

AIPLA

AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION

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Testimony of

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Mr. Chairman and Members of the Commission:

I am pleased to have the opportunity to appear on behalf of the American Intellectual Property Law Association (AIPLA) at this hearing on “China’s Green Energy and Environmental Policies.” Let me begin by expressing our appreciation for your interest in this very important topic. While I am a Deputy Executive Director at AIPLA, any views set forth herein are the personal views of the author, and not the official position of the Association, although a number of official positions that the Association has taken will be mentioned.

AIPLA is a national bar association of more than 16,000 members engaged in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property, and therefore have a keen interest in an efficient and smoothly functioning patent system.

As outlined in my biography, I have served as a senior official in relation to patents at the World Intellectual Property Organization in Geneva, and as liaison to the TRIPS Council of the World Trade Organization in relation to patents. Recently, I was the AIPLA representative to the 15th Conference of the Parties of the United Nations Framework Convention on Climate Change in Copenhagen. In addition, I am a registered U.S. patent attorney, and have a background in environmental science. I believe that this experience provides me with a unique perspective to discuss the issues before the Commission today.

AIPLA as an Association has recognized and supported the Obama Administration’s efforts to promote green technology, as evidenced for example in the President’s State of the Union address, through funding of green technology projects in the Recovery Act, and in the White House Strategy for American Innovation. Strong intellectual property protection is an essential part of any strategy that will be successful in promoting the development of new and innovative technologies.

AIPLA has also been active in following patent developments within the People’s Republic of China, and has responded to recent calls for comments on a number of domestic Chinese patent issues, including the Second Draft Amended Implementing Regulations of the PRC Patent Law, http://www.aipla.org/Content/ContentGroups/Issues_and_Advocacy/Comments2/International2/Comments-ChinaIPOffice.pdf, and National Standards Formulation and Revision Plan of Standardization Administration of China, the Disposal Rules for the Inclusion of Patents in National Standards, www.aipla.org/html/Comments/International/NationalStandards.htm.

In addition, AIPLA leaders have met with numerous delegations from the People's Republic of China, including IP officials and industry representatives from the State Intellectual Property Office (SIPO), the China State Administration for Industry and Commerce (trademark office), the All-China Patent Attorneys Association (ACPAA), and the Chinese Intellectual Property Society (CIPS). AIPLA also provides speakers to the China Trademark Association (CTA) annual meetings held in China, and our IP Practice in the Far East Committee undertakes annual trips to China to facilitate relations with SIPO, other governmental agencies, and IP practitioners.

Intellectual property protection is the engine of innovation, not only within the United States and its major trading partners, but also within countries with emerging economies that are fast becoming, especially in the technical field of clean energy and green tech, technology innovators and producers. US-China IP relations with respect to green technology must be built on this well-established and solid foundation.

Existing policies on patents and green tech, including climate change

The near-universal recognition of the importance of the development and diffusion of environmentally friendly technologies, and the critical role of intellectual property law, especially patents, is evidenced by the many green technology programs that have emerged over the past year to assist developers of green tech to obtain timely protection for their inventions.

In the United States, in particular, the U.S. Patent and Trademark Office (USPTO) of the Department of Commerce has initiated a "Pilot Program for Green Technologies Including Greenhouse Gas Reduction," Federal Register Notice 74-64666, dated December 8, 2009. <http://www.uspto.gov/patents/law/notices/74fr64666.pdf>. This program is intended to promote the development of green technologies by benefiting existing patent applications in predetermined green technologies that are caught in the U.S. Patent Office backlog. In its comments in response to the initiation of the Green Tech Pilot Program, AIPLA supported the intent of the program, as well as the extension of the program more widely, in particular, to newly filed applications, and applications that pertain to green inventions within a broader definition of technologies. AIPLA's comments can be found at www.aipla.org/html/comments/uspto/greenhouse.htm.

