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Amanda Patton

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When Patent Offices Become Captain Planet: Green Technology and Accelerated Patent Examination Programs In the United States and Abroad

Keywords

environment, Canadian Intellectual Property Office (CIPO), patent applications, global warming

WHEN PATENT OFFICES BECOME CAPTAIN PLANET: GREEN TECHNOLOGY AND ACCELERATED PATENT EXAMINATION PROGRAMS IN THE UNITED STATES AND ABROAD

by Amanda Patton

The catastrophic effects of global climate change will likely be the next great challenge that humanity will face in the 21st century. Rising global temperatures and sea levels, both in the past century and predicted for the next century, are causing the world to take notice.¹ The scientific consensus is that this global climate change has been caused in large part by the release of greenhouse gases into the environment. While many in the U.S. remain skeptical that humans are the cause of global climate change,² recent studies have convinced some of the most cautious that humans must do something to curb the change in the environment.³

Governments both in the U.S. and abroad are attempting to curb these changes to the environment by limiting the amount of greenhouse gases emitted into the atmosphere and by encouraging their citizens and industries to create and develop new technologies to help combat the problem.⁴ In 2009, the United States Patent and Trademark Office (USPTO) announced a limited pilot program in which patent applications “pertaining to environmental quality, energy conservation, development of renewable energy resources or greenhouse gas emission reduction”

could be examined before other applications filed at the same time.⁵ This program was discontinued in 2012,⁶ however, similar programs still exist in Canada, Australia, Japan, Korea, and the United Kingdom. These programs were created in order to shorten the amount of time needed for an application to be examined, allowing patent holders to obtain resolution of their application more quickly and hopefully spurring faster innovation.

Part I of this paper will discuss the history of out of turn patent examination in the U.S., the different ways that applications can be expedited, and the U.S. Green Technology Patent Expedited Process. Part II will provide an overview of similar programs in Canada, Australia, Japan, Korea, and the United Kingdom. Part III will discuss the relative merits and disadvantages of the programs, and offer a final conclusion on the programs.

I. U.S. EXPEDITED PATENT EXAMINATION PROCEDURES

A. *Expedited Prosecution and the 2006 Accelerated Examination Program*

It seems only fair that that patent applications be examined in the order in which they are received by a patent office. A patent applicant who applies for a patent in 2008 would logically expect an answer regarding their application before an applicant who applied in 2010. As patent examination has become more specialized, a first-into-the office, first-out-of-the-office rigid order is not always logistically feasible. Applications in the U.S. are typically divided into relevant technology groups and then examined based

1. See, e.g., AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT (Rodale 2006) (discussing the perils of global warming in the companion book to the Oscar-award winning movie of the same name).

2. See, e.g., GLOBAL WARMING LIES, <http://www.globalwarminglies.com> (last visited Feb. 18, 2012); GLOBAL WARMING HOAX, <http://www.globalwarminghoax.com> (last visited Feb. 18, 2012).

3. See John Timmer, *Climate skeptics perform independent analysis, finally convinced Earth is getting warmer*, ARS TECHNICA (Oct. 24, 2011), <http://arstechnica.com/science/news/2011/10/climate-skeptics-perform-independent-analysis-finally-convinced-earth-is-getting-warmer.ars> (discussing the Berkley Earth Temperature Project, a project started by several well known climate change skeptics that found evidence of a rise in global temperatures); THE BERKLEY EARTH TEMPERATURE PROJECT, <http://berkeleyearth.org/> (last visited Feb 18, 2012).

4. See Press Release, United States Patent and Trademark Office, USPTO Will Pilot a Program to Accelerate the Examination of Certain Green Technology Patent Applications (Dec. 7, 2009), available at http://www.uspto.gov/news/pr/2009/09_33.jsp [hereinafter USPTO Green Pilot Program Initial Press Release].

5. USPTO, Pilot Program for Green Technologies Including Greenhouse Gas Reductions, 74 Fed. Reg. 64,666 (Dec. 8, 2009) [hereinafter USPTO Green Pilot Program].

6. Sunset of the Patent Application Backlog Reduction Stimulus Plan and a Limited Extension of the Green Technology Pilot Program, 76 Fed. Reg. 77,979, 77,980 (Dec. 15, 2011).

on the oldest effective filing date of the application.⁷ There are, however, many mechanisms to advance applications out of turn.⁸

The patent rules of 1959⁹ included an exception to the examination order, stating that patents could be examined out of turn “upon order of the Commissioner to expedite the business of the office” or if “the inventions are deemed of peculiar importance to some branch of the public service and the head of some department of the Government requests immediate due action for that reason”¹⁰ In 1982, the USPTO added a means by which applications could be accelerated without a fee in response to a request stating the advanced age or ailing health of the applicant, or for any other reason with a fee and justification from the Commissioner.¹¹ Over the years, exceptions to the fee requirement were also created for inventions that materially enhance the quality of the environment, contribute to the development or conservation of energy resources, and contribute to countering terrorism.¹² Additional exceptions for advancement out of turn included “petitions based on: manufacture, infringement, environmental quality, energy, recombinant DNA, superconductivity materials, HIV/AIDS and cancer, counter terrorism, and biotechnology applications filed by small entities.”¹³

In 2006, the USPTO revamped its Accelerated Examination procedures, the goal of which was to create a mechanism through which patent applications could be examined within a twelve-month period from the filing date of the application.¹⁴ The changes

implemented in 2006 resulted in three different means by which an application could be designated as “special” and advanced out of turn.¹⁵ The first two programs including the petition to make special due to the applicant’s age or health and those filed under the Patent Prosecution Highway program with Japan, discussed in Part C of this section, remained relatively intact through the 2006 changes.¹⁶ However, all other applications filed after August 26, 2006, which were previously eligible for designation as “special” to be examined out of turn were required to comply with new accelerated examination procedures.¹⁷

Unlike the previous petitions for making an application “special,” which did not promote the same goals as the new program, the new Accelerated Examination program contains procedural and substantive requirements. While many of the requirements are considered practical and reasonable (for example, a limit to a single invention and twenty total claims to be examined), the process also requires an Examination Support Document (ESD)¹⁸ seen by many practitioners as onerous and impractical.¹⁹ The ESD requires the normal information disclosure statement, but also requires a list for each cited reference, an explanation as to why the claimed invention is patentable over the reference, as well as a “concise statement of the utility of the invention as defined in each of the independent claims.”²⁰

While some have regarded this program as successful,²¹ many have rejected the program as largely unusable because of the requirements for supplemental documents. The detailed information disclosure statements take additional time and expense to prepare,

7. See USPTO, MANUAL OF PATENT EXAMINING PROCEDURE [MPEP] § 708 (2011) (directing patent examiners in each Technology Center to give priority to the application that has “the oldest effective U.S. filing date”); see also 37 C.F.R. § 1.102 (2011) (requiring patent applications to be examined in turn absent certain listed exceptions).

