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GROUPS REPORTS Q 134:
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS – TRIPS
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The Editor
XXXVII\textsuperscript{th} CONGRESS OF AIPPI
MAY 24–29, 1998

QUESTION Q 134:
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS – TRIPS

XXXVII\textsuperscript{e} CONGRÈS DE L'AIPPI
24–29 MAI 1998

QUESTION Q 134:
MISE EN ŒUVRE DES DROITS DE PROPRIÉTE INTELLECTUELLE – TRIPS

XXXVII. KONGRESS DER AIPPI
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FRAGE Q 134
DURCHSETZUNG VON RECHTEN DES GEISTIGEN EIGENTUMS TRIPS
Question Q 134  
(Q 134A and 134B)

Enforcement of intellectual property rights - TRIPS

The Committee Q 134 had been divided into two Sub-Committees:

- Q 134A Enforcement of intellectual property rights - infringement and liability
- Q 134B Enforcement of intellectual property rights - procedure and sanctions

The National and Regional Groups submitted very complete Reports for the attention of the Executive Committee Meeting in Vienna. The Summary Report came to the conclusion that generally speaking the legislation of the countries covered by the Reports submitted is in harmony with the requirements of TRIPS.

The Summary Report suggested, however, the study of a number of additional questions in view of a possible effort of harmonization beyond the minimum requirements of TRIPS.

The two Sub-Committees Q 134A and Q 134B presented draft Resolutions at the Executive Committee Meeting in Vienna.

The discussion in the Plenary Sessions revealed some serious differences and the proposed Resolutions were only adopted in part.

The continuation of the study was reported to the Congress in Rio de Janeiro.

1. The two Sub-Committees Q 134A and Q 134B have been merged into one single Committee Q 134 under the Chairmanship of Joan Clark.

2. The questions which were not resolved in Vienna will be examined in Rio de Janeiro in 1998.

   See the list of seven questions annexed hereto: Annex to Question Q 134.

3. As the Groups have submitted Reports on all the questions no supplementary Reports will be required (Groups that so far have filed no Report may - of course - still do so until September 30, 1997).

   The Committee will base its preparation for the Congress of Rio de Janeiro:

   - on the Group Reports submitted to the Executive Committee Meeting in Vienna under Q 134A and Q 134B
   - additional Group Reports filed until September 30, 1997 under Q 134
- the draft Resolutions presented in Vienna
- the Minutes of discussions during the Working and Plenary Sessions of the Executive Committee Meeting of Vienna (4th and 5th Working Session of April 21 and Plenary Session of April 22, 1997).

Annex to Question Q 134

Questions to be studied in Rio de Janeiro:

1. Damages for infringement prior to the assignment of rights.

   The first alinea was adopted:

   "With regard to the right of an assignee to take action with respect to acts done prior to the assignment of a patent, the question of compensation for infringement committed prior to the assignment depends on the terms of the contract between the assignor and the assignee to the extent allowed by applicable law."

   The second alinea was sent back to the Committee for further consideration in the discussion in the Plenary Session:

   "In the absence of any stipulation in the contract of assignment as to compensation for infringement prior to the assignment, the right to compensation remains with the assignor."

   The Committee will have to form an opinion on that point.

2. Is it possible to determine a criterion which permits to distinguish between the legally permitted repair of a patented product and the reproduction of such a product which constitutes an act of infringement?

   It is accepted that this is a question which will primarily have to be answered by National Courts.

   But it would be of high value if the Committee could propose a criterion which would generally be accepted.

3. Definition of the product infringing a patent because it has been produced under a patented process.

   The Committee will be able to base its study on the previous work of the Subcommittee and on the discussion at the Sessions of the Executive Committee Meeting in Vienna.
The Sub-Committee in Vienna has very ably outlined the problem raised by this question and the draft Resolution which was not adopted in Vienna may well serve as a useful basis for the work in Rio de Janeiro.

4. Does the reproduction of a sign which constitutes a trademark with the intention of commercial exploitation constitute an act of infringement in the absence of actual use?

5. Does the application of a sign constituting a trademark on a product earmarked for export constitute an act of infringement?

6. Damages for the infringement of patents and trademarks.

In accordance with the Questionnaire (letters a) to j)) listed in the Annex to the Resolution Q 134B of Vienna.

7. Is it desirable that the intentional infringement of a patent constitutes a criminal act in addition to the civil remedies available?

On this point the discussion at the 5th Working Session in Vienna has revealed reservations of several Groups with respect to the notion as such that patent infringements are considered as criminal acts.

Without disregarding the risk of abuse inherent in criminal proceedings in this field the Committee should study in particular the following questions:

- Why should the patent be the only intellectual property right, the infringement of which is not subjected to criminal sanctions?

- The criminal procedure may in certain cases help to obtain evidence which could not be procured in civil procedure.

- The enforcement of cease and desist orders requires an element of coercion which under most jurisdictions only criminal law can provide appropriately.

The Committee should use as a basis for all these questions the Group Reports, the Summary Report, the discussions at the Sessions of the Executive Committee Meeting in Vienna and the parts of draft Resolutions Q 134A and Q 134B not adopted.

Mise en œuvre des droits de propriété intellectuelle - TRIPS

La Commission Q 134 a été divisée en deux sous-commissions:

- **Q 134A** Mise en œuvre des droits de propriété intellectuelle - Violation et responsabilité
- **Q 134B** Mise en œuvre des droits de propriété intellectuelle - Procédure et sanctions

Les Groupes nationaux et régionaux ont soumis des rapports très complets au Comité Exécutif de Vienne. Le Rapport de synthèse a constaté que, de manière générale, les législations des pays faisant l'objet de ces rapports étaient en harmonie avec les exigences des TRIPS.

Le Rapport de synthèse suggère toutefois d'étudier la question de savoir si un certain nombre de questions supplémentaires ne pouvaient pas aboutir à une harmonisation dépassant les exigences minimales des TRIPS.

Les deux sous-commissions Q 134A et Q 134B ont présenté des projets de Résolutions au Comité Exécutif de Vienne.

Les discussions aux Séances plénières ont fait apparaître quelques sérieuses divergences et les Résolutions proposées n'ont été adoptées que partiellement.

La poursuite de l'étude a été renvoyée au Congrès de Rio de Janeiro.

1. Les deux sous-commissions Q 134A et Q 134B ont été réunies dans une seule Commission Q 134, sous la Présidence de Joan CLARK.

2. Les questions qui n'ont pas été résolues à Vienne seront examinées à Rio de Janeiro.

Voir la liste des sept questions citées dans l'Annexe à la Question Q 134.

3. Etant donné que les Groupes ont présenté des rapports sur toutes les questions, aucun rapport supplémentaire n'est nécessaire (les Groupes qui n'ont pas présenté de rapports jusqu'à ce jour peuvent bien entendu encore les envoyer jusqu'au 30 septembre 1997).

