



## **Guidelines for National and Regional Group Reports**

The majority of the National and Regional Groups follows the Guidelines for the arrangement of their Reports and thereby contributes to a quicker and cheaper printing of the Summary Yearbooks. We are most grateful for this support and would like to draw your attention to following Guidelines:

- 1) The National and Regional Groups are responsible for the contents, spelling and trilingual summaries in their Reports. The texts will normally be printed without further correction.  
Please avoid sending us full translations of the Group Reports. Summaries in the two other languages will be sufficient.
- 2) Drafts cannot be accepted. Please only send final versions.
- 3) Please deliver your Reports by e-mail only. Our address is: [mail@aippi.org](mailto:mail@aippi.org). If you cannot provide the Reports by e-mail please contact us.
- 4) Please rewrite/include the questions in your Reports.
- 5) Please try to stick to a clear and simple presentation of the Group Reports without too many sub-paragraphs.
- 6) Please avoid too many and long footnotes.
- 7) We shall not be able to publish extracts of National Laws as Annexes. If necessary please make a reference to the laws in questions (websites).

For further questions concerning the presentation of Group Reports you are kindly invited to contact the AIPPI General Secretariat at [mail@aippi.org](mailto:mail@aippi.org).

Please make sure that your Reports are sent before **February 1, 2005**.

AIPPI General Secretariat, Zurich

## **Working Guidelines**

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### **Question Q187**

#### **Limitations on exclusive IP Rights by competition law**

The Executive Committee of the Congress of Geneva decided to put on the agenda of work of the AIPPI the examination of the limitations on the exclusive rights of intellectual property by the competition law.

This question is not new for AIPPI.

#### **Previous work of AIPPI**

On the occasion of the Congress of Berlin in 1963, the AIPPI studied Question Q37B relating to the incidence on the rights of industrial property of the national or international provisions guaranteeing free competition.

And the Congress of Berlin adopted a position of principle under the terms of which AIPPI considered that the normal exercise of the patent rights was legitimate and was not to be hampered by the regulations designed to ensure freedom of competition.

The Congress of Berlin also expressed the conviction that the protection of industrial property is an essential means of furthering progress, since the exclusive rights of industrial property stimulate research and encourage the investments necessary to technical development.

At the same time, the Congress of Berlin decided to maintain this Question on the agenda of work of AIPPI in order to follow its development.

And it is in this context that Question Q37B was again discussed during the Congress of San Francisco of May 1975.

At the time of this Congress, AIPPI adopted a Resolution, which reaffirms that industrial property rights and the rules relating to economic freedom are not in conflict, but on the contrary jointly serve economic progress and the public interest.

In addition, AIPPI considered that the regulation of economic freedom should not impair the exercise of the industrial property rights, if this exercise remains within the normal framework of the object and the ends of these rights.

Thus, twice, AIPPI confirmed compatibility between industrial property rights and the principles of freedom of competition, in particular with regard to the effect that the two systems of legal provisions have on economic progress and consequently on the wellbeing of the society.

Finally, one must recall that within the framework of the study of the Question Q157 AIPPI examined the relationship existing between the standards and the patents and decided in favour of a system in which it should be possible to obtain a licence by every interested party under reasonable and non discriminatory conditions.

AIPPI however, recognised in the Resolution adopted at the time of the Congress of Melbourne, that in absence of such a licence, the patent concerned could not be used and the standard was to be modified or withdrawn.

## **Discussion**

The context in which this Question was put on the Agenda of the Executive Committee of Berlin of 2005 is not very different from that in which Question Q37B was already discussed by AIPPI.

At present indeed, there is a putting into question the existence of the industrial property rights in particular at the time of the determination of the field of application of these rights.

The debates existing in particular in Europe about protection of software by patents, the question of the possible limitation of the exclusive rights of the patents in the field of drugs discussed during the meetings of the WTO, the question of protection by designs and models of the detached elements of the automobile bodies or finally the litigation in particular related to the possible abuse of the dominant position by the use of the rules guaranteeing the exclusive rights on software in the field of data processing gave place to a discussion on the utility of the existence of intellectual property exclusive rights.

In addition, one can note the appearance of new phenomena such as the considerable increase in the number of delivered patents or registered trademarks.

This situation exposes the enterprises to additional costs of research and analysis of the rights of the third parties, without a guarantee of legal safety being able to be obtained.

Thus arises the question of the economic utility of a system, which supports obtaining protection, without guaranteeing, at the same time, that this protection is granted by observing the strict conditions of the deliverance of these rights.