8. See, e.g., MPEP § 708.02 (2011) (applying 37 C.F.R. § 1.102 and providing the exceptions for advancing an application out of turn).

9. 37 C.F.R. § 1.102 (1959); Patents, Trademarks, and Copyrights, Republication of Regulations, 24 Fed. Reg. 10,332, 10,340 (Dec. 22, 1959) (recording 37 C.F.R. § 1.102 (1959)).

10. *Id.*

11. Revision of Patent and Trademark Fees Confirmation, 47 Fed. Reg. 41,272, 41,276 (Sept. 17, 1982) (to be codified in 37 C.F.R. § 1.102 (1982)).

12. Changes To Support Implementation of the USPTO 21st Century Strategic Plan, 69 Fed. Reg. 56,482, 56,511 (Sept. 21, 2004).

13. Changes to Practice for Petitions in Patent Applications to Make Special and for Accelerated Examination, 71 Fed. Reg. 36,323, 36,324 (June 26, 2006) [hereinafter USPTO Accelerated Examination Rules].

14. *Id.* at 36,327.

15. *Id.* at 36,323.

16. *Id.* at 36,324.

17. *Id.* at 36,323-24.

18. *Id.* at 36,324-25.

19. See, e.g., Russ Krajec, *Why I Will Not Be Filing Under the Accelerated Examination Program of the USPTO*, KRAJEC.COM, <http://www.krajec.com/blog/why-i-will-not-be-filing-under-the-accelerated-examination-program-of-the-uspto> (last visited Nov. 7, 2011) (claiming that “no sane practitioner will ever attempt” accelerated examination, due to the high risk of future claims of inequitable conduct stemming from rushed prior art searches conducted by the patent prosecuting attorney).

20. See USPTO Accelerated Examination Rules, *supra* note 13, at 36,325.

21. See Christopher Hilberg et al., *Accelerated Examination: A Second Look: Reconsidering the Benefits of the USPTO’s New Accelerated Examination Program*, LANDSLIDE, Mar./Apr. 2010, available at http://www.oppenheimer.com/uploadedFiles/News/Accelerated%20Examination_Landslide_3%2010_Hirning_Hilberg_Kiedrowski.pdf (discussing the many obvious (e.g. speed) and nonobvious (e.g. extended patent terms) benefits provided by the accelerated examination process).

and many attorneys fear claims of inequitable conduct with regards to their support documents.²² Thus, many applicants and practitioners desired a means of obtaining the speed of the new accelerated system without the requirements of the detailed support documents.

B. Green Technology Pilot Program

On December 7, 2009, the USPTO announced a pilot program to allow acceleration of certain green technology patent applications.²³ The timing of the announcement was not random—it was days before the start of the highly contentious United Nations Climate Change Conference in Copenhagen, Denmark.²⁴ The pilot program accepted 3,000 applications between December 8, 2009, and December 8, 2010, without a fee.²⁵ Many of the procedural requirements of the Accelerated Examination program were still in affect, including claim number limitations, but the dreaded ESD was no longer required.²⁶ Instead, one of the program's requirements was a statement that "[t]he claims must be directed to a single invention that materially enhances the quality of the environment, or that materially contributes to: (1) The discovery or development of renewable energy resources; (2) the more efficient utilization and conservation of energy resources; or (3) greenhouse gas emission reduction."²⁷

22. See, e.g., Nicholas Witchey et al., *Guest Post: Accelerated Examination and Prioritized Examination*, PATENTLYO (Oct. 2, 2011, 9:50 AM), http://www.patentlyo.com/patent/accelerated_examination/ (describing the costs associated with accelerated and prioritized examinations); Brett Trout, *Accelerated Patent Examination is a Bad Bet*, BLAWGIT (Feb. 7, 2007), <http://blawgit.com/2007/02/06/accelerated-patent-examination-bad-bet> (citing the uncertainty surrounding the appropriate way to conduct preliminary searches as a reason why patent attorneys should advise clients against filing an application under the Accelerated Examination procedure).

23. USPTO Green Pilot Program Initial Press Release, *supra* note 4.

24. See *id.*; United Nations Framework Convention on Climate Change, Copenhagen, Den., Dec. 7-19, 2009, *Rep. of the Conference of the Parties on its 15th Sess.*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>. The Convention in Copenhagen was largely regarded as a disappointment, since a binding protocol was not agreed upon and only the Copenhagen Accord could be agreed upon. See, e.g., *Copenhagen Ends in Disappointment*, WORLD NUCLEAR NEWS (Dec. 21, 2009), http://www.world-nuclear-news.org/Copenhagen_ends_in_disappointment-2112091.html (citing the lack of any legally binding authority of the accord as one reason the Convention was a disappointment).

25. USPTO Green Pilot Program, *supra* note 5, at 64,666-67.

26. *Id.*

27. *Id.* at 64,667.

The pilot program was limited in the technologies that were considered "green technologies."²⁸ The program rules defined green technologies as "pertaining to environmental quality, energy conservation, development of renewable energy resources or greenhouse gas reduction."²⁹ This broad definition alone would undoubtedly cover an extremely wide range of inventions. Typical inventions such as solar fuel cells and wind power devices would be included in this definition, but some inventions that are only tangentially related to the environment might also be included. One example of a very broad view of what was considered a "green technology" is shown in the discussion of the EcoAd campaign concerning a means for a company to buy ads that donate money to renewable resources.³⁰

The program, however, was further limited to applications that the U.S. Patent Classification System designated as "green technologies."³¹ These technologies fell under four main headings: alternative energy production; energy conservation; environmentally friendly farming; and environmental purification, protection, and remediation.³² While the applicant could suggest a possible classification for their invention, it was ultimately left up to the USPTO to determine whether the application fell under one of the qualifying classifications.³³

The program was initially modestly popular and by May 21, 2010, more than 950 applications had been filed.³⁴ However, only 345 were accepted, many failing because they did not fall under the correct classification for the green technology program.³⁵ The USPTO recognized that, while its initial limitations on subject matter were necessary to gauge interest and manage the program, the classification requirement was denying accelerated examination to inventions that were actually green technologies.³⁶ The USPTO then

28. *Id.* at 64,666.

29. *Id.*

30. See Part III.A.1, *infra*.

31. USPTO Green Pilot Program, *supra* note 5, at 64,668.

32. *Id.* at 64,668-69 (enumerating the classes and subclasses under the US Patent Classification System that qualified under "green technologies"). There are seventy-nine separately listed class/subclass combinations.

33. USPTO Green Pilot Program, *supra* note 5, at 64,668.

34. Press Release, USPTO, USPTO Expands Green Technology Pilot Program to More Inventions (May 21, 2010), available at http://www.uspto.gov/news/pr/2010/10_21.jsp.

