

CANADIAN PATENT POLICY IN THE NORTH AMERICAN CONTEXT

Keith E. Maskus
University of Colorado, Boulder

Prepared for the Conference, "Intellectual Property and Innovation in the Knowledge-Based Economy," Industry Canada and Centre for Innovation Law and Policy, Toronto, May 23-24, 2001.

INTRODUCTION: PRESSURES ON CANADIAN PATENT POLICY

- TRIPS Obligations and Disputes
- NAFTA
- Internal pressures to support domestic use and development of technology

QUESTION ADDRESSED: WOULD IT BE ADVISABLE FOR CANADA TO MOVE TOWARD HARMONIZATION WITH THE U.S. SYSTEM?

- Why this is a difficult question
- Initial answers

DIFFERENCES IN PATENT POLICIES BETWEEN CANADA AND U.S.

- U.S. system is strongly protective of inventors' interests; Canadian system is more cautious
- First to File v. First to Invent
- U.S. has virtually no exclusions from patent eligibility; Canada has several
 1. Higher life forms
 2. Business methods patents
 3. Software
 4. Surgical methods and medical treatments
- Breadth of claims allowed

- Disclosure and opposition procedures
- Patent term extensions for regulatory delays
- Dedicated Federal Circuit Court for IPR litigation
- Price controls and monitoring in medicines
- Approach to use of compulsory licenses

INDICATORS OF CANADA'S SHIFT TOWARD KNOWLEDGE ECONOMY

- Patent statistics
- Business enterprise R&D
- Technology balance of payments
- Revealed comparative advantage and sectoral trade balances

ROLE OF PATENTS IN PROMOTING GROWTH, AND EVIDENCE

- Encouraging R&D and commercialization
- Expand stock of knowledge publicly available
- Develop markets for creating and exchanging new information

HARMONIZATION AND THE REGIONAL DIMENSION

- Canada already has access to U.S. patent system and rights
- Differences in standards and procedures seem to matter for economic decisions
- Potential benefits from harmonization with United States

1. Small-country gains from policy convergence

Problems:

- a. patents are not taxes or necessarily inefficient distortions;
- b. presumes U.S. regulations are efficient;
- c. weak empirical data cannot support efficiency gains from harmonization.

2. Evidence suggests patent strengthening attracts trade, FDI, technology licensing

Problems:

a. relative erosion of Canada's patent strength relative to middle-income countries;

b. substitution toward licensing and away from FDI.

3. Stronger patents should attract more patent applications

4. Different standards impose nation-specific fixed costs on business

5. Friction costs could limit international exploitation of technological information

- Potential costs of harmonization with the United States
 1. Higher costs for access to technologies (rent transfers)
 2. Distinctiveness reflects Canadian preferences
 3. Sacrifice in policy discretion at national and provincial levels

TENTATIVE EMPIRICAL EVIDENCE

- Evidence that Canada has undertaken some convergence with the United States
- TFP regression results (13 sectors, 10 OECD countries, 3 years)
- Regressions for distribution of U.S. MNE sales and R&D by affiliates (36 countries, 2 years)

REGIONAL HARMONIZATION PRESSURES

- Cross-currents in technology competition from NAFTA
- Impacts of NAFTA on FDI and intra-firm exports
- *Intellectual Property Diversion* does not dominate *Intellectual Property Creation*

CONCLUSIONS

- Canadian innovation seems to be thriving without harmonization
- Unlikely to see significant internal pressure in Canada for harmonization
- Harmonization would have mixed impacts on inward FDI and technology flows
- Harmonization only makes sense where U.S. standards are not overly protective

RECOMMENDATIONS

- Do not abandon global standard of first to file
- Some form of additional protection with diffusion incentives in cases of regulatory delay is in order
- Ability to compete could be hampered by shifting toward broad and inclusive patent claims
- The U.S. policy of discouraging challenges to patent validity does not have much to recommend it
- A special IP court may be appropriate if it is not keyed solely on patent-holders' interests
- Consider a more competition-based approach to regulating patent abuse