

QUESTION 138 A

Confidentiality, disclosure and publication of data in information networks

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Resolution

The considerable development of exchanges by means of computerised networks for transmission of data, has led AIPPI to study some related legal problems concerning confidentiality, disclosure and the publication of data on such networks.

The variety of types of networks and of methods of communication on networks requires a technical analysis of the various cases to consider.

Confidentiality, disclosure and publication will then be considered in view of this preliminary analysis.

Networks and methods of communication

AIPPI observes that the word "network" refers to various kinds of networks on which various methods of communication may be used.

Networks

Some networks are closed networks because they belong to a single organization which fully controls them; other networks are shared by several organizations; public networks (like the Internet) are open to every individual either by direct access or through an access provider.

Network operators can use technical means to limit or control access to some information or services.

Users can also use technical means, such as data encryption or passwords, to increase the privacy of data sent through or stored on a network.

Methods of data communication

On each kind of network, various methods of communication can be used, namely:

- person to person (such as E-mail), either one-to-one or one-to-many messaging; and
- client/server, or remote information retrieval (such as World Wide Web), whereby a server computer offers information (data, pictures, sounds) to client computers; the server operator may decide to make accessible all or only part of the information stored on the server computer; he may also limit access to some information or to some people by technical means (including login and passwords).

The variety of networks and methods of communication requires therefore a specific approach of cases to consider.

However, some general rules can be set down.

Confidentiality

When confidential information is communicated to authorised recipients, the means or circumstances by which the information is communicated may affect the confidentiality as a matter of law.

Such confidentiality is one method for the protection of innovation, and its protection should be provided for by the law, as is recognised in Article 39.2 of TRIPS.

The transmission of confidential information by means of a computerised network for the transmission of data may result in an involuntary disclosure or misappropriation of the information. Such a transmission may cause the loss of protection of confidentiality at law.

Of course, the use of methods of communication, which by virtue of their technical specification imply free access of third parties to the information (such as an open site on the World Wide Web), is incompatible with maintaining confidentiality or secrecy.

In fact, even in the case of communication from person to person (such as E-mail), such networks do not always offer effective protection against the misappropriation or the inadvertent disclosure of data, which the persons concerned wish to keep confidential. For this reason, AIPPI recommends that institutions, businesses and advisers take all reasonable steps, depending on the nature of the information transmitted and its degree of sensitivity, to ensure and preserve its confidential or secret nature when transmitted by means of a computerised network. AIPPI further recommends that the confidentiality of any information with respect to which reasonable steps have been taken shall be presumed to have been preserved.

Such steps may include:

- the use of networks of which the technical specifications and the contractual obligations subscribed by the network operators provide satisfactory guarantees of confidentiality; and
- the use of encryption (where not prohibited by legislation).

AIPPI considers that legislation should not prohibit, or restrict in a manner jeopardizing the legitimate interests of Intellectual Property owners, encryption of information for the purpose of protecting its confidentiality when transmitted in computerised networks.

Disclosure

Under certain legal systems, the disclosure of an item of information may prevent the owner of the information from obtaining rights which require registration, such as patent or design rights. This is the case for patents in most countries (subject in certain cases to a grace period).

Under the legislation of most countries, information will be deemed to have been disclosed where it has been made available to the public, whether or not there has been actual access.

AIPPI considers that the mere fact of transmitting information by means of a computerised network will not result in the information becoming available to the public, and in consequence being disclosed. Account should be taken of the level of accessibility to the network, which is determined by, inter alia:

- the technical characteristics of the network;
- the method of communication; and
- the access and security provisions.

For example, although an item of information posted on a World Wide Web site is, *prima facie*, available to the public, such information will not be actually available when a secure password is needed to access it; on the other hand, although generally a person to person transmission does not make the information available, such transmissions, when addressed to a group of persons without a confidentiality requirement, may constitute a disclosure.

However, in order to determine whether the information has been rendered public, the traditional legal rules provide relevant criteria.

In view of the increased necessity of using the new means of communication, and the increased pressure to publish earlier, the introduction of a general grace period preceeding the Paris Convention priority should be reconsidered along the lines previously advocated by AIPPI (in Q 75).

Publication

The notion of publication as a rule is differently understood and defined under the copyright law, on the one hand, and other Intellectual Property laws on the other hand.

"Publication" under patent law is generally given the meaning of making information available to the public beyond the control of its originators. By contrast, this notion under copyright law has precise but different meanings, depending on applicable international conventions and national laws.

The notion of "publication" other than in the area of copyright does not present specific problems related to the use of information networks. The situation under copyright law, on the other hand, causes numerous problems, which are presently under consideration by national and international bodies. AIPPI expresses its hope that these problems will eventually be solved to the benefit of authors and copyright owners.