35. *Id.*

36. Elimination of Classification Requirement in the Green Technology Pilot Program, 75 Fed. Reg. 28,554, 28,554 (May 21, 2010).

lifted the Classification System requirement, allowing an invention in any classification area to be eligible as long as it contained a statement as to why the invention qualified as “green technology” under the original program rule.³⁷

On November 10, 2010, the USPTO announced that it was extending the deadline for the pilot program to December 31, 2011.³⁸ This action also applied to applications filed before December 8, 2009, which had missed the previous deadline.³⁹ Although the USPTO never failed to publicize milestones of the Program,⁴⁰ it was not as popular as initially expected.⁴¹

In part as a response to the passage of the Leahy-Smith America Invents Act, which calls for a more generalized, three-track examination system, the Green Technology Pilot Program was only renewed in December 2011 for the shorter of three months or 350 more applications.⁴² The USPTO cites the attractiveness of the rigid time requirements on the Office to examine Track I applications as well as the lack of subject requirements as the reasons why the Green Technology Pilot Program is no longer necessary.⁴³ Interestingly though, the Track I system does not give any financial relief to green applications.⁴⁴

C. Other U.S. Specialized Expedited Procedures

1. The Three-Track System and the America Invents Act

In 2010 the USPTO realized that a “one size fits all” examination order may not be the best policy and thusly proposed a three-track examination system.⁴⁵ This proposed program, which is very similar to the three track system implemented by the Korea Patent Office and discussed *infra*, allows applicants to choose one of three examination options: prioritized examination (Track 1), examination under the current procedures (Track II), and delayed examination for up to thirty months (Track III).⁴⁶ The USPTO decided to focus first on the development of a prioritized examination system (Track 1) and issued proposed rules in February of 2011.⁴⁷

The final rules were issued in April 2011 and set to be implemented in May 2011,⁴⁸ but were delayed for budgetary reasons.⁴⁹ However, with the passage of the Leahy-Smith America Invents Act, the program was funded again on September 23, 2011 and began accepting applications on September 26, 2011.⁵⁰ The program is limited to the first 10,000 applicants per fiscal year.⁵¹

The new program requires a substantial fee and limits the number of claims that can be filed, but does not require the same examination support document as required by the 2006 Accelerated Examination rules.⁵² It also does not terminate the 2006 Accelerated Examination Program. While information on this program is still extremely limited since it has just been implemented, 483 applications were filed in the 2011 fiscal year (includes less than a week between when program was implemented and the end of the fiscal

37. *Id.* at 28,555.

38. Press Release, USPTO, USPTO Extends Deadline to Participate in Green Technology Pilot Program by One Year (Nov. 10, 2010), *available at* http://www.uspto.gov/news/pr/2010/10_55.jsp.

39. Expansion and Extension of the Green Technology Pilot Program, Notice, 75 Fed. Reg. 69,049, 69,050 (Nov. 10, 2010).

40. See, e.g., *Protecting Innovation to Ensure New Opportunities for American Businesses, Higher Wages, and Greater Economic Security for American Families*, U.S. DEP'T OF COMMERCE (July 12, 2011, 9:35 AM), <http://www.commerce.gov/blog/2011/07/12/protecting-innovation-ensure-new-opportunities-american-businesses-higher-wages-and-> (announcing the issuance of the 350th patent under the Green Technology Pilot Program); Press Release, USPTO, UPSTO Issues 500th Patent Through Successful Green Technology Pilot Program (Oct. 5, 2011), <http://www.uspto.gov/news/pr/2011/11-53.jsp> (announcing the issuance of the 500th patent under the Green Technology Pilot Program).

41. See Martin LaMonica, *Green-Tech Patent Program Off Target Pace*, CNET (Aug. 27, 2010, 6:34 AM), http://news.cnet.com/8301-11128_3-20014880-54.html?part=rss&subj=news&tag=2547-1_3-0-20 (noting that “[o]verall, the program appears to be underutilized, particularly by start-up companies”).

42. Enhanced Examination Timing Control Initiative, Notice of Public Meeting, 75 Fed. Reg. 31,763, 31,764 (June 4, 2010); Sunset of the Patent Application Backlog Reduction Stimulus Plan and a Limited Extension of the Green Technology Pilot Program, 76 Fed. Reg. 77,979, 77,980 (Dec. 15, 2011).

43. See *id.*

44. *Id.*

45. Enhanced Examination Timing Control Initiative, Notice of Public Meeting, 75 Fed. Reg. 31,763, 31,764 (June 4, 2010).

46. *Id.* at 31,764.

47. Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures, 76 Fed. Reg. 6369, 6369-75 (Feb. 4, 2011) (discussing proposed rules).

48. Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures, 76 Fed. Reg. 18,399, 18,400 (Apr. 4, 2011).

49. Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures, 76 Fed. Reg. 23,876, 23,876 (Apr. 29, 2011).

50. Changes To Implement the Prioritized Examination Track (Track I) of the Enhanced Examination Timing Control Procedures Under the Leahy-Smith America Invents Act, 76 Fed. Reg. 59,050, 59,051 (Sept. 23, 2011).

51. *Id.*

52. *Id.* at 59,052.

year) and as of November 4, 2011, 377 applicants for the 2012 fiscal year.⁵³ It will be interesting to see whether this program that does not require the examination support document is more successful than the 2006 program.

2. The Patent Prosecution Highway

Patent protection worldwide is ruled by local laws. Thus, to gain “worldwide” protection, patent owners must file applications in every country in which they hope to assert their rights. Many programs have been developed in order to make this process easier. The Patent Cooperation Treaty (PCT), signed in 1970, made it easier to file patent applicants in any member countries.⁵⁴

Even with the procedural advances made through the PCT, each patent office independently grants patents that cover their jurisdiction. In order to minimize the amount of repeated searching work between different patent offices, the USPTO and the Japanese Patent Office (JPO) launched the Patent Prosecution Highway (PPH) pilot program on July 3, 2006.⁵⁵ This agreement allowed not only for procedural work sharing, but also substantive sharing as well.⁵⁶ Any claim determined allowable in the office of first filing is given accelerated status in the other office,⁵⁷ usually resulting in examination within two to three months⁵⁸ Additional agreements have been reached regarding search reports made as part of the PCT program, and there are currently bilateral agreements between twenty-four patent examination

authorities.⁵⁹

3. The “Bump and Dump” Program

On November 27, 2009, the USPTO published a notice in the Federal Register regarding the Patent Application Backlog Reduction Stimulus Plan, often referred to as the “Bump and Dump” Program.⁶⁰ In an attempt to reduce the patent application backlog at the USPTO, the program allowed small entity applicants with more than one application pending before the USPTO to obtain special status for one of their applications (not accelerated examination, but rather a status similar to that given for the age or health of the inventor).⁶¹ This status was given if the applicant agreed to expressly abandon one of their other applications.⁶² The program was extended three times in 2010⁶³ and expanded in June 2010 to eliminate the small entity requirement.⁶⁴

Overall, the use of this program has been extremely limited, with only 208 petitions filed since the inception of the program.⁶⁵ Many reasons contribute to the limited use of this program. First, the “special” status offered by this program is not equal to the twelve-month pendency goal of the accelerated examination procedure, making it less attractive to applicants. Additionally, applicants may be more attached to their applications than the USPTO initially assumed, resulting in the applicants’ hesitance to allow their applications they already spent time and energy drafting and filing to be discarded without any examination. In December 2011, the UPSTO

53. *America Invents Act – Patent Examination*, USPTO, http://www.uspto.gov/aia_implementation/patents.jsp (last visited Nov. 22, 2011).

