forum report *Accelerating Successful Smart Grid Pilots* discussing the central role of policy-makers and regulators in creating the right conditions for innovation acknowledged that "it is critical that they offer upside to the innovators to allow them to benefit from the intellectual property that they are developing, while encouraging the best practices to be shared and adopted elsewhere."

Embodying this pro-business pro-IP position is the recently-formed Coalition for Innovation, Development & Employment Alliance (or "IDEA"). This group, which was launched by the U.S. Chamber of Commerce and industry leaders shortly after Secretary's Chu's remarks, has the stated mission of "champion[ing] the role of innovation and creativity in creating jobs" by protecting strong intellectual property rights globally. IDEA urges that the continued growth of the cleantech industry, which has the potential to produce millions of new American jobs, depends on strong IP rights. The group has lobbied hard to prevent erosion of the U.S. patent system.

In the opposite corner from the "IP fundamentalists" are those who believe that IP rights challenge the deployment of innovative green technologies to developing countries. Because meeting future global targets for reducing carbon emissions will involve these countries, they should be granted access to the most efficient available technologies by reducing the barriers to use patented technologies.

The perceived tension between relying on strong IP rights to promote cleantech innovations and enabling global access to these technologies has been analogized to the fight for access to patented lifesaving medicines in developing and underdeveloped

countries. The international Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) set out minimum standards for IP regimes for a country to join the World Trade Organization (WTO), and anticipated that in some instances compulsory licensing may be appropriate. And indeed the Doha Declaration, adopted in 2001, affirms the flexibility of WTO member states to relax patent rights to improve access to essential medicines, and has successfully increased access to HIV drugs.

The fight for increasing the transfer of green technology is being waged within the ongoing United Nations Framework Convention on Climate Change (UNFCCC) meetings. At the 2010 Copenhagen negotiations, efforts to reach a binding agreement for IP and technology transfer issues were unsuccessful. Although there is consensus that clean technology must be disseminated worldwide, negotiations stalled over IP policies.

Two of the four options considered involved compulsory licensing proposals, in which a government is given permission to practice a patented invention without the patent owner's consent. The U.S. vigorously opposes compulsory licensing - the House of Representatives even passed a bill in June 2009 to provide for the protection of IP rights of U.S. persons in other countries. Voluntary licensing schemes, which are more politically viable, are more flexible and allow IP holders to choose to participate. Other approaches include creating incentives for sharing green technologies, creating common pools into which cleantech companies could devote some IP rights, and creating simplified licenses with reduced terms for sustainable uses of some IP.

Characterizing the debate for broadened access to cleantech IP as a "battle" unnecessarily amplifies the distance between two imperatives: promoting innovation to develop the technology we need to combat climate change, and ensuring its global implementation. Between a hardcore compulsory licensing regime and a pure IP fundamentalist approach lies ample room to craft policies which further both of these goals. If each side listens carefully to the other, there is no reason we can't find pragmatic ways to structure IP rights to both incentivize research and development and serve the public interest.

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