

# IP owners must wake up to their climate change challenge

**As so-called green patents become the latest IP rights to attract mainstream attention, rights owners need to understand what is at stake and join those companies that are already seeking to set the agenda**

Cast your mind back to December 2007. Representatives from all of the world's governments had gathered in Bali to try to hammer out an agreement on how to deal with climate change, one of the great challenges of the 21st century. In tense negotiations,

which saw people leave the conference hall in tears and the US representatives booed by members of other delegations, one of the major sticking points revolved around intellectual property: more specifically, how to facilitate the transfer of green technology from the developed world to the developing world.

It was a classic IP battle line. On one side there were those who insisted that IP is sacrosanct and it is up to those who own it to decide how it should be used, by whom and for how much; while on the other side there were those who were equally adamant that IP owners

demand too high a price and that because of this, technology that developing countries need is not available to them.

There should be no doubt that access to green technology – and the perceived barriers that IP ownership creates for this – is going to have far-reaching consequences over the coming years; even for those who have nothing to do with developing environmentally friendly technology. Although the Bali stand-off ended in a good, old-fashioned fudge, IP owners should be prepared to read story after story in the press and on the internet, and listen to report after report on the radio and TV, that not only does IP prevent people in the developing world from getting access to the medicines they need, but it also makes it harder to solve the planet-destroying challenges posed by global warming.

Of course, IP owners themselves will know that this is far too simplistic: if you are to develop the technologies necessary to lessen mankind's dependence on fossil fuels, you need to provide the incentives that will ensure that investing in the R&D to produce them is worthwhile. But they should also understand just what a powerful story their opponents will have. Denying the developing world access to green technology by making it too expensive – for that is how it will be portrayed, whatever the reality – harms not only people in the developing world, but absolutely everyone on the planet. This is how the energy sector differs from the pharmaceutical sector.

It may be cynical to say, but the fact that the poorest people in the world do not have access to treatment for AIDS/HIV, for

example, is a tragedy for them, but it has no material effect on the populations of Europe, North America, Australasia and Japan. But denying billions of Indians and Chinese the chance to drive energy-efficient cars, or to put solar panels on their roofs – that's a different matter. That harms the planet and has direct consequences everywhere: floods in the UK; droughts in the west of the US and in Australia; no snow on Alpine mountains; ever-more powerful typhoons battering the Japanese coast.

Now, fast-forward to January 2008 and the announcement of the Eco-Patent Commons: a project involving IBM, Nokia, Sony and Pitney Bowes, in association with the World Business Council for Sustainable Development (WBCSD). Designed to facilitate the sharing of patents that can benefit the environment, this new commons has seen the four companies donating a total of 31 patents, each one covering environmental conservation innovations. In effect, anyone who wishes to use them can do so for free. The WBCSD is hosting a searchable archive in which all of the donated patents can be identified, and on its website other corporations are encouraged to get involved (see box). There are many reasons why companies should seriously consider this offer. And one of them goes back to those fractious discussions in Bali.

The transfer of environmental technology is not like other types of technology transfer because every single person on the planet has a direct stake in ensuring that it happens. Those who own green patents have to understand this, and that it means they will need to come up with realistic solutions

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## The Eco-Patent Commons

**Benefits for member companies or other patent holders (that have pledged patents):**

- The Eco-Patent Commons will provide global recognition for the businesses whose leadership is contributing to the acceleration of sustainable development.
- It will be an efficient channel through which businesses can share their innovations.
- It will provide a catalyst for further innovation and can facilitate potential new opportunities for business collaboration.
- It can help introduce the pledger's technology and vision of the future to the industry and businesses in the industry – who may select the pledger's technology and adopt the pledger's vision.
- In contrast to dedicating patents to the public, the Commons allows the pledger to terminate as to those who assert patents

against the pledger.

- With respect to defensive termination, one pledger may assert patents, outside the field of the Commons, against another pledger without losing rights inside the Commons field.

**Benefits for patent users and our planet:**

- The Eco-Patent Commons will provide free access to patents that can be leveraged by others to improve the environmental aspects of their operations.
- The information will be readily available in one easily accessible place.
- The Commons will provide an avenue by which those who are facing a challenge that may have an environmental impact can connect with those who already have had success in meeting that challenge.

Source: <http://www.wbcd.org>

## Letter to the editor

**From: Rob Logan, Chief Executive Officer, and Karsten Voermann, Chief Financial Officer, ContentGuard Inc**

**Sir:** After reading your article entitled "It's time to take on economists who criticise patents" in *IAM's* recently published yearbook *IP Value 2008* ([www.buildingipvalue.com](http://www.buildingipvalue.com)), we feel compelled to support your position by adding an incremental dimension to it: the impact of strong intellectual property protection on international trade.