54. *See generally* Patent Cooperation Treaty (PCT), June 19, 1970, 28.7 U.S.T. 7645, *available at* <http://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct.pdf>.

55. Press Release, USPTO, U.S. and Japan to Pilot Patent Prosecution Highway (May 24, 2006), <http://www.uspto.gov/news/pr/2006/06-35.jsp>.

56. *Id.*

57. *Patent Prosecution Highway (PPH)—Fast Track Examination of Applications*, USPTO, http://www.uspto.gov/patents/init_events/pph/ (last visited Feb. 20, 2012).

58. *Patent Prosecution Highway (PPH) Frequently Asked Questions (FAQs)*, USPTO, http://www.uspto.gov/patents/init_events/pph/pph_faqs.pdf (last visited Feb. 19, 2012).

59. The bilateral agreements exist between various national patent offices in the US, Japan, South Korea, the United Kingdom, Denmark, Canada, Germany, Australia, Singapore, Finland, Russia, Austria, Hungary, Spain, Mexico, Portugal, Sweden, Taiwan, and China as well as the European Patent Office and the Nordic Industrial Property Office. *See Patent Prosecution Portal Site*, JPO, <http://www.jpo.go.jp/cgi/linke.cgi?url=/ppph-portal/index.htm> (last visited Feb. 19, 2012).

60. Patent Application Backlog Reduction Stimulus Plan, 74 Fed. Reg. 62,285 (Nov. 27, 2009).

61. *Id.* at 62,286.

62. *Id.*

63. *See* Extension of the Patent Application Backlog Reduction Stimulus Plan 75 Fed. Reg. 5041 (Feb. 1, 2010); Extension and Expansion of the Patent Application Backlog Reduction Stimulus Plan 75 Fed. Reg. 36,063 (June 24, 2010); Extension of the Patent Application Backlog Reduction Stimulus Plan 75 Fed. Reg. 71,072 (Nov. 22, 2010).

64. Extension and Expansion of the Patent Application Backlog Reduction Stimulus Plan 75 Fed. Reg. 36,063 (June 24, 2010).

65. USPTO, PROJECT EXCHANGE REPORT SUMMARY (Nov. 7, 2011), *available at* http://www.uspto.gov/patents/init_events/brs_report_summary20111107.pdf.

discontinued this program because of a steady decrease in use of it.⁶⁶

The USPTO is not the only patent office in the world to offer means for examination of patent applications out of turn. Below is a summary of the expedited examination programs in countries that also have green technology programs.

II. FOREIGN EXPEDITED ACCELERATION AND FOREIGN GREEN TECHNOLOGY PROGRAMS

A. Canada

1. Examination Procedure at the Canadian Intellectual Property Office (CIPO)

The CIPO patent examination procedures operate in a similar manner to the USPTO, with some key differences. First, applications filed in front of the CIPO are not automatically examined, but rather are only examined if the applicant, a third party, or the Commissioner for Patents request that the application be examined.⁶⁷ If five years pass without such a request, the application is considered abandoned.⁶⁸ However, applications are normally examined in the order the request for examination was made within a given technology.⁶⁹

The CIPO also has a means for patents to be examined out of turn, deemed “special order” applications.⁷⁰ Prior to 2010, the Canadian Patent Rules allowed for applicant or third parties to request a publicly available application to be examined out of turn by stating that “failure to advance the application is likely to prejudice that person’s rights” and paying the requisite fee.⁷¹ At the time, only two percent of applicants availed themselves of this opportunity.⁷²

2. Canada’s Green Technology Program

On October 2, 2010, the CIPO announced proposed changes to the Patent Rules, allowing additional means for applications to be examined without payment of a fee if the applicant files with the Commissioner a declaration indicating that the application relates to technology the commercialization of which would help to “resolve or mitigate environmental impacts or to conserve the natural environment and resources.”⁷³ The CIPO held a 30-day consultation period for the proposed rules.⁷⁴ The proposed rules did not contain a definition of the term “green technology,” but merely requires the declaration described above.⁷⁵

The Intellectual Property Institute of Canada, a professional organization with over 1700 members, filed a comment to the proposed rules.⁷⁶ The fear was that the proposed regulations contained a balanced definition of the term “green technology,” capturing both technologies that have a true environmental impact without being overly difficult to satisfy or administer and technologies that the regulations have a mechanism to prevent abuse.⁷⁷ Although the CIPO addressed the Institute’s fear of abuse by applicants filing false declarations, they determined that the delay caused by additional screening and the use of the CIPO resources would outweigh the risk of abuse of the program.⁷⁸ In keeping with the goals of quick examination, the rules have strict limitations for when applications can be revived from abandonment, including a limitation that, after April 30, 2011, applications deemed abandoned cannot be revived for accelerated examination.⁷⁹

B. South Korea

66. Sunsetting of the Patent Application Backlog Reduction Stimulus Plan and a Limited Extension of the Green Technology Pilot Program, 76 Fed. Reg. 77,979, 77,980 (Dec. 15, 2011).

67. CANADIAN INTELLECTUAL PROPERTY ORGANIZATION (CIPO), MANUAL OF PATENT OFFICE PRACTICE § 13.02 (Dec. 2010) [hereinafter CANADIAN MOPOP], available at [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/rpbb-mopop-eng.pdf/\\$file/rpbb-mopop-eng.pdf](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/rpbb-mopop-eng.pdf/$file/rpbb-mopop-eng.pdf).

68. *Id.* at § 13.02.

69. *Id.* at § 13.03.

70. *Id.* at § 13.03.

71. Patent Rules, SOR/96-423, § 28(1) (Can.), available at <http://laws-lois.justice.gc.ca/PDF/SOR-96-423.pdf> [hereinafter CIPO Patent Rules].

72. Rules Amending the Patent Rules SOR/2011-61, C. Gaz. Part II Vol. 145, No. 6 (Mar. 16, 2011) (Can.) available at <http://www.gazette.gc.ca/rp-pr/p2/2011/2011-03-16/html/sor-dors61-eng.html>.

