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Declaration on Patent Protection published under the auspices of the Max Planck Institute for Innovation and Competition

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Under the auspices of the Max Planck Institute for Innovation and Competition (Munich) 40 researchers from 25 countries passed a "Declaration on Patent Protection". This declaration was published in connection with the 20th anniversary of the TRIPs Agreement.

The authors of the declaration state that over the past decades, the autonomy of nation states to design their patent regimes has been progressively eroded by multilateral, regional and bilateral agreements, which are becoming increasingly complex and set more and more limits to the states' regulatory freedom. According to the authors, the ability of national legislators to maintain a proper balance between the need for protection of knowledge in global markets, the freedom to regulate national or regional innovation markets, and the ability to pursue diverse public interest goals risks becoming unduly constrained.

The authors' view that the patent system's overall acceptance rests on a delicate interplay of privileges and responsibilities seems to be generally accepted. It also seems to be accepted that as a regulatory institution, the patent system's operation must accommodate other public policies and interests, such as environmental protection, biological diversity, health care (including managing the risks of pandemics), nutrition, food security, technological and scientific progress, education, security, etc.

Other conclusions will engender more criticism from the patent community. The Declaration also points out the drawbacks of international harmonization of patent law by multinational, regional or bilateral treaties and seeks to identify and clarify some of the regulatory options states still retain under international law, in particular the TRIPs Agreement. However, it is not clear how a fragmented patent system (even if the fragmentation ranges between clearly defined boundaries) will help to solve the problems raised by the Declaration. In addition, it remains disputed which configuration of the patent system will best serve (national / global) welfare and prosperity.

The Declaration highlights interesting areas where legislators might have more room to manoeuver than expected.

The major part of the Declaration refers to the interpretation of article 27 TRIPs.

Article 27 para. 1 TRIPs reads as follows (emphasis added):

"Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable ***without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced***."

According to the authors article 27 of the TRIPs Agreement does not prevent states from reasonably differentiating between fields of technology according to the characteristics inherent in the technology at issue and the state's public policies pertaining to the sector at issue.

With specific regard to limitations of protection as set out in Articles 30 and 31 of the TRIPs Agreement, the non-discrimination principle does not apply at all according to the Declaration. This opinion is contrary to what a WTO's DSB panel assumed (cf. WT/DS114/R of 17 March 2000).

The authors point out that states have latitude to define what constitutes patentable inventions. Article 27 TRIPs does not require states to provide patent protection for subject matter that they (i) classify as discoveries rather than as inventions or (ii) do not consider being technical in nature. In particular, the authors opine that article 27 TRIPs does not prevent states from denying patent protection for (i) new uses of known products or substances; (ii) derivatives of known products or substances; and (iii) selection inventions otherwise lacking novelty and/or an inventive step.

The Declaration also concludes that states are not required to provide patent protection for inventions that have not been sufficiently disclosed and expressly claimed in the patent application.

In addition, states are not prevented from making the grant of a patent subject to revealing the origin of claimed biological material and associated traditional knowledge.

Furthermore, articles 27 and 28 TRIPs do not prevent states from limiting the protection conferred by a patent to products or processes in relation only to the specific function(s) of the invention expressly claimed in the patent.

The authors further state that article 6 TRIPs does not prevent states from determining whether patent rights are to be exhausted nationally, regionally or internationally and that article 27 TRIPs does not prevent states from discriminating among fields of technology with regard to the geographical scope of exhaustion.

Although the findings of the Declaration are not new, it is to be expected that the Declaration will launch a broader discussion about the future of the global patent system and the desired level of international harmonization and the national particularities of patent regimes. The Declaration was published at an interesting time since the annual Special 301 Report of the Office of the United States Trade Representative (USTR), which identifies trade barriers to U.S. companies and products due to the intellectual property laws in other countries, is due within the next weeks.

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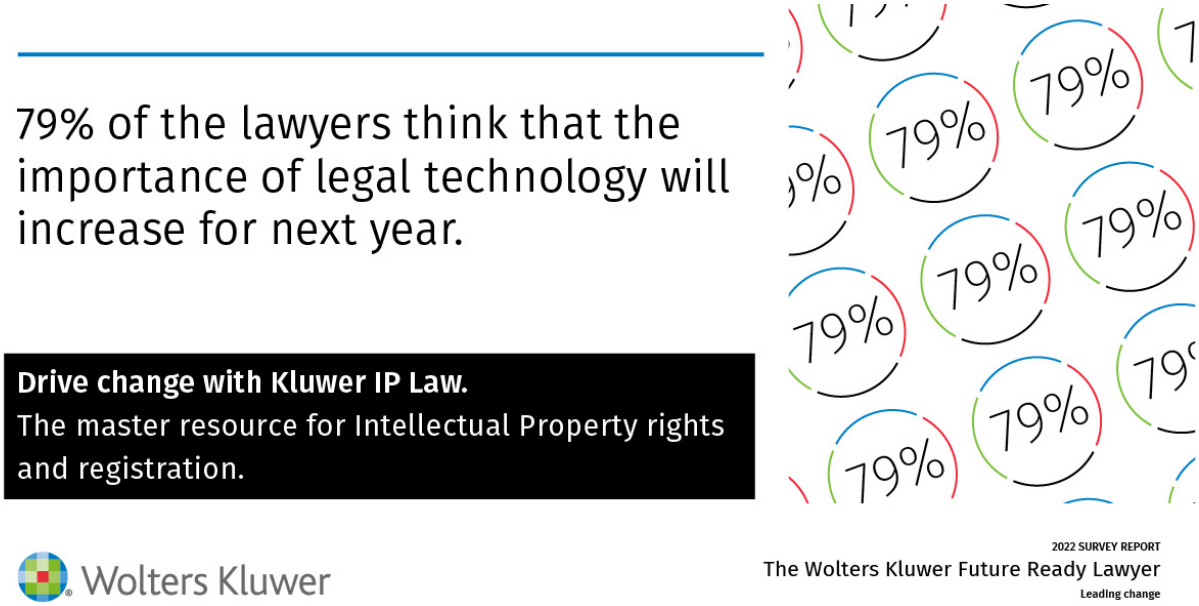

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