Pour le Congrès de Rio de Janeiro, la Commission basera ses préparatifs sur:

- les Rapports des Groupes soumis au Comité Exécutif de Vienne concernant les questions Q 134A et Q 134B
les Rapports supplémentaires des Groupes parvenus jusqu’au 30 septembre 1997

les projets de Résolutions présentés à Vienne


Annexe à la Question Q 134

Questions à étudier au Congrès de Rio de Janeiro:

1. Dommages-intérêts pour une contrefaçon antérieure à la cession de droits.

L’alinéa premier a été adopté:

"Eu égard au droit d’un cessionnaire d’agir à l’encontre d’actes commis avant la cession d’un brevet, la question du dédommagement pour une contrefaçon commise avant la cession dépend des clauses du contrat entre le cédant et le cessionnaire, dans la limite de ce qui est autorisé par la loi applicable."

L’alinéa 2 a été renvoyé au Comité pour une nouvelle étude lors de la discussion de la Séance Plénière:

"En l’absence, dans l’acte de cession, de toute disposition relative au dédommagement pour une contrefaçon antérieure à la cession, le droit du dédommagement continue de bénéficier au cédant."

La Commission devra se former une opinion sur ce point.

2. Est-il possible de fixer un critère permettant de distinguer entre la réparation licite d’un produit breveté et la reproduction d’un tel produit constituant un acte de contrefaçon?

Il est admis que cette question doit être tranchée en premier lieu par les Tribunaux nationaux.

Il serait néanmoins très souhaitable que le Comité puisse proposer un critère qui pourrait être accepté généralement.

3. Définition d’un produit contrefaisant un brevet du fait qu’il a été obtenu directement par un procédé breveté.
La Commission pourra fonder son étude sur les travaux précédents de la Sous-Commission et sur la discussion de la Séance plénière du Comité Exécutif de Vienne.

A Vienne, la Sous-Commission a bien mis en évidence le problème soulevé par cette question et le projet de Résolution qui n'a pas été adopté à Vienne pourrait servir de base utile aux travaux de la Commission à Rio de Janeiro.

4. La reproduction du signe constituant la marque dans l'intention d'une exploitation commerciale constitue-t-elle un acte de contrefaçon en dehors d'un usage effectif?

5. L'application du signe constituant la marque sur un produit destiné à l'exportation constitue-t-elle un acte de contrefaçon?

6. Dommages-intérêts pour la contrefaçon de brevets ou de marques.

Conformément au Questionnaire (lettres a) à j)) figurant en annexe à la Résolution Q 134B du Comité Exécutif de Vienne.

7. Est-il souhaitable qu'en plus des mesures civiles disponibles, la contrefaçon intentionnelle d'un brevet constitue aussi un acte pénal?

Sur ce point, la discussion lors de la 5e Séance de Travail à Vienne a fait apparaître les réserves de plusieurs Groupes sur le principe même du caractère pénal de la contrefaçon de brevets.

Sans méconnaître les risques d'abus auxquels peuvent donner lieu des poursuites pénales dans ce domaine, la Commission devrait se pencher notamment sur les deux questions suivantes:

- Pourquoi le brevet serait-il le seul titre de propriété intellectuelle dont la contrefaçon ne serait pas réprimée par des sanctions pénales?

- Dans certains cas, la procédure pénale peut contribuer à obtenir des moyens de preuve qu'une procédure civile ne pourrait pas fournir.

- La mise en œuvre d'injonctions en cessation et en renoncement exige un élément de coercion qui, dans la plupart des jurisprudences, ne peut être fourni de manière appropriée que par la loi pénale.

Pour toutes ces questions, la Commission devrait se référer aux Rapports des Groupes, au Rapport de synthèse, aux discussions de la Séance du Comité Exécutif de Vienne et aux projets de Résolution Q 134A et Q 134B non adoptés.

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Annuaire 1997/III, p. 323
Frage Q 134  
(Q 134A und 134B)

Durchsetzung von Rechten des geistigen Eigentums - TRIPS

Der Ausschuss Q 134 wurde in zwei Unterausschüsse aufgeteilt:

- **Q 134A** Durchsetzung von Rechten des geistigen Eigentums - Verletzung und Haftung

- **Q 134B** Durchsetzung von Rechten des geistigen Eigentums - Verfahren und Sanktionen

Die Landes- und Regionalgruppen haben zuhanden des Geschäftsführenden Ausschusses in Wien äusserst umfassende Berichte abgegeben. Der Zusammenfassende Bericht kam zum Schluss, dass im allgemeinen die Gesetzgebung der Länder, die durch die abgegebenen Berichte abgedeckt wurden, in Einklang steht mit den Anforderungen von TRIPS.

Der Zusammenfassende Bericht schlägt jedoch das Studium einer Anzahl zusätzlicher Fragen vor im Hinblick auf einen möglichen Vorstoß zur Harmonisierung über die Minimalanforderungen von TRIPS hinaus.

Die beiden Unterausschüsse Q 134A und Q 134B haben an der Tagung des Geschäftsführenden Ausschusses in Wien Entwürfe zu Entschlussungen vorgelegt.

Die Diskussion in der Vollversammlung brachte zum Ausdruck, dass einige ernsthafte Meinungsverschiedenheiten bestehen und die vorgeschlagenen Entschlussungen wurden daher nur zum Teil angenommen.

Die Fortsetzung des Studiums wurde auf den Kongress in Rio de Janeiro vertagt.

1. Die beiden Unterausschüsse Q 134A und Q 134B wurden unter dem Vorsitz von Frau Joan CLARK in einem einzigen Ausschuss Q 134 vereinigt.


   Siehe beiliegende Liste mit sieben Fragen: Anlage zu Frage Q 134.

Der Ausschuss wird seine Vorbereitungen für den Kongress in Rio de Janeiro abstellen auf:

- die Gruppenberichte zu Q 134A und Q 134B, die dem Geschäftsführenden Ausschuss in Wien vorgelegt wurden
- zusätzliche Gruppenberichte unter Q 134, die bis zum 30. September 1997 abgegeben werden
- die in Wien vorgelegten Entwürfe zu Entschliessungen

Anlage zu Frage Q 134

Fragen zum Studium in Rio de Janeiro:

1. Schadenersatz für Verletzung vor Rechtsübertragung.

Der erste Teil des Absatzes wurde angenommen:

"Hinsichtlich des Rechts eines Erwerbers, Ansprüche für Patentverletzungen geltend zu machen für die Zeit vor Erwerb des Patentes, hängt die Frage des Schadenersatzes für Verletzungen vor Übertragung des Patents von den Vertragsbestimmungen zwischen Übertrager und Erwerber ab nach Massgabe dessen, was das anwendbare Recht gestattet."

Der zweite Teil des Absatzes wurde anlässlich der Diskussion in der Vollversammlung an den Ausschuss zur weiteren Bearbeitung zurückgewiesen:

"Bei Fehlen jeglicher Angaben betreffend Schadenersatz für Verletzungen vor Übertragung in der Übertragungserklärung, bleibt das Recht auf Schadenersatz beim Übertrager."

Der Ausschuss wird zu diesem Punkt Stellung nehmen müssen.

