

II. Rights conferred to the patent holder

It is a general misconception that Article 28 of the TRIPS Agreement grants the patent holder the right to use, offer for sale, sell or import the invention. Instead, the patent holder acquires a ‘right to exclude’ others from making, using, offering for sale, selling or importing the patented product or process without his consent. The patent holder is thus the bearer of a negative right.²⁸⁷ As such, the patent holder has no right to prescribe an action but merely a right to proscribe an action. In other words, the patent holder has a freedom from interference. The right is not universal; instead the exercise of the right is physically limited to the territory in which it was granted.

The implementation of Article 28 and the rights conferred are relatively unproblematic. The scope of the right is unambiguous and flexibilities are absent in Article 28. As such, developing Member States implementing Article 28 have little interpretational discretion. Notwithstanding this, once the requirements have been fulfilled and the patent right is granted, the Member State’s obligations are passive. It will only be required to act, when the patent holder asks the courts to ascertain whether an infringement has actually occurred or when the patent’s validity is actually challenged.

Being the holder of a negative right, a patent holder may be subject to general laws that restrict the manner in which he exercises the patent right. For example, the sale, transport and use of a patented poisonous chemical can, and often is, regulated by domestic laws. This regulation is not a restriction of the patent holder’s rights; the patent holder has no right to sell the item – only to exclude others from doing so. Accordingly, Member States would not infringe the TRIPS Agreement were they to restrict or even prohibit the patent holder’s use of the patented products. It therefore follows that national pharmaceutical pricing systems and registration procedures are not a limitation on the rights conferred in Article 28 of the TRIPS Agreement. Other TRIPS-conform measures that could limit the realisation of the products of patent rights include anti-trust laws, product safety restriction, prior third party rights and patent maintenance fees.

Absent from the list of entitlements the patent holder acquires is the right to exclude the product being exported.²⁸⁸ It would therefore seem that the TRIPS Agreement entitles third parties to lawfully acquire the product and to export it without the patent holder being lawfully entitled to object to the export. This conclusion is not certain as it must be asked if ‘exportation’ could also be deemed to be ‘use’ in terms of Article 28. This does not seem to be the case.²⁸⁹ ‘Use’ infers the employment/enjoyment of the product in the manner for which it was intended to be used. In other words the patent’s field of use is dictated by the characteristics it displays.

²⁸⁷ *Garner (ed)*, Black’s Law Dictionary (8th edn Thomson West St. Paul 2004) p. 1348.

²⁸⁸ WTO Communication by Brazil and others to the TRIPS Council ‘Paragraph 6 of the Ministerial Declaration on the TRIPS Agreement and Public Health’ (24.06.2002) IP/C/W/355.

²⁸⁹ Abbott, Quaker Paper 7 (2001) p. 14 and fn. 27.

Exportation would not be a characteristic displayed by a patented product or process.²⁹⁰ It is also unforeseeable that the TRIPS Agreement would have entitled Member States to grant rights to patent holders that have the result of extending rights beyond their borders of the respective territory. Further, the general interpretation rule *unius inclusio est alterius exclusio* states that the inclusion of one is the exclusion of another.²⁹¹ Thus, the inclusion of importation into the scope of the patent holder's rights and not its corollary implies that the negotiating parties to the TRIPS Agreement intended to exclude the 'right to export'. The view corresponds to the context of the TRIPS Agreement, in particular Article 6. Article 6 accepts that the principle of exhaustion does not fall within the scope of the WTO. This legal principle is common to many, if not all, Member States. Exhaustion or the 'doctrine of first sale' refers to the limitation on the rights of intellectual property holders, i.e. that they do not extend beyond the first sale. Whereas these principles are the subject of abundant jurisprudence, the concept as a whole is consistent with an interpretation of Article 28 excluding the right to export. *de Carvalho* convincingly states that all patent rights conferred, with the exception of the exclusive right to 'make', become exhausted after the first sale.²⁹² Thus, even if the export were found to be a conferred right, the first sale of the patented goods by the patent holder or with his consent would exhaust its conferred rights and, as a result, no further restriction would stand in the way of a person who bought the goods from exporting the goods.

In addition to the abovementioned limitations, Member States are also able to impose direct restrictions on the rights conferred in Article 28. The exceptions to the rights are expressly referred to in Article 30 of the TRIPS Agreement. An analysis of the exceptions is dealt with Chapter 5(C)(III)(2) Seite 90 below.

III. The withdrawal and limitation of rights conferred

Patents and their exercise can lead to consequences that society, or elements thereof, find unacceptable. Where the patent or the exploitation thereof faces opposition, two measures exist that enable a rectification: the revocation of the patent rights and the limitation of the rights conferred. The revocation, the original means of redress, provided for the cancellation of the patent. A less drastic means to bring about social acceptance was the limitation of the patent holder's rights. The latter remedy has evolved into two distinguishable rectification remedies: limited exceptions and compulsory licenses. The role these rectification measures play in ensuring a balanced intellectual property system is discussed below.

290 The ECJ stated the 'substance of a patent right lies essentially in according the inventor an exclusive right to put the product on the market for the first time'. See *Merck v. Primecrown*, C267/95 [1996] ECR I-6285 para 3.

291 Unless the text indicates the contrary. Cf. *Botha*, Statutory Interpretation (Juta Cape Town 1994) p. 63.

292 Cf. *de Carvalho*, The TRIPS Regime of Patent Rights (Kluwer The Hague 2002) p. 215.