

QUESTION 105

Experimental use as a defence to a claim of patent infringement

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Q105

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Resolution

1. The following matters should be taken into consideration in determining the position of experimental use in relation to the infringement of patent rights.
 - 1.1 Rights conferred by a patent include the right to forbid use by third parties of the patented invention.
 - 1.2 The patent system should provide tools for research and contribute to the promotion of technical progress.
 - 1.3 The patent literature is an important means for the dissemination of technical knowledge and should benefit the public as substantially as possible.
 - 1.4 Third parties should be able to do tests to evaluate the teaching of a patent and its validity.
 - 1.5 There must be a balance between the desire of third parties to test the commercial value of a patent and the fundamental principle that the patented invention cannot be used without authorization by the patentee.
2. AIPPI is in favor of the authorization of experimental use of a patented invention by the third parties because of the potential importance of such use for technical progress.
3. AIPPI considers that each country should except acts done for experimental purposes from the rights of the patentee and wishes that this principle be recognized and applied in accordance with the following rules.

- 3.1 Experimental use includes any use of the patented invention performed for academic purposes and having no commercial nature.
 - 3.2 Experimental use includes testing to evaluate the teaching of the patent and validity of the patent.
 - 3.3 Experimental use includes any use of the patented invention to an extent appropriate to experimentation (as opposed to commercial use) which is for the purpose of improving the invention or making an advance over the invention or finding an alternative to the invention, but not the commercial exploitation of the subject of any improvement or advance.
 - 3.4 Experimental use should be subject to the overriding principle that the use must involve work on the subject of the patent; use merely to obtain the advantage of the invention disclosed by the patent is not experimental use.
4. Use by a third party during patent life (including any extension of the patent) for the purpose of obtaining regulatory approval to sell even after patent expiry is not experimental use.

AIPPI observes that some countries have allowed testing by third parties to be conducted during patent life for the purposes of obtaining regulatory approval for sales to be made after patent expiry.

5. As experimental use is an exception to the rights of the patentee, this exception should be narrowly interpreted by the Courts.
6. The burden of proof of an experimental use exception should lie on the third parties which put forward such an exception.

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