

Flexibilities in the Patent System

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Introduction

- The Context
- Flexibilities – An Overview
 - From Statute of Monopolies to Paris Convention
 - From Paris to TRIPS
 - TRIPS Agreement & Beyond
- Future of flexibilities
- The Challenges

The Context

- TRIPS Agreement
 - Globalization of the patent system - Uniform binding and enforceable standards
 - Restrictions to use flexible standards to promote competition through investment, imitation & innovation
- Free Trade Agreements
 - TRIPS-Plus standards for patent protection limiting the flexibilities resulting in strong patent monopoly
- Harmonization of Patent System – Efforts of WIPO – PCT, PLT, SPLT
 - A step towards the creation of international patent system

The Context

- Globalization
 - Access to new markets for new technology products
 - Opportunities to use patents to create market monopoly
- Unequal socio-economic and industrial conditions in the globe
 - The divide between the developed and developing countries
- How to encourage creativity and industrial growth with in the TRIPS framework?
 - Creation of capital and competitive market and the role of democratic governments to ensure access to basic needs to all in a developing economy

The Context

- Can a strong patent system result in equal distribution of benefits of globalization to unequal economies?
 - Access to technology, capital for infrastructure, technical education etc.
 - Ensuring the principles of equity, efficiency and distribution
 - Private rights vs. public domain
 - Problems of encouraging innovation
- Need for flexibilities in the patent system

Flexibilities: An overview

- Statute of Monopolies (1624) to Paris Convention (1883)
 - Period of total flexibility
 - Patent system was purely based on national standards
 - Patent was a privilege granted by the state
 - Grant of patent to facilitate investment to build industrial base
 - Facilitate transfer of technology and innovation – teaching the art
 - Protecting public interest

Flexibilities: An overview

- Different standards
 - Novelty – based on territoriality
 - nature of inventions – process or products
 - Inventor – “bringer in” of technology
 - Flexible term of protection
 - Disclosure requirements – not complete disclosure
 - Obligation to work the patent with starting of industrial activity
- Resulted in industrial revolution in Europe
- No obligation to protect foreign inventions
- Problems of imitation & innovation

Flexibilities: An overview

- Paris Convention (1883) to TRIPS Agreement (1995)
 - Patent system moved from national standards to minimum international standards
 - Minimum obligations with maximum flexibilities
 - Justification based on creativity – property right
 - Principles of national treatment, non-discrimination, independence of patent & priority dates
 - respect for foreign patents
 - Self imposed obligation

Flexibilities under Paris

- Freedom to discriminate grant of patents based on the nature of technology
 - process or product
- No fixed standards on novelty and nonobvious/inventive step
- Freedom to identify limitations and exemptions
 - research and use

Flexibilities under Paris

- Freedom to
 - Determine the term of protection
 - Identify the rights and exhaustion of rights
 - Determine the grounds and conditions of issue of compulsory licence
- Failure on the part of members to observe the minimum standards
 - Structured national laws depending upon the level of innovation and industrialization
- No effective mechanism to prevent distortions

Flexibilities under Paris

- Used the flexibilities to create new technologies and new industrial base
- Benefits shared by some Asian countries along with Europe and US
 - Movement of capital and technology from Europe to US and Asia
 - Emergence of new economic powers
 - Patent system accepted as a powerful tool for innovation and industrialization
 - Resulted in unequal development

Flexibilities: TRIPS and Beyond

- TRIPS Agreement
 - Period of binding obligations with limited flexibilities
 - Patent norms influenced by trade-off
 - Effective enforcement mechanism under WTO
- Binding obligations
 - Product and process patent for inventions in all fields of technology
 - 20 years of protection
 - Rights including right of importation
 - Restricted compulsory licence
 - Reversal of burden of proof in case of process patent
 - Norms for civil, criminal and administrative remedies

Flexibilities: TRIPS and Beyond

- Limited flexibilities in case of
 - Standards of patentability – novelty and inventive step
 - narrow down the scope of claims
 - Doha declaration on public health – grounds of compulsory licence
 - Limiting the scope of biotech and software patents
 - Standards and procedures on domestic enforcement
 - Exhaustion of rights and parallel import
 - Limitations and exemptions

Flexibilities: TRIPS and Beyond

- Interpretations from DSB of WTO
 - Interpretation strengthening private property rights
- Free Trade Agreements
 - TRIPS-Plus provisions on patent
 - Expand the rights of owners and reduce the scope of limitations and exceptions
- Attempt for new treaties
 - Substantive Patent Law Treaty
 - Strengthen domestic enforcement in case of infringement of patent

Future of Flexibilities

- Pressure on the patent system
 - Influence of new standards followed in developed countries on the laws of developing countries – unification of norms
 - Increase in filing of patent
 - Increase in infringement litigations
 - Abuse of monopoly
 - Reducing the space for future innovation
 - Difficulties in implementing public policy on health care & food security
- International Patent system
 - One application
 - Grant of patent by international agency
 - Enforcement by an international court

The Challenges

- Expansion of rights beyond what is optimum to provide incentive to encourage innovation and investment – limited monopoly
- Economic arguments taking predominance over public policy concerns
 - Denial of access to patented products to those who cannot afford – public health
- Need for a balanced approach by identifying the required flexibilities

The Challenges

- Facilitate Innovations
 - Standards of patentability
 - Problem of upstream patenting
 - Scope of Inventive step/non-obviousness
 - “Persons having ordinary skill in the art”
 - Prevent ‘ever-greening’ of patents
 - Scope of interpretation of patent claims
 - Exceptions and limitations
 - Research and fair use of patents
- Facilitate creation of follow-on inventions – and working of patents

The Challenges

- Promote investment and meet the public needs
 - Prevent creation of import monopoly
 - Prevent patent thickets resulting in anti-common effects
 - New liberal norms on compulsory licensing
 - Use of the principles of exhaustion
- Role of State to address public policy issues in negotiating patent norms and not to be completely influenced by the economic arguments ignoring social needs
- Need to re-visit the TRIPS based patent system from the perspective of the developmental agenda before the WIPO