This month, USPTO will be co-hosting, along with AIPLA and the World Intellectual Property Organization (WIPO), a World IP Day celebration on Capitol Hill, that will focus on IP and green technology. It is possible that USPTO Director Dave Kappos will outline the Office's ongoing strategy with respect to protection of green technology at that event.

Major trading partners such as the European Union have also recognized the importance of patent protection for green technology as a means to stimulate the development of green innovations, in order to meet emissions requirements. For example, at the end of June 2010, the

EU's 27 member states will all be required to present a plan on how they will generate 20% of their energy supplies from renewable energies. A major European Patent Forum to be held later this month in Madrid under the Spanish EU Presidency, will examine whether the EU has sufficient technologies to reach this target, and whether their IP system is sufficient to support the process required to meet the goals. www.epo.org/about-us/events/inventor-forum/forum.html. The European Patent Office (EPO), a separate regional entity with a large overlap of members with the European Union, in cooperation with the United Nations Environment Programme (UNEP) and International Centre for Trade and Sustainable Development (ICTSD), has recently published a study on "Patents and Clean Energy," which outlines the current state of play with respect to patents on green technology, and evaluates the effect of the patent system on the development of green inventions.

Facilitating patent protection for green technology has not yet been seen by industry as a priority of the government of China, and we believe that this is a fully ripe area of discussion for further development with the government of China.

International Treaties and Green Tech

The premier treaty on international protection of intellectual property is the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is based on the century-old Paris Convention for the Protection of Industrial Property. In principle, TRIPS is technology neutral, and in fact contains a clause that prohibits discrimination of the grant of intellectual property rights based on field of technology. TRIPS Article 27, http://www.wto.org/english/docs_e/legal_e/27-trips_04c_e.htm ("[] patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.") However, the members of the WTO have recognized that certain accommodations are to be made in special cases. For example, the Doha Declaration on the TRIPS Agreement and Public Health, <http://www.who.int/medicines/areas/policy/tripshealth.pdf>, was adopted in November 2001. It has been recognized that access to medicines for diseases that disproportionately affect developing countries is a very special case, where specific drugs are solely effective against specific diseases. While it has been occasionally suggested that a similar declaration would be appropriate in the case of green technology, the overwhelming judgment seems to be that the existing flexibilities in the TRIPS agreement are adequate to address any similar issue that may arise. In the case of environmentally sound technology, the breadth of technologies that fall within the umbrella of "green technologies," the diversity of innovators and developers, the abundant availability of alternative technologies, and the need often for highly developed infrastructure and engineering know-how to implement new technologies, does not allow for such a simple solution.

Within the Doha Round process of the WTO, a joint proposal by the US and the European Union was announced in November 2007 by Ambassador Schwab. The proposed “Environmental Goods and Services Agreement” would address the reduction of tariff and non-tariff barriers to environmental goods and services. While the intent of the agreement could be applauded, its benefits should come at the cost of provisions that would reduce the robust protection of new technologies under the intellectual property regime, for example, through compulsory licensing or other limitations or exclusions from intellectual property protection, especially patent protection. If anything, such an agreement should reemphasize the vitality of the existing international IP framework, and its sufficiency to stimulate the creative and unpredictable process of developing new and unanticipated innovations to solve problems which, while well-known, are not susceptible to easy solution.

In addition to WTO, the World Intellectual Property Organization has taken a strong interest in the role of intellectual property, including patents, in the development of technologies to address issues such as climate change. Through a series of high-level symposia, WIPO has made a significant contribution to defining the issues to be addressed, and outlining the relationship of intellectual property and “global challenges,” including climate change, that confront policy makers and technology developers alike.