2. Ist es möglich, ein Kriterium zu bestimmen, welches erlaubt, zwischen einer rechtmässigen Reparatur eines patentierten Produkts und der Reproduktion eines solchen Produkts zu unterscheiden, welche einen Akt der Patentverletzung darstellt?

Es ist unbestritten, dass es sich dabei um eine Frage handelt, die in erster Linie von den nationalen Gerichten beantwortet werden muss.

Es wäre allerdings von grossem Nutzen, wenn der Ausschuss ein Kriterium bestimmen könnte, das allgemein akzeptiert würde.

Der Ausschuss wird sein Studium auf die Vorarbeiten des Unterausschusses und die Diskussion in den Sitzungen des Geschäftsführenden Ausschusses abstützen können.

Der Unterausschuss hat in Wien das durch diese Frage aufgeworfene Problem sehr anschaulich erläutert und der Entwurf zu einer Entschließung, welche in Wien nicht angenommen wurde, könnte als gute Grundlage für die Arbeiten in Rio de Janeiro dienen.

4. Handelt es sich bei der Vervielfältigung eines Zeichens, welches eine Marke darstellt, mit der Absicht wirtschaftlicher Verwendung um eine Verletzungshandlung, wenn eine tatsächliche Nutzung nicht vorliegt?

5. Bedeutet das Anbringen eines Zeichens, welches eine Marke darstellt, auf ein für den Export bestimmtes Produkt eine Verletzungshandlung?


In Übereinstimmung mit dem Fragebogen (Ziffern a) bis j)), der im Anhang zur Entschließung Q 134B von Wien aufgeführt ist.

7. Ist es wünschenswert, dass die vorsätzliche Verletzung eines Patents - neben den zivilrechtlichen Abhilfen - einen Straftatbestand darstellt?

Zu diesem Punkt wurden anlässlich der 5. Arbeitssitzung in Wien von verschiedenen Gruppen Vorbehalte angebracht mit Bezug auf die Vorstellung an sich, dass Patentverletzungen als Straftat angesehen werden.

Ohne das Risiko des Missbrauchs zu missachten, das den strafrechtlichen Verfahren auf diesem Gebiet anhaftet, sollte der Ausschuss insbesondere die folgenden Fragen behandeln:

- Weshalb sollte das Patent das einzige Schutzrecht des gewerblichen Rechtsschutzes sein, dessen Verletzung nicht strafrechtlichen Massnahmen unterliegt.

- Das strafrechtliche Verfahren könnte in gewissen Fällen dazu beitragen, Beweise zu sichern, die in einem zivilrechtlichen Verfahren nicht erbracht werden könnten.

- Die Durchsetzung von Unterlassungsverfügungen bedingt Zwangsmassnahmen, die in den meisten Rechtsordnungen nur im Strafrecht angemessen vorgesehen sind.

Jahrbuch 1997/III, S. 339
Der Ausschuss sollte als Grundlage für alle diese Fragen die Gruppenberichte, den Zusammenfassenden Bericht, die Diskussionen in den Sitzungen des Geschäftsführenden Ausschusses in Wien und die Abschnitte der Entwürfe zu den Entschließungen Q 134A und Q 134B, die in Wien nicht angenommen wurden, berücksichtigen.
"In the absence of any stipulation in the contract of assignment as to compensation for infringement prior to the assignment, the right to compensation remains with the assignor."

This reflects the position under Australian law. A right to take action for infringement of a patent is known as a "chose in action". A chose in action is regarded as personal incorporeal property which is capable of assignment or transfer in the same way as other property. Accordingly, when a patent is assigned, it is a matter for the assignor and assignee to negotiate whether the assignment will include all rights of action for past infringements together with the patent. If the rights of action for past infringement are not assigned, they will remain with the assignor. The Australian Group favours the retention of this position.

Is it possible to determine a criterion which permits to distinguish between the legally permitted repair of a patented product and the reproduction of such a product which constitutes an act of infringement?

Under English law (and, we would submit, Australian law), a purchaser of a patented article may under an express or implied licence from the patentee conduct repairs to a product without infringing that patent.

There is, however, a distinction between repair of an article which "prolongs the life of a licensed article" and making a new article under the cover of repair. The United Kingdom Court of Appeal in Solar Thomson Engineering Co Ltd v Barton [1977] RPC 537 held that the court must determine, as a matter of fact, whether the work done on a patented article is such that a new article has been created, or an old article repaired. Determining whether work done on a patented article amounts to infringement is one of degree which depends on the nature of the patented article and the character of the work carried out on it. The comparative value of the replacement and the rest of the patented product and the comparative costs of repair and making the whole product may also assist in determining whether an infringement has occurred. Nevertheless, if what has been done to the product is truly a repair, then whether or not such work was economic or not will be irrelevant.
Although there is no Australian court decision directly on point, the Solar Thomson case has been applied in Australia in registered design and copyright matters. It is likely that a court in Australia would consider the Solar Thomson case to be of great persuasive value if the question of whether work done to a patented article amounted to a repair or infringed the subject patent arose.

It should also be noted that section 146(d) of the Patents Act 1990 (Cth) permits a patentee or exclusive licensee to reserve the right to supply new parts of the patented product that are required to put or keep it in repair.

3. Definition of the product infringing a patent because it has been produced under a patented process.

The applicable principle under Australian law is simply stated but can be difficult to apply in practice. Generally, the contribution of the patented process to the finished article must not be unimportant or trifling. However, where the patented process or device is only one of the steps necessary to produce a finished article, it may be difficult to say whether the finished product has resulted from the use of the patented method or process so that the supply or sale of the product will be an infringement.

To address some of these practical difficulties, section 121A of the Patents Act provides as follows:

"(1) This section applies only to a patent for a process for obtaining a product.

(2) If, in proceedings for infringement of a patent started by the patentee or the exclusive licensee:

   (a) the defendant alleges that he or she has used a process different from the patented process to obtain a product ("defendant's product") identical to the product obtained by the patented process; and

   (b) the court is satisfied that:

      (i) it is very likely that the defendant's product was made by the patented process; and

      (ii) the patentee or exclusive licensee has taken reasonable steps to find out the process actually used by the defendant but has not been able to do so;

     then, in the absence of proof to the contrary the onus for which is on the defendant, the defendant's product is to be taken to have been obtained by the patented process."

This provision means that although the patentee (or exclusive licensee) must adduce sufficient evidence to show that it is very likely that the infringer has used the
patented process and that reasonable steps have been taken by the patentee to discover the process actually used by the infringer, unless the infringer can prove that it has not used the patented process, it is presumed that the infringer has in fact used the patentee's process.

4. *Does the reproduction of a sign which constitutes a trade mark with the intention of commercial exploitation constitute an act of infringement in the absence of actual use?*

Under section 120 of the Trade Marks Act, a person infringes a registered trade mark if he or she uses as a trade mark, a sign that is substantially identical with or deceptively similar to the registered trade mark, in relation to the goods or services for which the trade mark is registered. There are other instances of infringement under the Act. For example:

- use as a trade mark, of a sign which is substantially identical with, or deceptively similar to, a registered trade mark in relation to
  - goods or services of the same description as the goods or services in respect of which the trade mark is registered; or
  - goods or services that are closely related to registered goods or services; and

- use as a trade mark, of a sign which is substantially identical with, or deceptively similar to, a registered trade mark that is well known in Australia, in relation to unrelated goods or services if, because the trade mark is well known, the sign would be likely to be taken to indicate a connection between the unrelated goods and the owner of the registered trade mark and the interests of the owner are likely to be adversely affected.

