

ALLIANCE FOR CLEAN TECHNOLOGY INNOVATION (ACTI)

Submission in Response to the Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan

March 24, 2010

The Alliance for Clean Technology Innovation ('ACTI') is pleased to provide the following comments in response to your office's Request for Public Comments Regarding the Joint Strategic Plan ('Request for Comments').¹

Summary

ACTI wishes to express its support for the U.S. Government's efforts, through the Office of the Intellectual Property Enforcement Coordinator and elsewhere to develop and put into place an effective Intellectual Property (IP) Enforcement Strategy, as mandated by the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Public Law 110-403 (Oct. 13, 2008). In this context, we ask for your particular vigilance against continued efforts to weaken overall IP protection that U.S. and non-U.S. industries face in the context of global climate change negotiations. Such calls seriously jeopardize the development and deployment of lower emission, more energy-efficient technologies and, as such, risk undermining global climate change goals. They also result in serious potential costs to the U.S. economy, competitiveness, and the creation and maintenance of American jobs.² Enforcement efforts and an enhanced U.S. enforcement strategy cannot be achieved without the strict protection of IP in this critical area of our economy.

Background

Despite its proven importance with respect to both climate change and global economic and development goals, IP has become a highly contentious issue in global climate change talks. Calls from leading emerging economies with clear industrial policy goals, as well as a number of other developing countries for a special compulsory licensing regime or other forms of IP weakening or undercutting³ present real challenges for U.S. and global climate change and energy policies, as well as the competitiveness and job creating ability of the U.S. economy and U.S. business:

¹ Fed. Reg. Vol. 75, No. 35, Tuesday, February 23, 2010, pp. 8137-8139.

² Request for Comments, Part I.

³ E.g., through non-commercial financing or technology transfer mechanisms.

**3M – Air Liquide – Alstom – ExxonMobil – General Electric –
Microsoft – Philips – Siemens – Vestas**

- Innovation and deployment of clean technologies are essential to effectively address global climate change. IP protection and the effective enforcement of such protection are critical, not only to innovation and the development of lower emission and more energy-efficient adaptation and mitigation technologies, but also to the deployment and broader use of such technologies in the United States and around the world. Without IP protection, companies will be highly reluctant to share their technologies and know-how with others.
- Clean technology innovation and deployment, and therefore IP, are also critical drivers of US competitiveness, long-term economic growth and sustainable, ‘green’ jobs.⁴ Our business models and competitive positions are highly dependent on continued innovative strength. Our ability to justify continued deep investment in the development and deployment of cleaner, lower emission and more energy-efficient technologies hinges on the continued availability of a firm business case. IP protection and enforcement are a critical part of that case.
- IP, moreover, is already well-regulated at the international level – particularly in the TRIPS Agreement – and there is no need for any special IP provisions in a climate change agreement. Incorporating IP language would cause confusion, create a range of complicated legal and policy conflicts and potentially put lower emission and more energy-efficient technologies out of the reach of IP enforcement and protection altogether. There are spill-over risks for other technology and innovation-focused sectors as well, and real risks to the IP regime more generally.
- Finally, IP is not – as suggested by some – a barrier to the transfer of technology to and its deployment in the developing world. Instead, it is a critical driver of development and deployment. Rather than IP, a range of other factors do constitute challenges to the uptake and lack of access to and deployment of mitigation and adaptation in the developing world. A sustained lack of funding, urgent capacity building needs, and the absence of effective and functioning enabling environments are key. Given intense competition between and among clean technologies and a range of patented alternatives, parallels to Essential Medicines are false⁵, and are based on the industrial policy and competitiveness objectives of their *demandeurs* only.⁶

⁴ See, e.g., *Intellectual Property Protection and Green Growth, Analysis and Implications for International Climate Negotiations*, Garten Rothkopf, September 2009 referring to 1 million U.S. job losses if clean technology IPR protections are weakened, and offering a range of other, more detailed study results as well.

⁵ A large body of literature confirms this by pointing to the very different economics of climate change technology markets. See, e.g., Copenhagen Economics, “Are IPR a Barrier to the Transfer of Climate Change Technology?”, 19 January 2009; John H. Barton, ‘Intellectual Property and Access to Clean Energy Technologies in Developing Countries: An Analysis of Solar Photovoltaic, Biofuel and Wind Technologies’, ICTSD, Issue Paper No. 2, 2007; John H. Barton, “Mitigating Climate Change Through Technology Transfer: Addressing the Needs of Developing Countries”, Chatham House, Energy, Environment and Development Programme: Programme Paper 08/02, October 2008; Daniel K.N. Johnson, Kristina M. Lybecker, “Innovating for an Uncertain Market: A Literature Review of the Constraints on Environmental Innovation”, “Challenges to Technology Transfer: A Literature Review of the Constraints on Environmental Technology Dissemination”, and “Financing Environmental Improvements: A Literature Review of the Constraints on Financing Environmental Innovation”, Colorado College Working Papers 2009-06, 07 and 08, July 2009.

