Patent Working Requirements

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At the beginning of the 20th century, commentators referred to patent working requirements as the most contentious contemporary concept in patent law, and working requirements were at the center of discussions about the revisions of the Paris Convention. By the end of the 20th century working requirements attracted very little attention, and the TRIPS Agreement did not even expressly address working requirements. However, some TRIPS Agreement provisions do arguably relate to such requirements, and some commentators believe that the TRIPS Agreement prevents countries from maintaining such requirements. In 2000 a WTO dispute arose in which the existence of working requirements in national law was challenged; however, the dispute was settled with no decision to clarify the status of the working requirement post-TRIPs . Recently, the phenomenon of “patent trolls” (aka “non-practicing entities”) has sparked interest among patent experts in the concept of patent working requirements; some commentators have suggested that the introduction of a working requirement for U.S. patents within the United States would alleviate the problems caused by patent trolls.

This paper discusses the origins and the development of patent working requirements and examines the rationales for and purposes of the requirements. The paper points out the links and interactions between working requirements and the other components of patent systems and shows that all of the components, including working requirements, serve to calibrate the systems to the particular needs of individual countries. To the extent that international patent law harmonization continues to allow some leeway for countries to calibrate their national patent systems according to their national needs, and to the extent that international law does not prevent countries from maintaining working requirements, countries should be able to use working requirements as they create patent systems that best serve their needs.