The key elements in establishing infringement are:

- use as a trade mark;

- of a sign that is "substantially identical with" or "deceptively similar to"; and

- in relation to goods and services in respect of which the trade mark is registered.

The application of a sign to goods with the intention of commercial exploitation will constitute an act of infringement if these elements are made out. The primary issue will centre on whether the application of a sign constitutes "use as a trade mark".

Section 7 of the *Trade Marks Act* provides that "use of the trade mark in relation to goods, means use of the trade mark upon, or in physical or other relation to, the goods (including second hand goods). A "trade mark" is defined as a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade. Accordingly, if a person uses a sign as a mark which is used or
proposed to be used in relation to goods or services, and this sign is substantially identical with or deceptively similar to a registered trade mark, this will constitute an act of infringement. Whether or not the product on which the trade mark is used is ultimately exploited commercially will not affect a finding of infringement, although it will affect any award of damages or account of profits.

When determining whether there has been "use as a trade mark", the courts will consider factors such as:

- the purpose and nature of the use in the light of a usage common in the relevant trade;

- the way in which the word has been displayed in relation to the goods i.e. whether the sign is used to invite persons to purchase the goods which are to be distinguished from the goods of other traders because they are described by the sign; and

- whether the sign is being used in a descriptive sense.

Assuming that the application of the sign to the goods is intended to distinguish the product and is not used in a merely descriptive sense, it is likely that such application would amount to an act of infringement, even if commercial exploitation has not yet occurred.

In addition, the reproduction of a sign which constitutes a trade mark may be an offence under the Trade Marks Act. Under section 146(1) of the Act, a person is guilty of an offence if, the person falsely applies a registered trade mark to goods or services that are being, or are to be, dealt with or provided in the course of trade, knowing that the trade mark is registered or reckless of whether or not the trade mark is registered.

Section 146(2) provides that a person "falsely applies a registered trade mark" to goods if the person applies the trade mark or a sign substantially identical with it to the goods without the permission of the registered owner or an authorised user of the mark and without being required or authorised to do so by law.

Accordingly, the reproduction of a sign constituting a trade mark with the intention of commercial exploitation may amount to an offence under the Trade Marks Act. A person guilty of an offence under the Act is punishable on conviction by either or both of a fine not exceeding AU$50,000, or imprisonment for a period not exceeding two years. A body corporate convicted of an offence may be subjected to a fine of up to AU$250,000. Further, company directors may be liable on an ancillary basis for offences committed by their company.

5. Does the application of a sign constituting a trade mark on a product earmarked for export constitute an infringement?

The application of a sign constituting a trade mark to a product earmarked for export will constitute an act of infringement if it can be said that the person applying
the sign is using the sign as a trade mark and the sign is substantially identical with or deceptively similar to the trade mark in relation to goods or services in respect of which the trade mark is registered. If the elements of infringement are made out and the sign is applied in Australia, the act of infringement will have occurred in Australia and will be actionable under the Act, notwithstanding that the product will be sold overseas.

Again, the issue will centre on whether the application of a sign will constitute "use as a trade mark". Assuming that the application of the sign to a product earmarked for export is intended to distinguish the product then it is likely that the person applying the sign will be found to be "using the trade mark" in the relevant sense. This is supported by section 228(1) of the Act which provides:

If:

(a) a trade mark is applied in Australia:

(i) to, or in relation to goods that are to be exported from Australia (export goods); or

(ii) in relation to services that are to be exported from Australia (export services); or

(b) any other act is done in Australia to export goods or export services which, if done in relation to goods or services to be dealt with or provided in the course of trade in Australia, would constitute a use of the trade mark in Australia;

the application of the trade mark or the other act is taken, for the purposes of this Act, to constitute use of the trade mark in relation to the export goods or export services.

6. **Damages for the infringement of patents and trade marks.**

*The question of compensation of injury resulting from the infringement of patents and trade marks raises many questions such as:*

(a) **Is it desirable that the patentee or trade mark owner has the right to choose between (or claim both) compensation of the injury proven and the unlawful profits obtained by the defendant. If (only) a choice between these two possibilities would be desirable at what time and on the basis of which information does the plaintiff have to make his choice?**

In Australia, a person who has had patent or trade mark rights infringed must choose between compensation (damages) or unlawful profits obtained by the defendant (an account of profits). Damages are regarded as a compensatory remedy for loss suffered by the applicant as a result of the respondent's contravention of the applicant's right. An account of profits, on the other hand, requires the respon-
dent to give up to the applicant the profits made by the respondent from the unau-
thorised use of the applicant's property.

The calculations associated with assessing damages or taking an account of profits may result in quite different sums, as depending on the circumstances of a particular case, the applicant's loss may be less than the respondent's profits, and vice versa.

As a practical matter, the taking of an account of profits in Australia is often seen as a less efficacious remedy than damages, as the courts permit general overhead expenses to be taken into account in taking an account. Apportioning general overhead expenses to the particular profits made by a respondent, for example by the sale of an infringing item, can be time-consuming and may permit a respondent to substantially reduce the amount which must be paid to the applicant.

The election between damages or an account of profits does not have to be made by an applicant until liability has been determined. If it is found that a respondent has infringed an applicant's patent or trade mark rights, the applicant must then make an election between the remedies. The applicant will usually have knowledge of the extent of the respondent's infringing activities (through the discovery process) and some idea of the gain which the respondent has made as a result of the infringement of the applicant's rights. If discovery of information about sales of infringing products etc has not been given by the respondent, discovery in relation to this question is normally ordered to permit the applicant to make an informed choice prior to the election between remedies.

(b) Should in relation to the question of compensation for infringement a distinc-
tion be made between innocent, negligent, knowledgeable or wilful infringe-
ment?

Section 123 of the Patents Act permits a court to take account of the respondent's innocence in determining the nature of the relief to be awarded. The court may refuse to award damages or an account of profits if the respondent was not aware, and had no reason to believe that a patent for the invention existed.

In relation to trade marks, no distinction is generally made between innocent, negligent, knowledgeable or wilful infringement for the purpose of assessing damages.

In any event, the award of a remedy for patent and trade mark infringement is discretionary and is made having regard to all the facts and circumstances in the case. If as a result of an infringement, a plaintiff has suffered little damage, the award of damages (if damages are elected by the plaintiff as its remedy) will reflect this accordingly.

(c) What constitutes compensation of injury proven (such as lost profits) and what constitutes unlawful profits of the defendant?

In assessing damages, the court must determine the extent of the applicant's losses arising from the injury inflicted from the respondent's wrong-doing and as-
sess whether those losses are recoverable. Damages aim to restore the applicant to the position he or she would have been in if the respondent had not committed the wrong for which the applicant must be compensated. This means that the court must "look backwards" to the moment prior to the commission of the infringement of the applicant's rights.

