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Anastasia Lewandoski

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INTELLECTUAL PROPERTY RIGHTS TO ENHANCE INTERNATIONAL CLEAN TECH TRANSFERS

by Anastasia Lewandoski*

The international transfer of clean technology has the ability to promote positive human rights, such as the right to health care and the right to enjoy scientific advancements to one's benefit. Although human rights appear to be inapposite to intellectual property rights, the protection of intellectual property rights will lead to increased clean technology transfer, which will thus increase the quality of life for many. Under the lens of climate change, the access to scientific advancements could protect those at risk to the adverse effects of climate change as technology to protect against droughts, flooding, water temperature changes, habitat deconstruction, and irrigation problems can protect people from famine, dehydration, and forced migration.¹ These rights take the shape of positive human rights, or those that are a guarantee that a government or other provider will supply a citizen with something. In the case of technology transfer, these positive human rights may compete with negative human rights, which require governments to enforce a right, such as the intellectual property right of the technology. Although seemingly at odds with each other, a middle ground can be reached that promotes human rights and intellectual property rights for the benefit of all. While a great deal of countries protect intellectual property to promote the advantages that come with new technology, other countries such as China lack strong protections for intellectual property; this may harm the clean tech trade.² For example, some clean tech producers are reluctant to sell in China because a producer there may simply copy without fear of copy-right penalties.³

While intellectual property may be a young field, the intent to protect intellectual property rights is present in many historic legal documents. The United States Constitution contains language which may be interpreted to protect intellectual property rights.⁴ Intellectual property rights are recognized worldwide by the World Trade Organization ("WTO"),⁵ and scientific productions are protected by the United Nations in its 1948 Declaration of Human Rights.⁶ However, many international documents also adopt positive rights, like the right to health care, food, shelter, and the benefits of scientific advancements.⁷ The United Nations has recognized the conflict between intellectual property rights and the promotion of human rights, particularly in light of the WTO's Agreement on Trade-Related Aspects of Property Rights ("TRIPS").⁸ The UN's response, described as "an antagonistic approach,"⁹ called for "the primacy of human rights obligations over economic policies and agreements."¹⁰

Some argue that for innovation in technology fields to even exist, one must protect the property right first, so that future profits remain as an incentive to innovate. Some economists

point out that this argument is not persuasive because in many fields where there is no intellectual property protection, such as fashion, innovation continues.¹¹ This argument may not hold as true in regards to the high cost of research and development for clean technology, however.¹² Due to the investments necessary for innovation in clean technology, protecting intellectual property rights may be imperative to ensure technological advances continue to be made, even if for some time the technology may not be transferred for others to use. To err on the side of caution, the protection of intellectual property rights should exist in all countries where clean technology is needed most, if even for a limited time under a patent system.

Intellectual property rights and human rights can be reconciled in a system that recognizes patent protection for a limited time. A limited period allowing for intellectual property protection provides incentive to innovate but still allows for the people of the world to enjoy the benefits of these advancements. Although this still prevents some of the poorest people from having access to this technology for some time,¹³ the incentive remains to produce the advancements at all and provides for incentive to make the product available to all in order to enjoy economies of scale. An international patent system may enhance clean tech transfer to less developed countries. Indeed, the World Intellectual Property Organization ("WIPO"), a specialized agency of the UN, is working towards such a system by drafting a substantive patent law treaty.¹⁴ Although WIPO has not yet reached an agreement, the group's existence is nonetheless indicative of a worldwide interest in protecting intellectual property rights. WIPO has worked with the UN's Office of the Commissioner of Human Rights by hosting a panel discussion in 1998,¹⁵ and continued discussions between these two groups may help bring about a solution. As technology transfer in the past by willing companies in foreign direct investment led to more jobs in less developed countries,¹⁶ clean technology transfer can help provide jobs, reduce dependence on carbon fuels, and advance in their own protection from the effects of climate change.¹⁷ In order to guarantee continued progress in the clean technology fields, intellectual property rights should be protected initially for the benefit of all.



Endnotes: Intellectual Property Rights to Enhance International Clean Tech Transfers *continued on page 70*

* Anastasia Lewandoski is a J.D. Candidate, May 2010, at American University, Washington College of Law.

ENDNOTES: INTELLECTUAL PROPERTY RIGHTS TO ENHANCE INTERNATIONAL CLEAN TECH TRANSFERS *continued from page 51*

¹ See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, CLIMATE CHANGE AND HUMAN RIGHTS: A ROUGH GUIDE 86 (2008), available at http://www.ichrp.org/files/reports/36/136_report.pdf.

² FINANCIAL EXPRESS, *U.S. Says Lax China IPR Hampers Clean Tech Trade*, Jan. 9, 2008, available at <http://www.financialexpress.com/news/us-says-lax-china-ipr-hampers-clean-tech-trade/259691/>.

³ Gerard Wynn, *Copyright Fear Hampers West's Climate Work in China*, REUTERS, May 16, 2007, available at <http://www.reuters.com/article/fundsFundsNews/idUSL1655432720070516>.

⁴ U.S. CONST. art. I, § 8 (laying out Congress's power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, § 1, art. 45, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

⁶ See Universal Declaration of Human Rights, G.A. Res. 217A, art. 27(2), U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948).

⁷ *E.g.*, *id.* art. 25(1), 27(1).

⁸ UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS: SUB-COMMISSION ON HUMAN RIGHTS RESOLUTION 2000/7 (Aug. 17, 2000), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> [hereinafter HUMAN RIGHTS RESOLUTION 2000/7] (declaring that "there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other").

⁹ Laurence R. Helfer, *Human Rights and Intellectual Property: Conflict or Coexistence?*, 5 MINN. INTELL. PROP. REV. 47, 55 (2003).

¹⁰ HUMAN RIGHTS RESOLUTION 2000/7, *supra* note 8.

¹¹ Douglas Clement, *Creation Myths: Does Innovation Require Intellectual Property Rights?*, REASON, March 2003, available at <http://www.reason.com/news/show/28703.html>.

¹² See Patrick Avato & Jonathon Coony, *Accelerating Clean Technology Research, Development, and Deployment*, 18 (World Bank Working Paper No. 138, 2008), available at http://www.esmap.org/filez/pubs/78200895253_accelerating_clean_energy.pdf (last visited Apr. 11, 2009) (noting that energy research and development requires significant initial capital investment).

¹³ Jeffrey Sachs, *Keys to Climate Protection*, SCIENTIFIC AMERICAN (Apr. 2008), available at <http://www.sciam.com/article.cfm?id=technological-keys-to-climate-protection-extended> (acknowledging that patent protection may be a double-edged sword).

¹⁴ COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY 125 (2002), available at http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf (noting that some hope to one day have an international patent system with a single application process).

¹⁵ World Intellectual Property Organization, *Human Rights and Intellectual Property: An Overview*, <http://www.wipo.int/tk/en/hr/> (last visited Apr. 11, 2009).

¹⁶ See, e.g., T.K. Jayaraman & Baljeet Singh, *Foreign Direct Investment and Employment Creation in Pacific Countries: An Empirical Study of Fiji*, 5 (May 2007), available at <http://www.unescap.org/tid/artnet/pub/wp3507.pdf>.

¹⁷ INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *supra* note 1, at 76.