⁶ Many of whom, in fact, have already achieved significant established positions in clean technology and other industrial sectors and openly view energy and climate change as a key strategic market.

A Positive Agenda for Clean Technology and Growth

In the context of ongoing international climate change negotiations, as well as in other appropriate fora, a targeted, positive agenda should be pursued. We would welcome any role that the office of the Intellectual Property Enforcement Coordinator could play in this respect.

First, the U.S. and other governments should (continue to) take a firm stance that IP rights are already well regulated at the international level, and that IP need not and should not be part of global climate change negotiations. The IP system as it currently exists at the international level, provides a comprehensive and proven path to innovation and technology deployment, justifies research budgets, and ensures the continued availability of critical seed money and (re)financing, including for small and mid-sized innovative companies and non-commercial R&D. Strong national IP protection systems, consistent with existing international norms, should be maintained, including by “strengthening the capacity of other countries to protect and enforce intellectual property rights” and “working with [them] to establish international standards and policies for the effective protection and enforcement of intellectual property rights” as provided for in Section 303 of the Prioritizing Resources and Organization for Intellectual Property Act of 2008.

Second, *financing and appropriate mechanisms* for technology development and deployment are key. Each, however, must be carefully structured and must not be allowed to undermine IP rights or to jeopardize existing and well-functioning market-based technology development and transfer processes. They must be meaningful and well-defined tools, not unwieldy and costly attempts to do everything, and must not become fora for renegotiation of IP or other international and market commitments.

Third, to be effective, technology mechanisms and financing must be accompanied by *fair, transparent and non-discriminatory government regulations*, for example for R&D, capacity building and procurement. Climate change and development financing must not be allowed to favor particular firms, to unfairly subsidize domestic industries, or to promote certain technologies at the exclusion of others. To do so would raise the price of climate change abatement and adaptation and would deter rather than enhance innovation, technology transfer and deployment, and result in harmful ‘green’ protectionism.

Fourth, policies to *enhance capacity building* and the creation and further development of receptive “*enabling environments*” will be essential, including with respect to the poorest and most vulnerable developing countries. Beyond proposals for Climate Change Technology Centers that ACTI has previously put forward⁷, IP enforcement capacity building, improved information sharing, and global IP education and enforcement cooperation, all of which are specifically referred to in Part II of your Request for Comments, may offer real promise as well.

⁷ Alliance for Clean Technology Innovation, *Climate Change Technology Centers, A Concept Paper*, October 2, 2009.

Finally, and beyond the Copenhagen and UNFCCC context *per se*, there are still too many instances where efforts to export to or partner with companies and governments abroad are undermined by *tariffs* and *non-tariff barriers* and a range of other *discriminatory* or otherwise *unfair* government practices. These can be direct and blatant, such as requirements that products be locally produced, or less direct, but no less pernicious, such as government procurement preferences for products that incorporate local or “indigenous” IP. Technology transfer and deployment can be enhanced – and real gains in terms of the pricing of and access to cleaner, more energy-efficient and lower-emission technologies achieved – by removing such policies and concluding a comprehensive Environmental Goods and Services Agreement (EGSA). Not acting, by contrast, undermines the very climate change, economic, competitiveness and employment goals that our IP policies are intended to pursue. We hope the office of the Intellectual Property Enforcement Coordinator can play a role here as well.

The Essential Role of U.S. and Global IP Enforcement

The issues, challenges and positive agenda outlined above, are intimately intertwined with the IP enforcement strategy of the United States. Policies in both the U.S. and elsewhere to accelerate the examination of “green” technology patent applications are a key example of a positive contribution our U.S. IP policies can make. The relationship, however, goes both ways. The risk of spill-over effects from demands for IP weakening in the energy and climate change technology sectors was already noted above. Without strict IP systems, moreover, effective enforcement policies and strategies aimed at perfecting them and enlisting other countries in their cause are effectively undermined. At the same time, successful U.S. Government policies at safeguarding and protecting existing international IP rights and frameworks in strategically critical sectors such as energy and climate change would be fundamentally undermined if not accompanied by effective efforts at their worldwide enforcement and implementation.

As an alliance of innovative energy and clean technology companies, we support the IP enforcement objectives that your office was set up to pursue. We point in this context to the 432-0 June 10, 2009 House vote for a legislative amendment that the United States “*should prevent any weakening of and ensure robust compliance with and enforcement of, existing international legal requirements as of the date of enactment of this Act for the protection of intellectual property rights related to energy or environmental technology*” in order to “*protect American jobs, spur economic growth, and promote a ‘Green Economy’.*”

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We would be happy to answer any further questions you may have and look forward to working with you and your office on these and related issues.

About the Alliance for Clean Technology Innovation

The Alliance for Clean Technology Innovation (ACTI) is a coalition of world leaders in clean technology products and services. Each of our companies has invested and continues to invest heavily in the development and production of new, clean energy and environmentally advanced technologies. Together, we have invested billions of dollars in clean technology innovation and deployment. ACTI members include 3M, Air Liquide, Alstom, ExxonMobil, General Electric, Microsoft, Philips, Siemens, and Vestas.