In the case of patent infringement, damages may be assessed by reference to a number of matters. The activities of the patentee in exploiting his or her monopoly provides some assistance in the approach the court must take in assessing damages.

For example, if the patentee does not exploit his or her monopoly but instead licenses others to use the invention in consideration of royalty payments, damages will generally be assessed as the amount which the infringer would have had to pay had she or he been granted a licence on the terms normally granted by the patentee.

On the other hand, if the patentee exploits his or her invention as a manufacturer, the courts will look to compensate the patentee for the sales lost as a result of the infringer's wrongful use of the invention. This can raise some difficult questions, such as whether an infringement deprives the patentee of manufacturer's profits equivalent to those which would have been made had the patentee made the sale of the infringing goods. A manufacturer patentee may also sustain loss of goodwill or business connection due to the necessity to reduce prices of the patented products to meet competition arising from the infringer's sales of infringing goods.

If the patentee neither grants licences nor manufactures, the court may assess damages, if no other damage can be proved, on a "reasonable royalty" basis.

It may appear that the assessment of damages is not a precise exercise. This is acknowledged by the courts. It has been stated on many occasions that difficulties in calculating damages will not preclude the court from estimating in a "rough and ready" manner the appropriate amount of damages payable to a patentee having regard to all the facts and circumstances of the particular case.

Similar considerations apply in assessing damages for trade mark infringement. Damages may be assessed by reference to sales lost by the trade mark owner as a result of the infringer's sales of goods under the relevant trade mark or by reference to the licence fees which the trade mark owner would have been paid had the infringer sought and been granted a licence to use the trade mark.

As noted above, difficult considerations may arise in relation to the taking of an account of profits. To take a simple case, if the infringer of a patent sells an article made wholly in accordance with the invention and obtains more than it cost him or her to make or acquire the article, the infringer will be accountable for the difference between the cost of making the article and the amount for which it is sold.

More complex considerations may arise in taking an account of profits in trade mark infringement cases. Infringement of a trade mark is the unauthorised use of the
trade mark in the course of trade in relation to goods for which the trade mark is registered. The profit for which the infringer of a trade mark must account may not be the profit made from selling the article itself but the profit made in selling the article under the infringed trade mark. The calculation of this profit may be difficult.

Further, the courts in Australia have held that general overheads may be taken into account in calculating the "cost" of making an article by an infringer. An infringer may sell infringing articles at a loss to establish its market presence. Accordingly, the infringer's "costs" may exceed its profits.

(d) Is with respect to the establishment of the amount of damages full proof required or should a court have certain discretionary powers?

As noted above, the courts in Australia have long recognised that precise evidence of the applicant's loss is not required in order for an assessment to be made and the fact that in some cases it will be impossible to precisely calculate damages will not disentitle the applicant to an award where infringement of her or his rights has been established.

(e) Should a patentee of trade mark owner who exploits its patent or trade mark through subsidiary companies be able to claim as compensation the lost profits of such companies?

We are not aware that this issue has been considered in Australia. However, we note that in Gerber Garment Technology, Inc. v Lectra Systems Ltd (unreported, Court of Appeal, 18 December 1996) the UK Court of Appeal found that a plaintiff is entitled to recover, directly or indirectly, in respect of the trading losses suffered by its subsidiaries provided the plaintiff can prove that it has suffered financial loss which it can quantify. In this case, Hobhouse J concluded that:

"provided a plaintiff can prove that he has been caused a financial loss which he can quantify as the result of the actionable fault of the defendant, he can recover those losses as damages. It is not an answer to say that he has suffered those losses as the shareholder of a company..."

Thus the position in the UK appears to be that a plaintiff will be able to recover losses of its subsidiaries provided it can show that it was a real loss to the plaintiff that can be adequately identified and quantified. This decision has not yet been considered in Australia. It will, however, be highly persuasive authority in any future cases dealing with this issue.

(f) What should be the rights of (exclusive) licensees to claim compensation in respect of infringement of the rights under which they are licensed?

Both the Patents Act 1990 (Cth) and the Trade Marks Act 1995 (Cth) permit exclusive licensees to bring actions for patent and trade mark infringement. Exclusive licensees are entitled to elect between an award of damages or an account of profits in the same way as the owner of the rights.
(g) **Should a patentee or trade mark owner always be at least entitled to reasonable royalties and what are reasonable (realistic) royalties**

As noted in our answer to question 6(c) above, Australian patent and trade mark law requires a defendant to compensate the owner of a registered trade mark or patent for loss suffered as a result of infringing sales. This is achieved through the mechanism of an "account of profits" which is available to a successful plaintiff, at its election, in lieu of an award of damages.

The provisions of the *Patents Act* and *Trade Marks Act* dealing with the award of damages do not prescribe a blanket royalty payable to the plaintiff. Rather, the court will be required to calculate the defendant's profit and allocate this to the plaintiff accordingly.

The difficulties and costs associated with ascertaining the defendant's profit are discussed above in our answer to question 6(c). Given the difficulties inherent in calculating the profit, the award of a "royalty" on infringing sales is, theoretically, attractive. This could be achieved by prescribing either a standard royalty for use in all cases or a mechanism for calculation of a royalty by the court. A statutory royalty would significantly simplify the calculation process. However, it is submitted that a "standard royalty" prescribed by statute would not fully compensate the plaintiff for the loss suffered as the royalty would not be equally applicable in all cases.

A mechanism for determination of a royalty would allow more flexibility but would be fraught with the same difficulties as an account of profits due to the need to calculate the royalty applicable to each particular case. It would be difficult to set guidelines for determination of the relevant royalty as what is "reasonable" will depend on the circumstances - for example, the industry norm, profit margins etc.

In summary, a patentee or trade mark owner may currently obtain compensation for infringing sales. The mechanism for obtaining this award reflects the equitable assumption that it would be unconscionable for a defendant to retain profits made dishonestly. While the process involves difficulties in calculating the profits attributable to the infringement, the imposition of a "reasonable" royalty is unlikely to be significantly more efficient or equitable.

(h) **Are punitive damages desirable?**

As noted, a plaintiff is entitled to elect either damages or an account of profits in cases of patent and trade mark infringement. Where the infringer has acted innocently, in ignorance of the registered trade mark or patent, or the infringement is shown to be purely technical and the court is satisfied that the plaintiff will not suffer more than minimal loss as a result, the court will usually award only nominal damages and the costs of the proceeding. Otherwise, compensatory damages will be awarded. The defendant will be liable for all loss which is actually sustained by the plaintiff which is the natural and direct consequence of unlawful acts of the defendant.
Punitive, or exemplary, damages are intended to punish the defendant. Punitive damages are generally only awarded in respect of conduct which is of such nature as to be deserving of punishment because it is harsh, vindictive, reprehensible and malicious. The conduct must be extreme in its nature and such that by any reasonable standard it is deserving of punishment. It is rare that a court will award punitive damages in a commercial context. Usually the award will be confined to cases involving personal injury.