73. Rules Amending the Patent Rules, C. Gaz. Part I, Vol. 144, No. 40 (proposed Oct. 2, 2010) (Can.), available at <http://www.gazette.gc.ca/rp-pr/p1/2010/2010-10-02/html/reg6-eng.html> [hereinafter CIPO Proposed Rules].

74. *Id.*

75. *Id.*

76. INTELLECTUAL PROPERTY INSTITUTE OF CANADA, SUBMISSION REGARDING THE PROPOSED RULES AMENDING THE PATENT RULES (EXPEDITED EXAMINATION OF PATENT APPLICATIONS RELATED TO GREEN TECHNOLOGY) 2 (Nov. 1, 2010), available at [http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/03102010commentaires1-03102010comments1-eng.pdf/\\$FILE/03102010commentaires1-03102010comments1-eng.pdf](http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/03102010commentaires1-03102010comments1-eng.pdf/$FILE/03102010commentaires1-03102010comments1-eng.pdf).

77. *Id.*

78. CIPO Proposed Rules, *supra* note 73.

79. CIPO Patent Rules, *supra* note 71, § 28(2).

1. Examination Procedures of the Korean Intellectual Property Office (KIPO)

The KIPO has a similar system to its Canadian counterpart, in which an application is not examined until a request for examination has been received.⁸⁰ If no request for examination is received after five years, the application is considered abandoned.⁸¹ The Korean Patent Act also calls for an accelerated examination when either a person other than the applicant is considered to be infringing on the claimed invention or the examination of the application is considered necessary as prescribed by presidential decree.⁸²

KIPO has a three-track patent examination program that began on October 1, 2008, which is similar to the three-track prioritized examination system proposed in the U.S under the America Invents Act. This system allows for Accelerated Examination (examined within three months of an examination request), Regular Examination (examined in the order in which the applications are received), and Customer-deferred Examination (examined within three months of the date requested by the customer). These systems allow an applicant to determine the time frame in which their application is examined with greater precision, while maintaining the priority date that is very important to the substantive examination of the application. South Korea also has Patent Prosecution Highway agreements with several countries, allowing accelerated examination of those applications.⁸³

2. Super-Accelerated Examination for Green Technologies

For green technologies, the KIPO offers a “Super-Accelerated Examination,” which was introduced in October 2009.⁸⁴ This examination is restricted to applications to technology that are either classified as green by the government (in the form of financial aid or certification) or designated in environmental laws as green technology.⁸⁵ These

definitions are quite strict.⁸⁶ Applications require a search report from one of the prior art search organizations contracted by the KIPO, a statement as to why the application is eligible as green technology, and a completed online form.⁸⁷ Under this system, the applications are typically reviewed within one month of the request, and the fastest case took only eleven days.⁸⁸ This fast examination time has caused many to take notice.⁸⁹

In 2010, 20,832 (13%) of KIPO applications were examined under the normal Accelerated Examination procedures, while 229 applications (1.4%) of applications were examined under this Super-Accelerated Examination for green technologies.⁹⁰

C. Australia

1. Examination Procedures at IP Australia

Australia’s patent examination system requires that applicants request examination of their application, much like in CIPO and KIPO. What makes the Australian patent system different is the existence of two different types of patents, a “Standard Patent” and an “Innovation Patent.”⁹¹ An Australian Standard Patent is much like the utility patents in the United States with a regular examination process and a term of up to twenty years from the filing date of the application.⁹² Innovator patents, on the other hand, are granted in a registration process, and are not initially examined.⁹³ Innovator patents are beneficial in rapidly developing technology areas because the standard for patentability is a lower “innovative step” than the typical “inventive step” and they are granted typically

80. Patent Act, Act. No. 950, Nov. 28, 1949, *last amended by* Act. No. 9381, Jan. 30, 2009 art. 59(1) (S. Kor.), *available in English at* <http://www.kipo.go.kr/upload/en/download/PatentAct.pdf>.

81. *Id.* at art. 59(2).

82. *Id.* at art. 61.

83. KIPO, Patent Prosecution Highway (Sept. 29, 2011), http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=100016&catmenu=ek02_02_03.

84. KIPO, IP Policies Three-Track Patent Examination (Oct. 11, 2011), http://www.kipo.go.kr/kpo/user.tdf?a=user.english.html.HtmlApp&c=100000&catmenu=ek02_01_02_01 [hereinafter KIPO Three-Track System].

85. *Id.*

86. *KIPO Super-Highway Patent Examination within one month implemented starting October 1, 2009*, HANYANGLAW, http://hanyanglaw.com/eng/news/newsletter_preview.asp?curPage=1&ca=116 [hereinafter KIPO Hanyang Super-Highway].

87. KIPO Three-Track System, *supra* note 84.

88. *Id.*

89. Peter Ollier, *The Fastest Patent Office in the World*, MANAGINGIP (Nov. 1, 2008), <http://www.managingip.com/Article/2041474/The-fastest-patent-office-in-the-world.html>.

90. KIPO Three-Track System, *supra* note 84.

91. *Standard vs. Innovation Patents*, IP AUSTRALIA (Sept. 29, 2011), <http://www.ipaustralia.gov.au/get-the-right-ip/patents/types-of-patents/standard-vs-innovation-patent/> (explaining the difference between the two types of patents).

92. *Standard Patents*, IP AUSTRALIA (Sept. 29, 2011), <http://www.ipaustralia.gov.au/get-the-right-ip/patents/types-of-patents/standard-patent/>.

93. *Innovation Patents*, IP AUSTRALIA (Nov. 2, 2011), <http://www.ipaustralia.gov.au/get-the-right-ip/patents/types-of-patents/innovation-patent/>.

within one month of application.⁹⁴ These patents, which have a term of eight years from filing, are not enforceable unless they are examined and certified. Requests for extermination and certification can be made at any time during the life of the patent by any interested party.⁹⁵

2. Fast Tracking Green Patents Program

The Australia Patent Office offers an “Expedited Examination” that allows patents to be examined more quickly. Under Reg. 3.17 of the Australian Patent Regulations, an application may be expedited if the Commissioner believes that it “is in the public interest” or that “there are special circumstances that make it desirable.”⁹⁶ On September 25, 2009, Australia’s Parliamentary Secretary for Innovation and Industry announced a fast tracking program for green technology solutions.⁹⁷ This program allows for expedited examination of a green technology application for no fee and claims to allow examination within four to eight weeks after the filing of the petition.⁹⁸

Australia currently runs a PPH pilot program with the US.⁹⁹ These applications are examined under the modified Examination Procedure.¹⁰⁰

