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Eye On Copenhagen — Implications for 'Green IP'

Law360, New York (December 03, 2009) -- Many companies are devoting substantial resources to develop environmentally friendly, or “green,” technologies and are seeking worldwide intellectual property protection for them. However, current international climate change treaties may significantly alter the protection afforded to green IP.

The United Nations Framework Convention on Climate Change (“the convention”) is recognized as one of the most significant international treaties relating to environmental issues. It aims to devise a comprehensive plan to address the challenges posed by global climate change.

A sub-committee of the convention, called the Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA) has been working on draft proposed terms for administering the long-term implementation of the convention’s objectives.

The proposed terms will address numerous issues pertaining to global warming, including provisions that could potentially impact the intellectual property rights of global signatories.

The United Nations Framework Convention on Climate Change: Overview

The convention was established in 1992 with the stated goal of establishing a framework for addressing problems associated with global climate change. A total of 193 countries, including the United States, have ratified the convention.

Although each party has pledged to implement the goals of the convention, the text of the convention itself is phrased in terms of broad objectives and general commitments and is not legally binding.

Rather, it anticipates the execution of further agreements or protocols, similar to the Kyoto Protocol, that will contain binding terms and commit parties to specific actions.

Notably, the convention emphasizes that developed countries shall share the responsibility of helping developing countries adapt to the adverse effects of climate change and meet the costs associated with adaptation.[1]

In 2007, the parties to the convention formed the “Copenhagen Deal,” an agreement to adopt specific terms and measures for solving global climate change problems no later than the 15th session of the convention, to be held in Copenhagen in December 2009.[2]

The goal was for the parties to incorporate the adopted terms and measures into one or more binding legal agreements.

The AWG-LCA, one of the convention’s various subcommittees, was given the responsibility of developing the set of terms to be proposed for adoption by the convention.

The convention and the AWG-LCA clearly expect terms pertaining to intellectual property rights — patent rights, in particular — to be a part of the international framework for mitigating global warming.

While the convention has acknowledged the fact that patent rights play a role in crafting the solutions needed to address climate change, it has also specifically noted the view that patents can be a barrier to technology transfer.[3]

The specific terms pertaining to IP rights that have been proposed for adoption by the convention are discussed in more detail below.

Negotiating Text of the Ad Hoc Working Group on Long-Term Cooperative Action: Overview and Terms Governing IP

At each session of the AWG-LCA, representatives from convention parties and accredited observer groups are given the opportunity to submit ideas and proposals for how parties can best achieve the goals of the Copenhagen Deal.

The proposals are written up in a “negotiating text,” which is revised after each meeting of the AWG-LCA.

The AWG-LCA’s goal has been for the final negotiating text to represent the set of terms that will be presented at Copenhagen in December, some or all of which will be incorporated into a binding international agreement.

Current Status of IP Provisions

The most recent draft of the AWG-LCA negotiating text includes a list of measures to address intellectual property rights. The proposed measures take the form of four “options,” the precise language of which is yet to be finalized.

The key provisions of each of the options are:

Option 1

Option 1 is cast in very broad terms. It proposes, generally, that the IP regime shall be used to encourage development of climate-friendly technologies, but simultaneously facilitate their demonstration, diffusion and transfer to developing countries.

It proposes, for example, a compulsory licensing scheme, or that the cost of licensing technologies be graduated based on a country's ability to pay.[4]

An "Alternative Option 1" is even more ambiguous; it simply proposes that parties "cooperate to develop and deploy patent sharing and/or intellectual property for renewable energy and energy efficiency technologies." [5]

Option 2

Option 2 is the most extensive and most detailed of the options.

It proposes that "specific and urgent measures shall be instituted ... and mechanisms developed to remove barriers to development and transfer of technologies from developed Parties to developing parties." [6]

The list of proposed measures that would facilitate technology transfer includes, for example,

(a) All necessary steps shall be immediately taken in all relevant fora to:

- mandatorily exclude from patenting,
- revoke all existing patents on, and/or
- implement compulsory licensing for

specific climate-friendly technologies in developing countries, including those technologies developed through funding by governments or international agencies;

(b) Pooling and sharing publicly funded technologies and making the technologies available in the public domain at an affordable price to ensure access to technologies that can be used to adapt to or mitigate climate change;

(c) Using the full flexibilities contained in the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, including compulsory licensing to access intellectual property protected technologies, taking into account the example set by decisions in other relevant international forums relating to IP rights, such as the Doha Declaration on the TRIPs Agreement and Public Health;

- (d) Preferential or differential pricing between developed and developing countries;
- (e) Promoting innovative IP sharing arrangements for joint development of environmentally sound technologies;
- (f) Reduced duration of patent protection for climate-friendly technologies.[7]

Notably, many of the provisions under Option 2 would significantly diminish — and, in some instances, eliminate — IP rights in green technologies, particularly in less developed countries.

Option 3

Option 3 is essentially a blanket exemption from any patent protection of climate-friendly technologies for countries that do not currently have the capacity to develop them or encourage their development.[8]

The convention has identified a list of 49 “least developed countries,” which comprise the group of parties that would likely qualify for preferential treatment under Option 3 (or under any of the other options). The list includes Afghanistan, Bangladesh, Cambodia and many African nations.[9]

If Option 3 is adopted by the convention, it may require further negotiations to delineate more precise terms governing the exemption, such as terms to define which technologies are subject to it.

Option 4

Option 4 proposes that a committee, advisory panel or other body be created to proactively address patents and related intellectual property issues and to ensure both increased innovation and increased access to mitigation and adaptation technologies.

The committee or panel would develop a framework for determining when IP becomes a barrier to research, development, deployment and transfer, and would make recommendations to the convention on how to address such barriers.[10]

Option 4 could be adopted on its own, or in combination with one of the other Options.

