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IP Policy Void in the 'Grand Climate Bargain'

Matthew Rimmer, *Australian National University College of Law*

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DR MATTHEW RIMMER*

On the 23rd September 2009, the Prime Minister, Kevin Rudd, emphasized the need for national and global action on climate change:

We can no longer afford to wait for action on climate change; the time for action is now. Let's never forget the basic fact on climate change. Australia is the hottest and the driest inhabited continent on the planet. Climate change will hit Australia hardest, and will hit Australia earliest. Therefore, we need national and global action now.¹

The Prime Minister has called for ‘a grand bargain’ between ‘the developed world and the developing world in order to reach an outcome for the planet earth as a whole’.

The Copenhagen Discussions

The chairs of the Ad Hoc Working Committee on long-term action under the *United Nations Framework Convention on Climate Change* have been considering five distinct options to address the crucially important issue of intellectual property and climate change.

Under Option 1, ‘Technology development, diffusion and transfer [shall] be promoted by operating the intellectual property regime in a balanced manner.’

Under Option 2, ‘Any international agreement on intellectual property [shall][should] not be interpreted or implemented in a manner that limits or prevents any Party from taking any measures to address adaptation or mitigation of climate change, in particular the development and transfer of, and access to, technologies’.

Under Option 3, ‘All necessary steps required to be immediately taken in all relevant forums to exclude patents and revoke existing patents in [developing countries] [least developed

* Matthew Rimmer, BA (Hons)/ LLB (Hons) (ANU), PhD (UNSW), is a Senior Lecturer and the Associate Director of Research at the Australian National University College of Law, and an Associate Director of the Australian Centre for Intellectual Property in Agriculture (ACIPA).

countries][Countries vulnerable to the adverse effects of climate change] on essential/urgent environmentally sound technologies to adapt to and mitigate climate change, including those developed through funding by governments or international agencies and genetic resources and biological resources that are used for adaptation and mitigation of climate change.’

Under Option 4, ‘The Executive Body on Technology should establish a committee or an advisory panel or designate some other body to proactively address patents and related intellectual property issues to ensure both increased innovation and increased access for both mitigation technologies and adaptation technologies.’

Under Option 5, ‘Consistent with their obligations under international treaties and agreements, Parties may compulsorily license specific technologies for the purpose of mitigation and adaptation to climate change, where it can be demonstrated that those patents and licenses act as a barrier to technology transfer and prevent the deployment or diffusion of that technology within a given country.’

The Australian Position

Celebrating World Intellectual Property Day, Innovation Minister Senator Kim Carr, contended that an increase in patent applications and trade mark applications was further evidence that industry is adapting to, and finding new ways to combat, the challenges of climate change. He observed: ‘The IP system allows Australia to benefit from investment in green technologies by protecting that investment, and licensing the technology to other countries.’

The Minister neglected to mention that intellectual property has equally provided incentives for a wide range of dirty technologies in the coal, oil, gas, and transportation industries which have had an adverse impact upon the environment and climate change. Taking a technology-neutral posture, the intellectual property regime has indiscriminately promoted both environment pollution and green innovation.

Following the example of the United States and the United Kingdom, IP Australia announced in September 2009 that it would fast-track ‘patents for green-technology solutions’.² Richard Marles, Parliamentary Secretary for Innovation and Industry, launched this campaign, with these words:

¹ <http://www.pm.gov.au/node/6219>

² http://www.ipaustralia.gov.au/media/resources/MR_150909_fast_track_green_patents.pdf

‘This initiative will provide speedy access to Australia’s strong intellectual property system and help businesses protect their valuable assets’. Arguably, though, such administrative measures are relatively minor, and provide little in the way of an incentive in respect of working on clean technology.

In its submissions in the lead-up to Copenhagen, the Australian Government has promoted an intellectual property maximalist agenda, and argued that there should be greater incentives for the private sector to engage in technology transfer. The Australian Government has flatly denied that intellectual property could present barriers to access to clean technology: ‘Ownership of intellectual property (IP) rights is not a significant barrier to technology cooperation or use’. Such a stance is not supported by any theoretical justifications or empirical evidence.

By definition, intellectual property owners enjoy exercise exclusive rights in relation to certain technologies, and can block others from using those technologies. The energy sector is not immune from litigation over patents or other forms of intellectual property. Indeed, there is a rich tradition of conflict – dating back to the patent battles over Thomas Edison’s light-bulbs. In contemporary times, there is a free for all – with patent litigation over renewable energies like wind turbines and solar technology, and energy efficient technologies, such as the Toyota Prius hybrid and smart grids. In addition, there have been battles over ‘green’ trade marks, greenwashing and the ownership of Internet Domain names with the dot.‘eco’ suffix; copyright fights over databases and ‘An Inconvenient Truth’; and concerns about confidential information.

Policy Formation

Strangely, there has been no public discussion or consultation regarding the fundamentalist position of the Australian Government on intellectual property and climate change. There has been effectively a policy void on the subject. IP Australia has only issued public relations messages on the subject. The Advisory Council of Intellectual Property has not investigated the issue. The Department of Climate Change has not taken an interest in the subject. The Department of Foreign Affairs and Trade section dealing with intellectual property has shown little interest in public policy issues, such as climate change. There is a real danger that the Australian Government has adopted an ideological position in Copenhagen, promoted by industry lobby groups, which has not been properly tested in the relevant policy forums.

By contrast, the United States Select Committee on Energy Independence and Global Warming has already held a hearing entitled, ‘Climate for Innovation: Technology and Intellectual Property in Global Climate Solutions.’

Arguably, the Australian House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts should be given a reference to hold an inquiry into intellectual property and climate change. There is a need to develop policy settings, which will encourage innovation in clean technologies, and offer access to those technologies, both domestically and internationally.

Especially given that it will no doubt be a net importer of clean technology, the Australian intellectual property regime needs to have effective mechanisms for experimental use, co-operative research and development, technology transfer, compulsory licensing, and crown use. There also needs to be an evaluation of the efficacy of alternative forms of incentives, such as prizes, like the United States Lighting Prize and the Hydrogen Prize, patent pools, such as the Eco-Patent Commons, and open innovation.