As you state in the article, recent debate has emerged over the costs and benefits of IP rights protection generally, and in particular of patent protection. Economists, couching their opinion in analytics, are joining the discussion. Unfortunately, they are not expanding it. They, like most other commentators, maintain a narrow focus on domestic issues such as research constraints, administrative costs and litigation.

The international trade implications of changing the procurement, enforceability and subsequent monetisation of IP rights have been ignored. But they must be considered in this debate. The following illustration, using the United States as the example country, indicates why to do otherwise is perilous. The thesis would be equally appropriate for similarly situated regions or countries such as the EU or Japan.

An invention is created in the US and subsequently receives patent protection. European, Japanese and other international patents are then secured. The US inventor begins licensing and generates royalty revenue from a Chinese manufacturer selling infringing products into the European market. The inventor's

cash flows, whether paid by the Chinese manufacturer or a European entity, will presumably return to the US to fund further invention, or to be spent and/or reinvested by the inventor in support of his business or lifestyle. These cash-flow streams have the following effects on the American economy:

- The chronic trade deficit the US maintains with many trading partners is reduced, helping to improve the balance of trade and thereby reducing interest payments on US debt (or capital related payments on other foreign assets) paid to foreign entities.
- The inventor is required to pay incremental taxes in the US, reducing federal and state government deficits.
- Foreigners are essentially required to buy dollars to pay royalties. This supports the US dollar (or if priced in another currency, the inventor sells that currency to buy US dollars to spend here with the same effect).

Many articles have been written about the necessity of shifting the US and European economies towards intellectual activity and away from traditional manufacturing, agriculture and other non-intellectual services. This makes sense, given our decreasing ability to compete with Chinese and Mexican manufacturers, or with Indian and Russian technology service providers. Without strong intellectual property rights, the benefits of this economic shift to intellectual pursuits are first-order only. They are limited to increased sales of innovative products and services during the short period when they are not yet being produced in, and exported from, low-cost countries

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# IP Business Congress all set for Amsterdam lift-off

The IP Business Congress, being held in Amsterdam on 25th and 26th June, looks like being one of the major IP events of 2008 and, quite possibly, this year's most important gathering of global IP business leaders. Organised by *IAM* magazine in conjunction with Ocean Tomo LLC, the Congress combines the first-ever Chief Intellectual Property Officer (CIPO) Summit and a live IP auction in which assets worth potentially many millions of Euros will be up for sale.

All day on 25th June and for the morning of 26th June, the CIPO Summit will focus on understanding the roles and the responsibilities of the CIPO. It will identify the regulatory and business challenges facing today's CIPOs, and will explore the opportunities and dangers these present. To lead the debate, a world-class faculty of over 70 speakers has been assembled, including:

- **Mike Barlow**, Head, Global Patents and Technology Law, BP plc
- **Joe Beyers**, VP, IP Licensing, Hewlett-Packard
- **Sharon Bowles**, MEP
- **Roberto Dini**, Founder, Sisvel Spa
- **Bill Elkington**, Senior Director, Technology Strategy, Rockwell Collins
- **Marian Flattery**, Head of IP, Syngenta Crop Protection AG
- **Scott Frank**, President, AT&T Intellectual Property
- **Horacio Gutierrez**, VP IP Licensing, Microsoft
- **Ton van Hoef**, VP and Chief IP Counsel, ASML
- **Peter Holden**, Head of IP Investment Group, Collier Capital
- **Bertram Huber**, Head of Corporate IP, Robert Bosch GmbH
- **David Kappos**, Global Head of IP Law, IBM
- **Leo Longauer**, Head of Group IP, UBS AG
- **Jean-Pierre Maeder**, Group Head of Trademarks, Nestlé
- **Damon Matteo**, VP and CIPO, PARC
- **Ciaran McGinley**, Controller, European Patent Office
- **Ruud Peters**, CEO, Philips IP & Standards
- **Marshall Phelps**, Corporate VP for IP Policy and Practices, Microsoft
- **Kevin Rivette**, Chairman, USPTO Patent Advisory Committee
- **Peter Spours**, Director of IP Transactions and Strategy, TomTom

On the afternoon of 26th June, Ocean Tomo LLC will hold its second ever European IP Auction. Ocean Tomo has so far sold well over US\$50 million worth of IP at auctions in both Europe and North America. At its London event last year, an internet-related patent was sold for £2.47 million (US\$4.9 million), a world-record price. Dozens of lots encompassing a variety of technologies and industries will be offered in Amsterdam.

The IP Business Congress goes to the very heart of IP as a business asset – with high-level debate and IP monetisation in action. Already over 300 delegate places have been filled and spaces are going fast. To make sure you are at this unique gathering of global IP thought-leaders, register at the Congress's website:

[www.ipbusinesscongress.com](http://www.ipbusinesscongress.com)

*Zie u in Amsterdam!*



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lacking respect for intellectual property.

