

# 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