There is no mechanism in Australian trade mark and patent law which allows for the award of exemplary damages. It is generally thought that a plaintiff can be adequately compensated for loss suffered by way of an award of compensatory profits or, at his or her election, an account of profits. It is submitted that it is not appropriate to award punitive damages in the commercial context which usually surrounds trade mark and patent infringement. The well entrenched principle behind an award of damages is that the plaintiff should be put in the position he or she would have been in had the tort not occurred. There is a danger, where punitive damages are awarded, for the plaintiff to be overcompensated. Accordingly, it is submitted that punitive damages are not desirable for trade mark and patent infringement.

(i) What compensation should be awarded to a defendant who has been wrongly submitted to provisional measures?

There is no provision in Australian intellectual property legislation which specifically provides for indemnification of the defendant if a petition is not well founded or he or she is wrongly submitted to provisional measures.

In relation to interlocutory injunctions, a plaintiff will be required to give an "undertaking as to damages" before an injunction will be awarded. This is an undertaking to the court to pay the defendant damages for any loss sustained as a consequence of the injunction being granted if the applicant does not ultimately succeed at trial. Such damages may be substantial and are designed to compensate a defendant who has been wrongly submitted to provisional measures.

There are several other avenues of redress open to the defendant if it considers that an action is unjust or improper, depending on the circumstances:

(a) the intellectual property statutes create a right to damages for persons injured by "unjustifiable" or "groundless" threats; and

(b) the Court has an inherent jurisdiction to dismiss an action or strike out a claim if it fails to disclose a reasonable cause of action or defence, has a tendency to cause prejudice or embarrassment, or is an abuse of process. In these circumstances costs will be awarded to the defendant.

It is submitted that these avenues of redress adequately compensate a defendant who has been wrongly submitted to provisional measures. These issues will be considered separately.
(a) Threats actions

Threats to sue for infringement of intellectual property rights are regarded as being particularly serious by the courts. The mere threat of litigation and the possibility of incurring the significant costs associated with litigation can often force the person at whom the threat is aimed to compromise, even where that person is in fact innocent of the alleged act. Accordingly, there are provisions in the Patents Act (section 128) and the Trade Marks Act (section 129) that confer a right of action on a "person aggrieved" against the person making the threats, whether or not that person is actually the owner of the intellectual property rights in question.

The following elements must be established before a threats action will be successful:

(i) the threat must be something more than a mere notification of the existence of intellectual property rights. Generally, it will be enough if the threat of legal action is an inference which an ordinary person would draw; and

(ii) the threat must be made to a particular person or class of persons and not generally to the world at large.

It is a defence if the person making the threats satisfies the court that the conduct complained of in the threat was an infringement of the intellectual property rights.

(b) Dismissal of an action or claim

All jurisdictions give the courts power to dismiss the plaintiff's claim on application by the defendant. For example, the Federal Court Rules give the Federal Court the power to order a stay or dismissal where it is shown that the claim discloses no reasonable cause of action, is an abuse of process, or is frivolous or vexatious (Order 20, rule 2). The courts also have an inherent jurisdiction to dismiss frivolous or vexatious proceedings. In addition, a pleading can be struck out if it fails to disclose a reasonable cause of action or defence, has a tendency to cause prejudice, embarrassment or delay, or is an abuse of process (Order 11, rule 16).

The courts will not exercise their jurisdiction to dismiss an action or strike out a claim lightly and it is unusual for a court to make such an order where there is a serious factual dispute between the parties. The circumstances in which the court will intervene in this manner were summarised by Dixon J in Dey v Victorian Railway Commissioners (1949) 78 CLR 62 where he stated, at 91:

"The application is really made to the inherent jurisdiction of the Court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the Court to
prevent a plaintiff submitting his case for determination in the appointed manner by the Court with or without a jury... But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."

In Australia, the court has a discretion to award whatever costs it considers appropriate at any stage of the proceeding. The ordinary rule is that an plaintiff who has brought a defendant to court and has been unsuccessful should be required to pay that defendant's costs. This rule will apply equally in the case where a plaintiff's claim is struck out because it is vexatious, an abuse of process or is otherwise improper or unfounded.

The notion of compensatory costs (ie that costs follow the event and the "loser" should therefore pay) is very deeply rooted in the Australian system. Despite this, the broad discretion of the court to award costs as it thinks appropriate means that the successful party may, in some circumstances, be ordered to pay costs. Thus for example, the court may penalise a party for costs which it believes have been unnecessarily incurred.

In general terms, where a plaintiff has acted improperly by bringing an action that is vexatious or does not disclose a reasonable cause of action or is otherwise an abuse of process, the court is likely to award costs against the plaintiff. Thus while there is no specific provision in the trade marks and patent legislation conferring on a defendant a right to indemnification if the plaintiff's claim is generally improper, that defendant can obtain some relief:

(i) in the case of a successful threats action, from an award of damages; and

(ii) in an application for dismissal of the plaintiff's action, from an award of costs.

(j) What attorney fees and costs (and to which extent) should be reimbursed to the prevailing party?

The unsuccessful party in an action in Australia will generally be required to pay the costs of the other party. The proportion of the costs which must be paid by the unsuccessful party is a matter entirely within the discretion of the Court. Thus, the court may determine in the circumstances of the case that it is appropriate for that party to pay only a proportion of the other party's costs.

In Australia, there are three bases on which a Court may make a costs order. Briefly, these are as follows:
(a) **Party and party basis**

This is the most usual basis for an award of costs. Party and party costs are the costs the successful party incurs to obtain justice. They must be reasonable and not incurred because of over caution. These costs only partially indemnify a client against the costs payable to its lawyers. Any difference between these two amount is payable personally by the client.

(b) **Solicitor and client basis**

This basis is essentially different from the party and party basis as it represents costs payable by a client to its solicitor under the retainer between the solicitor and client. Solicitor and client costs are more generous than costs awarded on a party and party basis. They are generally awarded where the costs are payable not by the unsuccessfully party but out of a common fund, such as a trust fund. Solicitor and client costs are more likely to be awarded in equitable matters than in common law actions. However, in general terms, it is rare for an award of costs to be calculated on a solicitor and client basis.

(c) **Indemnity costs**

The court also has the power to award costs on an indemnity basis which confers on a particular party a complete indemnity for costs incurred. This type of award of costs is very rare in practice and is generally only made where a party has acted in a reprehensible manner.

In Australia, the costs ordered by a court are the subject of taxation against a scale of costs. The scale provides a list of itemised costs which may be charged against a party under an order for costs. Costs in excess of those depicted on the scale are not allowed, unless the court makes a special order.

Given that in most actions, costs are awarded on a party and party basis and the costs recoverable are, therefore, limited to costs incurred in the conduct of the action, a successful party will generally not be able to reclaim all costs incurred in the course of obtaining legal advice, pre-trial preparation, etc. Accordingly, costs recovered by a successful party usually only represent one half to two thirds of the costs actually incurred by that party.