The United States’ Stance on IP and the Convention

The United States has demonstrated an awareness of the problem of global warming, and it has evidenced a commitment to its current obligations under the convention.

Indeed, President Obama recently announced his plans to attend the 15th session of the convention in Copenhagen this December and to firmly commit the United States to reducing its greenhouse gas emissions by a fixed percentage in the coming years.[11]

Additionally, Congress has already enacted federal statutes, such as the Clean Air Act, that are designed to allow access to important environmentally friendly technologies.

However, the United States may be hesitant to sign on to a legally binding international agreement that would significantly diminish the rights of United States patent holders.

As an initial matter, the United States is one of the few convention parties that did not ratify the Kyoto Protocol, the major binding legal agreement that has emerged from the convention, partially in light of concerns for the health of the global economy.[12]

Furthermore, not long after the United States became a party to the convention, it commented in an official communication to the convention that “it would not be appropriate for the [convention review committees] to make policy recommendations about the relative merits of one or another policy choice by individual countries.”[13]

And in the very first draft of the negotiating text, the United States proposed that individual parties should “strengthen ... legal and economic institutions to promote the protection and enforcement of IP rights” and “promote competitive and open markets for environmentally sustainable technologies.”[14]

In September of this year, President Obama, in a speech on innovation and sustainable growth, commented about the importance of a robust IP regime in the United States:

“[T]here are [] important steps to foster markets that value and promote risk-takers and idea-makers who’ve always been the center of our success. That’s why it’s essential that we enforce trade laws and work with our trading partners to open up markets abroad; that we reform and strengthen our intellectual property system; that we sustain our advantage as a place that draws and welcomes the brightest minds from all over the world ...”[15]

Thus, it appears that the United States might be hesitant to sign a binding international agreement that eliminates or significantly curtails IP rights without careful consideration of the broader implications of such an agreement.

Implications for Green Technology and IP

The most recent version of the negotiating text indicates that a final set of terms could potentially have significant impacts on IP rights worldwide.

Individuals and companies with global IP portfolios will be impacted by the outcome of the convention, and entities that are investing resources in developing climate-friendly technologies should be aware of the terms currently under consideration that may protect less-developed countries’ access to those technologies.

However, the current draft of the negotiating text reveals there are still many details to be worked out before a final set of IP-related terms is adopted by the convention.

Adding to the complexity of the negotiations, some of the proposed provisions could conflict with convention parties' obligations under existing international agreements governing IP, such as Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Berne Convention, the Paris Convention, the General Agreement on Tariffs and Trade (GATT), and the various other treaties administered by the World Intellectual Property Organization (WIPO).[16]

Further indicative of the improbability of reaching an international agreement governing IP by the end of 2009 are comments that President Obama made during a recent visit to Shanghai.

The president acknowledged the difficulty of reaching any type of legally binding agreement at Copenhagen and seemed to support a trajectory that would result in an international climate-change agreement in 2010, or possibly later.[17]

The president's remarks coincided with an announcement from leaders of the Asia-Pacific Economic Cooperation forum that they were abandoning efforts to reach a binding international agreement in Copenhagen and were aiming instead for a "political framework for future negotiations." [18]

President Obama stressed that such a "political framework" would be still meaningful and comprehensive:

"Our aim [at Copenhagen]," he explained, "is not a partial accord or a political declaration but rather an accord that covers all of the issues in the negotiations and one that has immediate operational effect." [19]

Despite these recent developments and the unlikelihood of reaching an international agreement on IP rights in 2009, those who are investing resources in green technologies stand to be impacted by the decisions that are made by the UNFCCC.

Therefore, entities with any green IP will want to stay apprised of the developments taking place within the UNFCCC and the outcome of its 15th session this December.

--By David K. Callahan (pictured), Aaron D. Charfoos and Elizabeth Nemo at Kirkland & Ellis LLP

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[1] Convention Text at Article 4(4).

[2] Fact sheet: 10 frequently asked questions about the Copenhagen deal, available at unfccc.int/press/fact_sheets/items/4997.php.

[3] Intellectual Property Rights, available at unfccc.int/ttclear/jsp/IPR.jsp

[4] Sept. 15, 2009 Negotiating Text at ¶ 33.

[5] Id.

[6] Id. at ¶ 34.

[7] Id.

[8] See id. at ¶ 35.

[9] LDC Country Information, available at unfccc.int/cooperation_and_support/ldc/items/3097.php.

[10] Sept. 15, 2009 Negotiating Text at ¶ 36.

[11] John M. Broder, Obama to Offer Firm Pledge on Emissions Cuts in Copenhagen, The New York Times (Nov. 25, 2009), available at www.nytimes.com.

[12] U.S. Embassy Fact Sheet: United States Policy on the Kyoto Protocol, available at vienna.usembassy.gov/en/download/pdf/kyoto.pdf.

[13] Summary of the Report of the In-Depth Review of the National Communication of the United States of America, UNFCCC (Feb. 26, 1996).

[14] Jan. 15, 2009 Negotiating Text at ¶ 129.

[15] President Barack Obama, Remarks by the President on Innovation and Sustainable Growth (Sep. 21, 2009) (transcript available via The White House Office of the Press Secretary).

[16] Press Release, WIPO, Heads of Agencies “Seal the Deal” on Sidelines of Conference on IP & Public Policy Issues (July 14, 2009).

[17] Emma Graham-Harrison, Copenhagen deal should have immediate effect –Obama, Reuters (Nov. 17, 2009), available at www.reuters.com.

[18] Jonathan Weisman, Concerns Rise Around Obama Trip, The Wall Street Journal (Nov. 16, 2009), available at online.wsj.com.

[19] Graham-Harrison, *supra*, note 18.