Significant second-order IP licensing benefits, incremental to the first-order effects described above, are provided by strong IP protection. These second-order effects ensure that the US can continue to benefit from so-called Yankee Ingenuity long after the period in which US-based production of a given product or service is no longer economically feasible. There is even hope for third-order benefits, namely the re-investment of the returns earned by the newly created innovation abroad in US, so that those returns on innovation help to fund further invention, to continue the cycle into the future.

Some argue that product and service costs to American consumers and companies are increased due to the rapacious licensing demands of US IP rights holders. This is a tired argument, growing weaker with each passing day. The population of the European Union is greater than that of the US, with purchasing power per person that is growing relative to that of the US, if measured in dollar denominated GDP. Moreover, the billion-person populations of India and China are

experiencing GDP increases, and therefore purchasing power growth, much higher than the US or Europe. Using per-capita wealth creation and consumption as measured by GDP to indicate purchasing power growth, one realises that, whether today or a few years from now, most highly innovative products and services will mostly be bought by non-Americans. However, if the US continues to lead in properly IP-protected innovation, royalties will continue to flow into American coffers from many of these increasingly consumption-focused foreign jurisdictions.

The inflows to the American economy from the two or three billion consumers outside the US will therefore dwarf the IP-related costs borne by the 300 million American consumers paying the costs of IP rights licences embedded in their own purchases. The same logic would apply, of course, if a European country or Japan replaced the US in the preceding sentences. The only difference is that while Europe's GDP per capita is growing more rapidly than GDP in the US, it is still lower, as is Japan's, causing the argument to be even more applicable today.

While foreign licensing may not be Pareto-optimal relative to giving away IP rights for free, since not every American (continuing with the US example) will necessarily be better off

financially, it is clear that the average American will, in fact, benefit. For a Pareto-optimal outcome to occur, an inventor would have to seek patent coverage only outside his or her home jurisdiction. That is not a realistic scenario; neither is it necessary, given the discussion focuses on aggregate gains through foreign trade and IP protection to the entire jurisdiction and all of its members. In addition, government redistributive tendencies will probably ensure these benefits are shared throughout the socio-economic strata to a greater or lesser degree.

As long as the centre of innovative gravity rests in countries such as the US and the trend of value creation is tilted towards knowledge as opposed to physical goods creation, we should neither decrease access to IP protection nor dilute the protection provided. Doing so only accelerates the rate at which global macroeconomic forces cause US, European and other post-industrial economies' productive activity to decrease in worldwide relevance. Instead, currently misdirected lobbying and policy efforts should be re-focused on encouraging foreign jurisdictions, many of which we all know are lax in enforcement of IP rights, to improve their performance. This latter strategy would support the competitive

advantage of innovative economies well beyond the horizon a reasonable person can currently anticipate.

As you state in "It's time to take on economists who criticise patents": "Those who advocate radical change have an obligation to provide hard evidence that this will be positive." In our view, that evidence must include the results of macroeconomic transnational analyses. The danger we face is that once IP rights are diluted, it becomes challenging to increase their strength again. The decision to reform the patent system must therefore be made only after considering all consequences, including cross-border effects. Without such analysis, a sub-optimal decision to weaken IP protection could potentially be made. If that should occur, there is an increased probability that the populations of the US, Japan and the European nations will no longer enjoy the high relative standard of living they maintain today. They will hold all of us who influence IP policy accountable for their loss.

*Yours faithfully,*

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[www.contentguard.com](http://www.contentguard.com)

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to deal with any IP-related obstacles to it taking place. If they do not, they will find that in many countries their freedom to operate will be severely curtailed as governments begin to put in place facilitating regimes that will be unlikely to put the needs of IP owners at the top of their list of priorities.

More generally, IP owners need to understand that the environment is going to become

yet another stick with which to beat them. If you ask the average citizen about IP, the chances are that if they have heard of it their perceptions will be almost entirely negative. Rights owners, they will say, sue their kids for downloading music; they make clothes and accessories more expensive than they need be; they prevent the world's poorest people from getting the medicines they need; and now they are an obstacle to saving the planet from climate catastrophe. It's not a very good

place to be – either from a PR point of view or, more importantly, from a political perspective. Which politician or government is going to want to be an active supporter of a community that is seen in such a poor light?

Of course, the Eco-Patent Commons is not a cure-all solution to the problems that environmental technology transfer presents; and, without doubt, legislators and campaigners should recognise that without strong IP there is

much less incentive for anyone to invest the sums necessary to do R&D in the environmental field – meaning that potentially breakthrough products will be far slower to arrive or may not ever appear. However, what the commons does do is give companies the opportunity to show that IP does not have to be an obstacle to greening the world and that it can, in fact, be an enabler. It is an opportunity that all those who can would be well advised to seize. ■