There is, accordingly, a substantial disincentive to a party commencing legal proceedings in Australia, even where it has a strong case, due to the high costs of litigation and the fact that costs will not be fully recoverable. As noted, the award of legal costs is entirely a matter for the discretion of the court. The calculation of costs on a court scale allows the court to ensure some consistency in the award of costs and ensures that unsuccessful parties are not required to pay exaggerated or unnecessary legal fees. Accordingly, while it may appear inequitable for a successful party not to recover all its costs, there are benefits in the current costs regime.
7. **Is it desirable that the intentional infringement of a patent constitutes a criminal act in addition to the civil remedies available?**

Neither patent nor trade mark infringement is a criminal offence in Australia. Infringement of a patent or trade mark is a civil wrong compensable by civil remedies such as damages, an account of profits and delivery up.

Under Australian law, it would be undesirable for patent (and trade mark) infringement to be a criminal offence. The evidentiary and procedural requirements for criminal prosecutions are quite different to those applicable in civil proceedings. For example, a criminal proceeding must generally be instituted by the Director of Public Prosecutions and cannot be initiated by patentees themselves. In addition, the burden of proof is more onerous in criminal proceedings than in civil proceedings. In criminal proceedings, the prosecutor must establish its case "beyond reasonable doubt". This is a substantially higher threshold than the standard of proof in civil cases which, as discussed above in our answers to question 4, is "on the balance of probabilities".

In general, patentees are regarded as able to achieve better protection of their rights by bringing a civil action against an alleged infringer as the evidentiary and proof requirements are less stringent than in criminal matters.
Report Q 134

in the name of the Chinese Group
by Wen XIKAI

Enforcement of intellectual property rights - TRIPS

A. China's IPR Legal System

China has a complete legal system for the protection of intellectual property rights. China's intellectual property law stipulates the legal responsibilities to be borne by anyone who violates the law, including civil liability, criminal liability and exposure to administrative sanctions.

1. Patent

China's patent Law provides that in the case of infringement arising from the exploitation of a patent without authorization of the patentee, the patentee or other affected parties may request the patent administrative authorities to deal with the matter or may directly file suit in a people's court. In investigating and dealing with the matter, the patent administrative authorities are empowered to order the infringer to stop all acts of infringement and compensate for any losses. Whoever counterfeits a patented product or wrongly appropriates a patented technique will be ordered by the patent administrative authorities to cease all acts of counterfeiting, to provide the public with notification of his or her violation, and to pay a fine. In the case of serious violation, the criminal liabilities of the person directly responsible shall be investigated through application of relevant articles of the Criminal Law, and if found guilty, the person directly responsible shall be sentenced to fixed-term imprisonment of not more than three years criminal detention or a fine.

2. Trademark

China's trademark laws and regulations stipulate that in the event of infringement on the right to exclusive use of a registered trademark, the administrative department for industry and commerce can, in line with its functions and powers or on the basis of a consumer complaint, examine and deal with the violation on its own initiative. The party whose right has been infringed may also, at the place where the infringer lives or where the act of infringement took place, request an administrative department for industry and commerce at or above the county level to handle the matter. The relevant administrative department for industry and commerce has the right to order the infringer to immediately cease infringement and to compensate the party whose right has been infringed for its losses. If the act of infringement on the right to exclusive use of a registered trademark does not constitute a crime, the administrative department for industry and commerce may still impose a fine...
on the infringer. If the party concerned wishes to challenge the decision of the administrative department for industry and commerce, it may bring suit in a people's court within a fixed time and the court will render judgement on the case. These regulations provide convenience to the litigants, and moreover, ensure consistency, impartiality and seriousness in administrative law enforcement and judicial adjudication. In the event of an infringement on the right to exclusive use of a registered trademark, the party whose right has been infringed may also directly bring suit in a people's court. If the counterfeiting of registered trademarks constitutes a crime, the person who committed the act shall be ordered to compensate the party whose right has been infringed for losses suffered and his criminal responsibility shall be investigated and dealt with in accordance with the law. In cases where the illegal gains are relatively large or other serious circumstances are involved, the counterfeiter of a registered trademark will be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and/or fined; if the illegal gains are very large, the counterfeiter shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years and be fined.

3. Copyright

The Copyright Law of China provides that the following acts shall be regarded as infringement: publication of a copyright owner's work without his or her permission, and the unauthorized publication of a cooperative work as the work of a single author; claiming authorship of another person's work without taking part in its creation with the intention of gaining fame or profit; distortion or alteration of another person's works; exploitation of an author's work without providing the legally stipulated payment; and live broadcast of a performance without the performer's prior permission. In such cases, the infringer shall bear civil responsibility for the cessation of the infringement for the elimination of any negative effects caused by his actions, for offering a public apology, and for compensation for any losses. Those who plagiarize other people's works or reproduce and distribute another person's works, or reproduce and distribute another person's works for their personal benefit without the copyright holder's permission, those who publish a book without the permission of the owner of the publishing right, and those who duplicate and distribute video and audio tapes without getting the permission of the tape manufacturers bear civil responsibility for their actions. The copyright administrative authorities may confiscate their illegal income or impose a fine on them. In the case of a copyright infringement or of violation of other related interests, the party whose rights have been infringed may also directly bring suit in a people's court. With regard to illegal activities that gravely jeopardize the social order or seriously infringe on the legitimate rights and interests of a copyright holder or the holder of other intellectual property rights, in cases where such violations constitute a crime, the criminal liability of the infringer shall be investigated and dealt with in accordance with the criminal law, i.e. in cases where the illegal gains are relatively large or other serious circumstances are involved, the counterfeiter be sentenced to fixed-term imprisonment of not more than three years or criminal detention, and/or fined; if the illegal gains are very large the counterfeiter shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years and be fined.

4. Border Measures

Starting from Oct.1, 1995, the "Customs Rules of the P.R. China Concerning the Implementation of Customs Protection of Intellectual Property Rights" came into force. Where any owner of IPR or his agent, who has registered his or her rights with the General Cus-
toms and finds that suspected infringing goods are about to be imported or exported, he may request the customs in the place of import or export of the goods to take protective measures. Where it is deemed necessary, the Customs may require the consignors and consignees to make a supplementary declaration of the status of the intellectual property rights of the goods when going through the customs formalities regarding the import or export goods. When it is deemed necessary, the Customs may inspect the import or export goods and take samples in accordance with the relevant provisions of the Customs Law. After detaining the suspected infringing goods, the Customs shall in accordance with the provisions of this Customs Rules, initiate an investigation on the suspected infringing goods and the relevant circumstances. The Customs shall terminate the investigation when the case is already submitted to competent department for that category of IPR to be dealt with or the court by any of the relevant party. If it is liable to be a criminal case, the case will be turned over to the relevant organization to carry out investigation. Infringing activities at the border are subject to civil, administrative and criminal sanctions.

B. China's IPR Law Enforcement System

China's IPR laws and regulations have provided for a comprehensive judicature and administration for the enforcement of IPR rights.