D. Japan

1. Examination Procedures at the Japanese Patent Office (JPO)

As in Korea and Canada, patent examination in Japan operates under a deferred examination model, wherein applications are not examined until an examination request is made.¹⁰¹ The JPO additionally

allows for accelerated examination under PPH agreements.¹⁰²

Since 1986, the JPO has operated an accelerated examination program.¹⁰³ The program, amended in 2004, applies to four types of applications: already commercialized inventions; applications filed under PCT procedures; applications filed by universities and public research institutes; and applications filed by individuals and small entities.¹⁰⁴ This procedure reduces wait time for examination from an average of twenty-seven months to approximately two to three months.¹⁰⁵

Additionally, on October 1, 2008 the JPO announced a “Super-Accelerated Examination” system pilot and allowed the first application in the pilot a mere 17 days later.¹⁰⁶ This procedure is available to applicants who have a corresponding foreign application, can show that they plan to or have already commercialized the invention, and meet the other administrative requirements.¹⁰⁷

2. Super-Accelerated Examination for Green Technologies

On November 1, 2009, the JPO initiated an accelerated examination program for green technology applications.¹⁰⁸ The program has two requirements: (1) “a short description that explains that the claimed invention has an advantage in reducing consumption, reducing CO² and the like in a reasonable manner” and (2) a disclosure of the prior art and a comparison of

94. *Id.* (citing that inventor, a third party, or the Commissioner of Patents can decide to have a patent examined).

95. *Id.*; see also PATENT MANUAL OF PRACTICE & PROCEDURE, § 2.31 (Austl.), http://www.ipaustralia.gov.au/pdfs/patentsmanual/WebHelp/Patent_Examiners_Manual.htm [hereinafter AUSTRALIA PATENT MANUAL]; *Patent Act 1990* (Cth) ch 9A (Austl.).

96. *Patent Regulations 1991* (Cth) reg 3.17 (2)(a)-(b) (Austl.).

97. Press Release, IP Australia, Fast Tracking Patents for Green Technology Solutions (Sept. 5, 2010), available at <http://archive.innovation.gov.au/ministersarchive2010/Marles/Pages/fasttrackingpatentsforgreentechnologysolutions.html>.

98. *Fast Tracking Patents for Green Technology*, IP AUSTRALIA, (Sept. 5, 2011) <http://www.ipaustralia.gov.au/get-the-right-ip/patents/patent-application-process/expedited-and-modified-examination-for-standard-patents/green-patents/>.

99. *Examination under the Patent Prosecution Highway*, IP AUSTRALIA, (Nov. 9, 2011) <http://www.ipaustralia.gov.au/get-the-right-ip/patents/patent-application-process/examination-under-the-patent-prosecution-highway/>.

100. AUSTRALIA PATENT MANUAL, *supra* note 95, § 2.14.1.3.

101. *Procedure for Obtaining Patent Rights*, JAPANESE

PATENT OFFICE (JPO), http://www.jpo.go.jp/cgi/linke.cgi?url=/tetuzuki_e/t_gaiyo_e/pa_right.htm (last visited Nov. 22, 2011).

102. *Patent Prosecution Highway Portal Site*, JPO (Nov. 3, 2011), <http://www.jpo.go.jp/cgi/linke.cgi?url=/ppph-portal/index.htm>.

103. *Outline of Accelerated Examination and Accelerated Appeal Examination (Patents)*, JPO (July 23, 2004), http://www.jpo.go.jp/cgi/linke.cgi?url=/torikumi_e/t_torikumi_e/outline_accelerated.htm.

104. *See id.*

105. *Unique JPO Practices, Accelerated Examination*, JAPANESE PATENT ATTORNEY ASSOCIATION (JPAA), http://www.jpaa.or.jp/english/patent/unique_jpo_practices.html (last visited Nov. 22, 2011).

106. Press Release, JPO, First Patent Granted under Super Accelerated Examination System (Oct. 17, 2008), http://www.jpo.go.jp/cgi/linke.cgi?url=/torikumi_e/hiroba_e/first_patent_granted.htm.

107. *Super-Accelerated Examination Begins Oct. 1, 2008*, JPAA, http://www.jpaa.or.jp/english/whatsnew/super_accelerated_examination.html (last visited Nov. 22, 2011).

108. *Accelerated Examination for Green Technology Patent Applications*, JPAA (Mar. 7, 2010), http://www.jpaa.or.jp/english/whatsnew/pdf/green_technology_patent.pdf.

the claimed invention to the closest prior art.¹⁰⁹ This disclosure is very similar to the ESD requirement in the 2006 Accelerated Examination program at the USPTO.

E. United Kingdom

1. Examination Procedures at the United Kingdom Intellectual Property Office (UK IPO)

The UK IPO operates under a modified deferred examination system similar to those described previously. After initially filing the application, applicants must submit requests throughout the examination process.¹¹⁰ The first is a request for search, which must be filed within twelve months of the first filing of the application.¹¹¹ Then, once a search is conducted and the results are given to the applicant, the applicant has six months after the publication date to request a substantive examination of the application, and if no such request is received the application is deemed to have been abandoned.¹¹² Unlike many other systems in which applications can remain pending for years, there is a four and a half year compliance deadline for all UK applications, although extension of the deadlines is possible.¹¹³

The UK IPO offers three different types of “accelerated” examination.¹¹⁴ The first two systems, Combined Search and Examination and Early Publication, are available to anyone upon request.¹¹⁵ Combining search and examination allows applicants to get their search and initial examination done together instead of requiring applicant to file a special application for examination after receiving a search from the UK IPO.¹¹⁶ Early publication accelerates examination procedures since the UKIPO requires that applications must be published at least three months before a patent can be granted, and applications are normally published eighteen months after filing.¹¹⁷

109. *Id.* This requirement for comparison of the claims to the closest claim is very similar to the requirements for the Examination Support Document required in the 2006 Accelerated Examination Proceedings in the U.S.

110. *Applying for a Patent – After You Apply*, UK IPO, <http://www.ipo.gov.uk/types/patent/p-applying/p-after.htm> (last visited Nov. 22, 2011).

111. *See id.*

112. *See id.*

113. *See id.*

114. UK IPO, PATENTS FAST GRANT GUIDANCE 1 [hereinafter UK IPO Fast Grant Guidance], available at <http://www.ipo.gov.uk/p-fastgrantguide.pdf> (last visited Nov. 22, 2011).

115. *Id.* at 1.

116. *Id.* at 3.

117. *Id.* at 4.

