

Max Planck Institute
for Intellectual Property and Competition Law

OPTIONS WITHIN THE IP SYSTEM TO PROMOTE MINOR INNOVATIONS

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Outline

- An **Overview** of the Options within the IP System to Promote Minor Innovations
- UM Systems and their alternatives in light of the **Motives for- and Downsides of Protection**
- Specific Considerations for **Developing Countries**



Overview of the Options within the IP System

1. *Not protect sub-patentable innovation at all* by IP rights and thereby leave them in the public domain for everybody free to use;
 2. *Lower the thresholds for patent protection* in order to cover some or most of the innovations considered worthy of protection under the patent system;
 3. *Rely on alternative mechanisms* for protecting these innovations – in particular under notions of preventing misappropriation or unfair competition; or
 4. *Introduce a specific system (such as utility models)* for protecting sub-patentable innovations as alternative incentive mechanism.
- In **balancing access and incentive**, countries should consider these options in light of the **motives for UM protection** and its **downsides**



Motives for UM Protection

→ 1) Incentives for **Minor and Incremental Innovation**

■ As most welfare enhancing inventions are incremental and cumulative in nature, **need for legal protection to incentivize** such inventions

■ especially small inventions are **vulnerable to ‘unfair’ copying**

■ Role of IPRs in **securing investments & exploitation**

→ Alternative of **lowering patent thresholds**: (+)/(+)/(+)

→ **Not protecting** minor innovations: (-)/(-)/(-), but enhanced access / public domain

→ **Alternative IPRs** (unfair competition laws): (+)/(+)/(-), further depending on type of protection



Motives for UM Protection

→ 2) Incentives for **Small and Medium Enterprises**

■ Assumption that there is a large presence of SMEs in technological sectors where small and incremental innovation is the norm

■ **Low up-front costs as compared to** than for Patents

■ No long waiting periods (**patent-backlog**); quick registration

→ Alternative of **lowering patent thresholds**: (-)/(-)

→ **Not protecting** minor innovations: (+)/(+)

→ **Alternative IPRs** (unfair competition laws): (+)/(+)



Motives for UM Protection

→ 3) Encouraging **Local Innovation**

■ SMEs engaged in minor innovation are presumed to be part of the local industry, so **promoting SME inventions facilitates local innovation** (WIPO, 2011: 98% local filings)

■ UM applications as **useful source of information**

■ combination of weak patent protection with (UM) system to protect minor innovation often facilitated local innovation through **technological learning** (Kumar, 2002)

→ Alternative of **lowering patent thresholds**: (-)/(+)(-)

→ **Not protecting** minor innovations: (-)(-)(+), but public domain

→ **Alternative IPRs** (unfair competition laws): (+)(-)(+)



Costs and Disadvantages of the UM System

Legal Uncertainty and Wasteful Litigation

- Lack of substantive examination system which serves as a gatekeeper ensuring high standards and legal certainty
- Risk of abusing the system in order to block competitors from marketing competing products
 - Alternative of **lowering patent thresholds**: (-)/(-)
 - **Not protecting** minor innovations: (-)/(-)
 - **Alternative IPRs** (unfair competition laws): (+)/(-)



Costs and Disadvantages of the UM System

Blocking the Public Domain and Preventing Technological Learning by Imitation

- Introducing another layer of IPRs diminishes the public domain
- In Dubio contra a new IPR (see Machlup, 1955):

If we did not have a patent system, it would be irresponsible on the basis of our present knowledge of its economic consequences to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible on the basis of our present knowledge to recommend abolishing it.

→ Alternative of **lowering patent thresholds**: (+)/(+)

→ **Not protecting** minor innovations: (-)/(-)

→ **Alternative IPRs** (unfair competition laws): (-/+)/(-/+)



Specific Considerations for Developing Countries

Domestic Innovation below the Patent Level

- What is the **domestic standard for patent protection**, in particular how high is the **threshold of inventiveness** being applied in practice by the domestic IP office?
- **Which domestic industries/sectors**, especially SMEs, **engage in small scale or incremental innovative activities?**
- To what extent **does the output** of these innovative activities **meet the threshold for patent protection?**



Specific Considerations for Developing Countries

Degree of Copying and Imitation in Sub-Patentable Innovation

■ Is **copying or imitation an issue** in the industrial sectors with small scale or incremental innovative activities which functions as **disincentive to innovate** or to bring the products resulting from innovative activity onto the market?

■ On the other hand, is there any indication or evidence that SMEs **rely on existing innovative products** locally produced to come up with **follow-on innovation** or to **produce value-added products**?



Specific Considerations for Developing Countries

Alternative Protection Regimes

- Is there a legal protection against **‘unfair competition’**, misappropriation of another person’s efforts, or passing-off (usually in form of a tort)? How do domestic courts apply this system? Especially, **what elements of ‘unfairness’ are usually required?**
- Can **industrial design protection** be useful in some cases?
- Is **trade secret protection** a viable alternative?
- Can any of these alternatives be relied upon by SMEs?



Specific Considerations for Developing Countries

Domestic IP Infrastructure (IP Offices, Courts, Professionals)

■ How detailed – if existing – is the **knowledge of SMEs of the IP system**?

■ To what extent do SMEs generally **use the domestic IP system**? In particular:

- Are there **any awareness programmes by the IP Office** (or other institutions) focussing on SMEs?
- Is there any **support for SMEs in registering or applying** for IP rights?
- Do **SMEs use the judicial system to settle IP related disputes**; especially do they bring infringement proceedings?
- Are **legal services** (advice, litigation) from attorneys, etc. **affordable** to SMEs?
- **What role do IP rights play for SMEs in their business activities** in general and in protecting the results (good, services, processes) of their innovative activities in particular?
- If so, **what kind of IP rights are relied upon** by SMEs?



Thank you for your attention!

Comments and critique to
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