

Adequate Remuneration for Crown Use of Patents: Some Guidance from Constitutional Property Law

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Much debate has taken place about finding a balance between access and innovation regarding patents over essential pharmaceuticals and related products. Broad arguments have been made for TRIPS waivers. By comparison, little attention has been spent on simply implementing existing tools effectively, namely compulsory licenses and State/Crown use of patents. This paper focuses on a narrow aspect, to find guidelines for adequate remuneration where a State uses a patent for a particular public purpose and a finite time. Some guidance may be found from intellectual property law of comparative jurisdictions in their treatment of compulsory licenses, but for the terms of Crown/State use, better guidance may be found in expropriation/takings law since the State uses the property. While this paper is written from a predominantly South African perspective, comparative jurisdictions considered include Australia, the USA and Germany.

On remuneration and terms for exploitation, section 165 of the Australian Patents Act (as amended in 2020) states that the authorised party invoking the Crown use provisions and the holder of the patent rights may agree upon them, but failing that, either party may apply for a prescribed court to make such determination. The terms for exploitation and remuneration must be determined by this court, determining just and reasonable remuneration, 'regarding the economic value of the exploitation of the invention and any other matter the court considers relevant.' The South African provisions also state that a court can determine the terms, which would necessarily include remuneration. Since the Constitution of the Republic of South Africa, 1996 is the country's highest law, a court must consider constitutional principles and hence the guidelines in the property clause (section 25) in determining adequate remuneration, especially since section 4 of the South African Patents Act (which facilitates State use) explicitly references public purposes, closely matching the wording of the property clause. If adequate remuneration (determined as guided by constitutional principles) is provided to the patent owner by the State, it would certainly be much harder to pinpoint any arbitrary deprivation or uncompensated expropriation during any subsequent constitutional property review following a determination made by the prescribed court.