The final type of “accelerated” examination that the UK IPO offers is Accelerated Search and Examination.¹¹⁸ The goal of this type of examination is to issue a search report within four months of the request.¹¹⁹ However, these Accelerated Search and Examination applications require a showing of why the accelerated examination is necessary.¹²⁰ Such showings include awareness of a potential infringer or need of examination in order to secure an investor.¹²¹ Applications in PPH programs are also granted admission into this program.¹²²

2. Green Channel Examination Program

On May 12, 2009, the UK Minister for Intellectual Property, announced a system in which green technology could be fast-tracked through the patent examination process.¹²³ The initial press release notes that this acceleration “will be made available to any patent applicant who makes a reasonable assertion that the invention in the patent application is one which has some environmental benefit.”¹²⁴

This program was titled “Green Channel” and allows applicants access to the Accelerated Search and Examination service as described above without a fee or declaration as to a need for examination.¹²⁵ The applications to this program need not satisfy any classification requirement and need only “provide as much justification as is necessary to explain why their invention is environmentally-friendly.”¹²⁶ The UK IPO additionally includes a search exclusively for these Green Channel applications on their website, which as of November 16, 2011 contained 382 hits.¹²⁷

118. *Id.* at 3.

119. *Id.*

120. UK IPO Fast Grant Guidance, *supra* note 114, at 3.

121. *Id.* at 4.

122. *See PCT(UK) Fast Track*, UK IPO, <http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-accelerated/pro-p-fasttrack.htm> (last visited Nov. 22, 2011); *Patent Prosecution Highway*, UK IPO, <http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-accelerated/pro-p-ph.htm> (last visited Nov. 22, 2011).

123. Press Release, UK ‘Green’ inventions to get fast-tracked through patent system (May 12, 2009) [hereinafter UK Green Tech Press Release], available at <http://www.ipo.gov.uk/about/press/press-release/press-release-2009/press-release-20090512.htm>.

124. *Id.*

125. UK IPO Fast Grant Guidance, *supra* note 114, at 1.

126. *Green Channel Frequently Asked Questions*, UK IPO, <http://www.ipo.gov.uk/pro-types/pro-patent/p-law/p-accelerated/pro-p-green/pro-p-green-faq.htm> (last visited Nov. 22, 2011).

127. *Green Channel Patent Applications*, UK IPO (Nov. 16, 2011), <http://www.ipo.gov.uk/types/patent/p-os/p-gcp.htm>.

F. Green Technology Considerations of Other Patent Offices

1. Other Patent Offices

The Israel Patent Office also allows for accelerated examination of green technology patents.¹²⁸ This program requires no fees or declarations, but simply requires a brief explanation why the technology or concept helps advance environmental protection.¹²⁹

The European Patent Office (EPO), as well as many other European national patent offices (including the German Patent and Trade Mark Office (DPMA) and the French Patent Office (INPI)) have not implemented a green technology accelerated examination program. The EPO does, however, allow accelerated examination under other programs.¹³⁰

2. Patent Cooperation Treaty's Green Technology Considerations

The World Intellectual Property Organization (WIPO) also considered affording preferential treatment to international PCT applications that fall under "green technology" at the Meeting of the International Authorities in Rio de Janeiro in February of 2010.¹³¹ However, authorities expressed concerns over an adoption of a similar program for the PCT program.¹³² All authorities at the meeting feared the ambiguity of the term "green technology."¹³³ In fact, one authority claimed that only ten percent of the applications for their green technology program contained contain green technology.¹³⁴ The panel also noted the inequity of the program since no such classification designation was available for any other type of humanitarian relief, such as public health or food security, and they felt that such inequity could

lead to complicated regulations for a wide variety of humanitarian problems.¹³⁵ Thus, the committee declined to suggest implementation of any accelerated program for the PCT process.¹³⁶ They were, however, in favor of a possible system to mark applications as "green" for licensing or commercialization purpose.¹³⁷

III. DISCUSSION

A. Over- and Under-Inclusion in the term "Green Technology"

With the varying definitions of "green technology" used by the programs described above, it is not surprising that the programs have drawn criticism for being both under- and over-inclusive. The following two examples are a few of the cases in which these programs have come into question.

1. The Over-Inclusive USPTO System

There was a big question as to whether the inventions claimed in applications being filed under the green tech program at the USPTO are actually helping to combat climate change. One such example is CBS's EcoAd program.¹³⁸ On September 19, 2011, the patent for this method was granted acceptance into the Green Technology Pilot Program.¹³⁹ This program involves a media advertiser purchasing an advertisement package, and a portion of the revenues from the ads are used to fund environmental and clean energy project.¹⁴⁰ The subsequent advertisements are run with a "digital green leaf" in the corner of the advertisement.¹⁴¹ This highly controversial program has many critics.¹⁴² The program has even been accused of "greenwashing" (a term used in public relations for deceptively marketing a product as environmentally friendly) and a formal complaint has been filed with the FTC on the program in April for false advertising.¹⁴³ Critics claim that this green leaf image is misleading, and that consumers assume the green leaf implies that the advertising company

128. Michael Factor, *Israel Patent Office Goes Green!*, IP FACTOR (Dec. 14, 2009), <http://blog.ipfactor.co.il/2009/12/14/israel-patent-office-goes-green/>.

129. *Israel Patent Office Encourages Green Patents*, JMB FACTOR & Co. (Dec. 2009), http://www.israel-patents.co.il/index.php?page_id=272.

130. *Guideline for Examination at the EPO, pt E, ch. 8, s 3*, EUROPEAN PATENT OFFICE (EPO) (Mar. 30, 2010), http://www.epo.org/law-practice/legal-texts/html/guix/e/e_viii_3.htm.

131. World Intellectual Property Organization (WIPO) PCT Union, 17th Sess., Preferential Treatment for International Applications Relating to "Green" Technology, PCT/MIA/17/5 (Jan. 21, 2010), http://www.wipo.int/edocs/mdocs/pct/en/pct_mia_17/pct_mia_17_5.pdf.

132. WIPO PCT Union, 17th Sess. Rep. Feb. 9-11, 2010, PCT/MIA/17/12, 18, http://www.wipo.int/edocs/mdocs/pct/en/pct_mia_17/pct_mia_17_12.pdf.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See Ads Funding Environmental Projects, <http://ecoad.cbs.com/>.

139. Press Release, CBS, EcoMedia's EcoAd Program is Granted Special Status by the USPTO (Sept. 19, 2011), *available at* <http://www.cbscorporation.com/news-article.php?id=820>.

140. *Id.*

141. *Id.*

142. *Id.*

143. *CBS Accused of Greenwashing with EcoAd Program*, SUSTAINABLEBUSINESS (Apr. 13, 2011), <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/22241>.

participants in green practices, rather than purchasing green technology advertisement.¹⁴⁴

The program, at its heart, does not constitute technological advancement aimed at meaningfully combating climate change, but rather is a means of using consumer's desire to protect the environment to make more money, while not meaningfully affecting climate change. The initial UPSTO classification requirement would have rejected this type of application. However, the UPSTO classification requirement was not without its own problems. Since it was up to the USPTO to determine which applications were eligible for the program, patent examiners were forced to take the extra step in their initial examination analysis to determine whether the application fell into one of the prescribed classification.¹⁴⁵ This extra step was time that the examiner could have spent on a more productive endeavor. While the USPTO system can be considered over-inclusive, the KIPO suffers from the opposite problem and imposes extremely rigid requirements.