One must finally note that certain provisions of the Union of Paris Convention admit the legality of limitations to exclusive substantive patent rights by envisaging in particular in art A.4 the mechanism of compulsory licence.

In the same way articles 30 and 31 of the treaty TRIPS contain the provisions in virtue of which it is possible, under certain conditions, to limit the exclusive rights granted by patents.

The same principle is expressed in article 13 of the treaty TRIPS about the copyright.

There thus exists at the international level a legal base for a possible limitation of the exclusive patent rights or of protection conferred by the copyright under certain conditions.

Lastly, the recent decision of the European Court of Justice of April 29 2004, (IMS Health GmbH & Co.ONG C / NDC Health GmbH & Co.KG, aff.C-418/01), rules on the question of a possible grant of licence to use a format of data. And it should be recalled that the request for granting of such a licence was justified by the rules of competition.

In this case the Court specified the circumstances which can lead to the granting of such a licence.

It is thus about a topical question.

It is thus desirable that AIPPI discusses the influence that the rules guaranteeing the freedom of competition can have on the existence and the exercise of the exclusive rights of intellectual property.

And it is advisable to observe that the rights of intellectual property are relatively recent.

It is thus not abnormal that its evolution continues and that it is adapted to contemporary needs.

The Working Guidelines in the first part are devoted to the study of the existing current substantive law in the various countries.

And in its second part, the Working Guidelines offer the consideration of the possible adjustments of the existing rules.

It however is specified that the present question relates to neither the problem of the exhaustion of rights, nor the question of the validity of the clauses of licence agreements and the Groups must thus in their answers endeavour not to treat these aspects of the problem.

## **Questions**

### **I) STATE OF THE SUBSTANTIVE LAW**

The Groups are invited to describe the state of the substantive law in the field of the limitations of the exclusive intellectual property rights in particular with regard to the impact the principles governing the freedom of competition can have on the rules granting the exclusiveness of the rights.

This description must relate to patents, copyright, designs, models and trademarks.

- 1) *The Groups are requested to indicate if the law of their country knows rules governing in general the relationship between the rules of competition and the intellectual property rights.*

- 2) *The Groups are invited to indicate if previous to the adoption of the TRIPS, the legislation of their country knew the exceptions in particular founded on article A.4 of the Paris Union Convention, to the exclusive rights of patents, designs and models or copyright.*

*The Groups must also describe the conditions and the effects of these exceptions.*

*Finally, do the Groups have to indicate the justification of these exceptions and in particular if these exceptions were justified by requirements of the freedom of competition?*

- 3) *The Groups are invited to indicate if articles 13, 30 and 31 of the treaty TRIPS gave place to the establishment of legal rules defining the exceptions being able to be brought to exclusive rights of copyright, patent, designs.*

*The Groups should in this case indicate the conditions for application of these exceptions and their consequences.*

*And the Groups should indicate the justification of these exceptions and in particular if these exceptions were justified by requirements of the freedom of competition.*

- 4) *The Groups are invited to indicate if such limitations apply as regards to trademarks and which are the conditions, the consequences and the possible justification.*

- 5) *The Groups are invited to inform if the existence of intellectual property rights constitutes a justification to some practise regarded in general as anti-competing, such as the refusal to sell or others?*

- 6) *The Groups are invited to indicate if some of the attributes of the intellectual property rights, such as the duration of these rights, are considered in their country as raising problems from the point of view of the exercise of the freedom of competition.*

- 7) *The Groups are finally invited to formulate any other observation concerning the relationship which may exist in the substantive law of their country between the exclusive rights of the intellectual property and the rules relating to the respect of the freedom of competition.*

### **II) PROPOSALS FOR THE FUTURE**

- 1) *The Groups are invited to indicate if any modifications of the exclusive rights of patent rights are desirable in aim to reinforce the freedom of competition.*

*On which attributes of the exclusive rights of intellectual property these modifications should carry (duration, exclusiveness, specific evidence etc...)?*

*How then it would be advisable to preserve the monopoly resulting from the exclusive rights of intellectual property?*

- 2) *The Groups are also invited to wonder about the possible application of the concept of compulsory licence, licence ex-officio or improvement licence as regards patents, copyright, designs and models or the trademarks.*
- 3) *The Groups are requested to also formulate any other suggestion concerning the Question.*

**Note:**

It will be helpful and appreciated if the Groups follow the order of the questions in their Reports and use the questions and numbers for each answer.