Of significant note has been the process under the United Nations Framework Convention on Climate Change (UNFCCC) to update the Kyoto Protocol, and set appropriate binding emissions targets for its member states. The discussions culminated in the important 15th Conference of the Parties in Copenhagen in December 2009. During these meetings, Member States discussed the issue of intellectual property and its effect on the development and dissemination of innovations in green technology that could have a significant effect on the ability of UN members to meet their carbon emissions targets over the coming decade or more. Unfortunately, for some negotiators, the solution to creation and dissemination of technology was represented by a desire to either reduce or eliminate patent protection for new green technologies. The US and a number of trading partners undertook a very strong position that the UNFCCC discussions should not address issues of intellectual property, on the grounds that the current IP system in fact is the most effective way to stimulate creation and dissemination of technology, and any diminution of protection would have the opposite effect of discouraging new innovation.

The “Copenhagen Accord” that emerged from the UNFCCC discussions, while recognizing the importance of stimulating technology transfer, properly avoided any discussion of intellectual property issues, and wisely avoided any provisions that would weaken IP protection at this critical juncture in our technological history. China was a significant player in the discussions leading up to the Copenhagen Accord, and it is likely that they will be a significant partner for the US in developing the right policies and the right strategies for optimal development and deployment of green technologies. Future discussions on climate change, including bilateral discussions between the US and China, should maintain that position.

Potential for New Cooperation

With all of the projects that are underway or being contemplated, these represent only the beginning of national and international cooperation in the area of patents and green technology. It has been estimated that tens of trillions of dollars of investment in green tech will be required to achieve the emissions targets necessary to bring climate change under control. Whether or not these numbers are correct, it is certain that green technology is the path of the future, and substantial investment in treasure and human ingenuity will be required in the coming years. The stimulus for that investment can be achieved in only one way – through robust and enforceable intellectual property protection, which provides a credible and realizable promise of return on investment. Without solid IP protection for green tech, investment financing will simply take a different road.

The work of this Commission is timely, in that the demand and the resources put into development and dispersion of new environmentally sound technologies is likely to grow exponentially in the coming years. Cooperation is needed, particularly, in two areas:

1. Innovation / Development of New Green Technologies

Recent investigations suggest that a significant portion of green technology patents, in some cases up to 30%, are coming out of developing countries. What this means is that intellectual property protection is needed every bit as much by industrialized countries. Now more than ever, IP is a critical piece of the puzzle for the future welfare of all countries. Thus, far from being a hindrance to developing countries and emerging economies in the area of green technology, intellectual property will in fact assist them to solve the pressing problems resulting from climate change and environmental degradation.

2. Incentives For Quick Dispersion of Successful Technologies

It is axiomatic that only a limited number of new inventions will be successful, and only a tiny percentage will be ground-breaking pioneer innovations that will change the way we live our lives. There is no reason to doubt that a ground-breaking pioneer innovation in green technology will emerge in the coming years. That innovation is being developed right now, because of the existence of intellectual property protection.

Almost a greater challenge than finding this life-changing innovation, will be finding the right incentives to allow a quick and effective dispersion of the technology to all of the countries that will need it, which in the case of green technology is virtually everyone.

Venture capital companies tell us today, that there is virtually unlimited money available for funding technology transfer of successful green technologies. They also tell us that the money

that exists will not be available to fund technology projects that are not protected by intellectual property rights. The reason is simple: without IP protection, a venture capital company has no means to ensure a return on their investment, and without a possibility of return on investment, there will simply be no investment. Thus, the second major challenge of deploying new breakthroughs in green innovation is also addressed through the effective protection of intellectual property, both domestically and internationally.

Conclusion

Cooperation with China and other emerging economies will not only be useful – it will be critical to overall success with respect to green technologies. Far from posing a potential risk to US IP interests, cooperation with China is likely to stimulate US creativity, and promote a more sophisticated and viable market for US technology into the future.

Efforts are being made to confront the challenges of counterfeiting and piracy in China, and the field of green technology will be no exception. The US government and US industry should continue to promote adequate and effective protection and enforcement of IP rights in China, with a view to establishing a stable market for US green technology.