IP and Health and Environment Policy in Developing Countries – Setting the Policy Context

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Introduction

- Amongst the diverse theories that exist today about patents: most cited is the “incentive” or the “reward” theory
- In both the health and climate change debates, IP and patents are perceived to have both positive and negative effects
- There is much debate on whether or not patents, in fact, encourage the creation of new technologies, and if so, to what extent
- And once the technology has been developed, does the patent system play a role in its diffusion?
- Developing countries are importers of technology

In sum, does the patent system do what it is intended for, namely foster innovation and technology diffusion in the areas we are discussing today? And why are so many people excluded from the benefits of innovation?

The role of the patent system in innovation

Framework for:

- Providing incentives to invest, in particular, mobilizing resources into risky investments
- Preventing free-riding
- Promoting an efficient allocation of resources into innovation
- Specialization and shaping partnerships at various levels and supporting cumulative and shared innovation

Beware of:

- Abuse of patent rights, for example, on research tools
- Impediment to access important goods
- Non-practicing entities
- Cases of market failure

The role of patents in technology diffusion

- The patent system is generally understood to facilitate technology diffusion and investment; for some, it is even a prerequisite for technology transfer and investment abroad
- It does that mainly via
  - patent information and
  - by using patents as an instrument to assist technology transfer
- Several countries have in the past relied on the patent system as a tool in developing the national economy and this assisted it in promoting FDI and transfer of technology (e.g. Japan, Republic of Korea)
- Other countries also show a correlation

The current international discourse

- Classical North-South debate to a certain extent (IPR as a barrier), but also serious discussions
- Environment
  - UN Conference on Sustainable Development (Rio+20)
  - UNFCCC
  - WIPO Development Agenda
  - WIPO Standing Committee on the Law of Patents (SCP)
- Health
  - WHO's Intergovernmental Working Group on Public Health, Innovation and Intellectual Property
  - WHO GSPOA
  - WTO/TRIPS
  - WTO/WHO/WIPO trilateral cooperation

Patents and Health

WIPO
WORLD
INTELLECTUAL PROPERTY
ORGANIZATION

The broader policy debate

Internal challenges

- Use of private rights to promote the production of public goods
- Consequences on access to medicines
- Number of patents

External challenges: patent law and policy interacting with:

- Public policy issues, bioethics, development
- Public international law – human rights, biodiversity
- Interface with other issues (e.g. competition policy; standards)

Is health a special beast?

- Social and economic factors:
  - ethical concerns about the technology
  - ethical concerns about *patenting* the technology
  - concerns about environmental impact
  - technology addresses fundamental human needs: food & health
  - public funds account for a significant proportion of research, including fundamental research
  - makes use of genetic resources - human, agricultural, biodiversity – raising questions of ownership and control of resources, prior informed consent, benefit-sharing
- Specific production criteria: expensive to develop, very cheap to copy
- North-South dimension: patent system has allowed much of the developments in health care. At the same time, the patent system does not fully work as an incentive for the development of medicines against diseases affecting manly developing countries

Is medical innovation in the IP system...

… much the same as any other technology?

The same rules & principles:

- patentable subject matter
- no patents on mere discoveries
- novelty, non-obvious, inventive step
- sufficiency of disclosure
- regulation of technology distinct from patenting

… totally different, needing unique responses?

- Specific international compulsory licensing rules
- Public interest exceptions to patentable subject matter
- Morality & ordre public
- Limited reach of claims
- Unique legal mechanisms for deposit of microorganisms and disclosure requirements

Climate

Patents and climate change

- Is this debate just another IP and technology transfer debate?
  - Like
    - Access to medicines debate
    - Implementation of TRIPS 66.2
    - Convention on Biological Diversity
    - UNCTAD Code of Conduct
- Or do climate change mitigation and adaptation present distinctive challenges for IP law, policy and administration?
- How to define and meet such challenges?

Patents, technology and the climate

- Technology is part of the sources of climate change
  - But technology is equally part of the solution
  - The lesson: it's not (just) what you've got, it's how you use it
- The patent system is closely associated with the generation, dissemination and publication of new technologies
  - What is the system for and what are its basic principles?
  - How best to deploy it in structuring technological responses for mitigation and adaptation?
  - How to get the best information out of it?
  - Are there specific aspects in the climate context?

Patents, technology and the climate (ctd)

- There are many different, competing technologies to reduce emissions
- There are many competing suppliers within each industry
- Information Needs:
  - Identify trends in relevant technologies
  - Identify the major entities, inventors, countries and companies developing a technology
  - Investigate the patent landscape of a technology - legal status, ownership, legal scope, geographical coverage
  - Find appropriate technologies for transfer
- Number of existing patents (see e.g. Kopenhagen Study, 2009)

Some further thoughts on the patent system in relation to health and climate change

- It is important to consider national policy choices before weakening or strengthening the patent system, including a long-term view
- Fact-based discussions rather than ideological debate, including the role of the patent system in reality
- Consider technological differences
- Learn how to use the patent system for various purposes (e.g. patent information, technology diffusion, including areas of flexibility: pre-grant and post-grant)
- Also consider:
  - Transfer of money and knowledge
  - Encourage cooperation (between States, with private sector, between research institutions and private sector)

Thank you

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