2. The Under-Inclusive KIPO System

On the other hand, KIPO's Super-Accelerated program requirements have been deemed by many as obscure and somewhat misleading.¹⁴⁶ The KIPO guidelines specify seven categories of inventions which are in the program, while an eighth requires a "certificate of funding" from the government.¹⁴⁷ Unlike the broad definition of "green technology" included in the USPTO program,¹⁴⁸ these seven automatic categories are far from intuitive. They include small environmental problems (e.g. noise, sound, and dust proofing, as well as livestock excrement management) while leaving large well-known categories of climate change technology into the eighth group, requiring additional certification (including renewable energy technology and minimization of greenhouse gases).¹⁴⁹

Another problem with the program is that it appears that only foreign companies with branch offices in South Korea are eligible to apply for green certification.¹⁵⁰ This makes the program useless to any company without offices in South Korea. This program may even bring about larger international law questions regarding the treatment of foreign applicants compared to national applicants. While the over- and under-inclusiveness of the U.S. and Korean programs and the potential for abuse is important, another issue with these programs is the unintended consequence of the combination of these programs with other programs offered by different countries.

B. Combination of Patent Prosecution Highway and Green Technology Programs

Many national and supra-national patent offices have not implemented a green technology program. However, if an office has not implemented such a program, it does not mean that applicants cannot use other countries green technology programs to expedite their patents. For example, Canada has many PPH agreements similar to the PPH agreements the USPTO has with other countries.¹⁵¹ It has been suggested that the loose requirements for admission into the expedited program in Canada could be used in combination with the Patent Prosecution Highway program with the U.S. to expedite examination of applications that would not pass the stricter standards required for accelerated examination in the U.S..¹⁵² While this strategy to combine two expedited programs is not unique to the Green Technology and PPH programs, it seems counterintuitive that an agency

transportation and green city related technologies all require extra certification. KIPO Hanyang Super-Highway, *supra* note 86.

150. Lane, *supra* note 146.

151. CIPO currently has pilot program agreements with the JPO, KIPO, National Board of Patent and Registration of Finland, German Patent and Trade Mark Office, Danish Patent and Trademark Office, and the Spanish Patent and Trademark office that expire between 2012 and 2013 and an agreement with USPTO that extends indefinitely. *CIPO, PPH Pilot Project* CIPO (Apr. 8, 2011), <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr02813.html>.

152. See, e.g., J.W. Robinson, *CIPO Green Technology Expedited Examination Program*, DISTINCTLY AND IN EXPLICIT TERMS BLOG (Mar. 27, 2011), <http://jwtrobinson.wordpress.com> (describing a scenario for an application directed to a process for extracting minerals from ore which would not qualify for expedited examination under US procedures, but would likely pass under the Canadian program, which could, in turn, be examined under the PPH accelerated application process in the US); Wilfred So, *Canadian Patent System Expedites Applications for Green Technology*, BLAKES (Apr. 21, 2011), http://www.blakes.com/english/view_bulletin.asp?ID=4718.

144. *Id.*

145. USPTO Green Pilot Program, *supra* note 5, at 64,668.

146. Eric Lane, *KIPO Green Tech Fast Track Inaccessible for Most Applicants*, GREEN PATENT BLOG (Nov. 9, 2011), <http://www.lexisnexis.com/community/patentlaw/blogs/patentlawblog/archive/2011/11/09/green-patent-blog-ki-po-green-tech-fast-track-inaccessible-for-most-applicants.aspx>.

147. KIPO Hanyang Super-Highway, *supra* note 86.

148. USPTO Green Pilot Program, *supra* note 5, at 64,666.

149. The complete list of technologies that are allowed automatic entry into the system include noise/vibration regulation, water quality, air environment preservation, waste management, livestock excretions management and use, economizing natural resources and recycle promotion, and sewage management, while technologies including new renewable energy, carbon reduction, high powered water handling, LED application, green

that has chosen not to implement a green technology program would nevertheless have to examine those applications out of turn when they come in through the PPH program.

C. *Practical Limitations and Limited Resources*

1. Technology Questions

As these programs are scaled up, it will be important to continually question whether they are practical or a good use of limited patent office resources. For instance, it is clear that all applications are not filed equally across all technologies, and while “green technology” is a broad term, research has typically been forced on several small areas. Unlike programs such as the three-track systems implemented by the KIPO and the USPTO, “green technology” affects some technologies more than others. At the USPTO, for example, green technology applications have received the most filings in the technology centers related to chemical and material engineering; semiconductors, electrical and optical systems and components; and mechanical engineering, manufacturing and products.¹⁵³ Although data is not available, it is likely the petitions are even more concentrated into smaller technological art units within these technology centers.¹⁵⁴ Barring any massive shifting of examination resources, which seems unlikely as a short term solution, those trained in technological art units seeing large amounts of petitions will be forced to examine both the applications coming in normal order and those coming through this special program. It is likely then, as an unintended consequence of these programs, that in these technological art units the normal examination applications will be slowed relative to other technological units.

2. Administrative Resources

Any office run on limited resources must choose what actions are worthwhile to continue implementing. While the offices implementing these programs have made sure that their efforts to help combat climate change have not gone unnoticed,¹⁵⁵ it

remains to be seen if the resources used in starting these programs and maintaining them could not be better spent elsewhere. Every denied or accepted petition takes resources from the office that could be used for other things.

IV. CONCLUSION

There is no question that climate change will be one of the great global problems our generation will have to tackle. It may even be “our Sputnik moment.”¹⁵⁶ Many patent offices, including the USPTO, have attempted to help combat climate change using the green technology programs as discussed above. By looking at how each country examines patent applications in normal, “special,” “expedited,” or “accelerated” order, it is clear that one size does not work for all and that each country has developed a different way of determining how applications should be examined. More importantly though, it is unclear if any of these programs are actually providing incentives to bring technology that will meaningfully affect climate change to the market faster. If the programs fail at this goal, they are nothing more than a Public Relations campaign.

153. USPTO, GREEN PETITION REPORT SUMMARY (Oct. 2120, 2011), http://www.uspto.gov/patents/init_events/green_report_summary20111020.pdf.

154. Although the EcoAd example shown above indicates that no technology is completely immune to a Green Technology Petition, it is far more likely that those units focused on solar cell design will receive more petitions than those focused on cardboard box configurations.

155. See, e.g., USPTO Green Pilot Program Initial Press Release, *supra* note 4.

156. For a more optimistic view on green technology examination expedition programs, see Kate Nuehring, *Our Generation's Sputnik Moment: Comparing the United States' Green Technology Pilot Program to Green Patent Programs Abroad*, 9 NW. J. TECH. & INTELL. PROP. 609 (2011), available at <http://scholarlycommons.law.northwestern.edu/njtip/vol9/iss8/5>.