1. China's judicial institutions for intellectual property protection

In China, any citizen, legal person or organization entitled to intellectual property rights whose rights and interests have been infringed may bring a lawsuit to the people's court in accordance with the law and receive practical and effective judicial protection.

The people's courts exercise judicial power independently according to law, are subordinate only to the law itself, and are not subject to interference by any administrative organ, public organization or individual.

The judicial activities of a people's court are carried out on the basis of facts, and with the law providing the criterion. Cases are tried strictly in accordance with substantive and procedural laws. Cases are heard in an open court, and a collegiate system, a challenge system, a system whereby the court of second instance is the court of last instance, and a trial supervision system are practised. Judicial work, in accordance with the law, is also subject to supervision by people's congresses and people's procuratorates at all levels and by the masses, so as to ensure openness, impartiality, and seriousness.

In recognition of the specialized nature of intellectual property rights cases and the advanced nature of the technology often involved, the higher people's courts in several provinces and municipalities directly under the central government such as Beijing, Shanghai, Guangdong, Fujian and Hainan have since 1992 established such intellectual property rights courts as their actual needs demand. The intermediate people's courts in all the special economic zones as well as Beijing and Shanghai have also established intellectual property rights courts. Intermediate people's courts in the capital cities of other provinces, municipalities and autonomous regions have set up collegiate panels specializing in cases involving intellectual property rights protection. In Oct.1996, the supreme People's court also established the intellectual property court. In this manner the hearing of intellectual property rights cases is centralized with the advantageous results that unity
in executing the law is ensured, experience in dealing with the law is amassed, and the quality of judicature in intellectual property rights cases is strengthened.

In civil infringement cases, the people's court is empowered to order the infringer to bear civil responsibility for the cessation of the infringement, for the elimination of any negative effects caused by his actions, for offering apologies, and for compensation for any losses in accordance with the law. Furthermore, it is empowered to confiscate the infringer's illegal gains and/or adjudge the infringer to criminal detention or a fine.

If the infringement of intellectual property rights is so serious that it has disrupted the economic order and constitutes a crime, the infringer's criminal responsibility is investigated and dealt with according to the criminal law. When a people's procuratorate institutes prosecution for a criminal act of infringement, if the evidence is sufficient to prove that the case is so serious as to constitute a crime, the people's court shall promptly and precisely impose punishment in strict accordance with the law.

When a people's court tries a case arising from intellectual property rights involving foreign nationals, it acts in accordance with Chinese laws and relevant international conventions to which China is a party, adhering to the principle of equity and reciprocity. In this way, the court provides the solid legal guarantees necessary for expanding international exchange and cooperation.

2. **Administrative Channels for Intellectual Property Protection in China**

In addition to judicature in accordance with international practices, China's system for the protection of intellectual property rights comprises the Patent Law, the Trademark Law, and the Copyright Law and other administrative channels designated in intellectual property laws, all proceeding from China's actual conditions.

Under the Patent Law, the competent authorities in the State Council and local people's governments have the right to establish patent offices. Today, China has more than 50 patent offices established by local governments and more than 20 patent offices established by various ministries and departments under the State Council.

The State Copyright Administration and local copyright administrative organs have been established in accordance with the Copyright Law.

Trademark administration calls for unified registration of trademarks by the central government and level-by-level administration by the various local governments. Trademark administrative departments under the administrative bureaus for industry and commerce have been established at the central, provincial, city, prefectural and county levels; below the county level, there are administrative offices for industry and commerce. Today, there are well over 7,000 full-time trademark administration personnel throughout China, in addition to 300,000 part-time personnel.

According to China's Administrative Procedure Law, if a citizen, legal person or organization wishes to contest a judgement or order of an administrative department for intellectual property protection in a dispute concerning intellectual property rights and to initiate ad-
ministrative procedure litigation, the people's court shall try the case and shall, in accordance with the law, make a decision to maintain, rescind, or alter it.

Chinese intellectual property rights administrative departments exercise their legally stipulated powers and functions to safeguard law and order within the field of intellectual property, encourage fair competition, mediate disputes, settle cases involving violations of intellectual property rights, and protect the interests of the broad masses of people by maintaining a good social and economic environment.

In China the administrative procedures for solving disputes concerning intellectual property rights are simple and convenient. Cases can be quickly filed for official examination and possible prosecution, investigation follows promptly, and efficiency in handling the case is high. This is advantageous to the owners of the rights. China's intellectual property rights administrative organs, in accordance with Chinese laws and relevant international treaties to which China is a party, adhering to the principle of equal treatment for nationals and non-nationals and reciprocity, give effective protection to foreigners' intellectual property rights.
The response to questions Q 134A and Q 134B are as follows:

4) The reproduction of a trademark with the intention of commercial exploitation constitutes an act of infringement, even in the absence of actual use.

5) The application of a sign constituting a trademark on a product earmarked for export constitutes an act of infringement under Egyptian law.

6) The response of the Egyptian Group to the questionnaires under letters a) to j) are as follows:

   a) Under Egyptian law he may claim both. We endorse such dual claim.

   b) A distinction should be made, since it has its effect on the burden and scope of responsibility and the amount of damages judged.

   c) Under Article 221 of the Egyptian Civil Code, compensation for injury proven would cover losses suffered and profits that the injured person has been deprived from.

      Any profits generated directly or indirectly by the infringer from the infringement act should constitute unlawful profits.

   d) With respect to the establishment of the amount of damages, courts should have discretionary powers based on the submission of appropriate evidence that convinces the court.

   e) As a general rule, a patentee or trademark owner who can establish that he suffered damages and lost profits as a result of an infringement of a trademark or a patent he owns will be able to claim compensation. However, if the return to such patent owner or trademark was in a form of an advance one time lump sum payment then such patent owner should not be able to claim damages.
The rights of exclusive licensees to claim compensation in respect of infringement of the rights under which they are licensed are identical to those of the licensor.

A patentee or trademark owner should always be entitled to royalties. The reasonableness of the amount of royalty depends on economic reasons, the nature of the products, demand and market place etc....

Punitive damages are desirable.

A full compensation which covers losses suffered and profits deprived should be awarded to a defendant who has been wrongly submitted to provisional measures.

As a general rule all fees and costs should be reimbursed to the prevailing party. However, attorney fees and costs in a court case are usually set at a nominal and symbolic amount which usually does not exceed US $10. Further, this amount is paid to the Egyptian Bar and not cashed by the lawyer. Therefore, it should be clear that the prevailing party will not be reimbursed for the amount he paid to his attorney. This situation does not apply in case of arbitration where the arbitrators fix the attorney’s fees and costs of arbitration based on the actual amounts and would entitle the prevailing party to receive same in full from the losing party or the tribunal may divide the costs of arbitration between the two parties and have each party bear the fees of its lawyer.

The Egyptian Group would support regarding the intentional infringement act to be criminal in nature with the right for civil remedies. This criminal aspect will also be a deterrent to any infringer. The Egyptian Group would support that criminal action be taken against all acts of infringement of intellectual property rights, as is the case currently in Egypt.

The Egyptian Group is of the opinion that a criminal procedure in certain cases help to obtain evidence which could not be otherwise obtained in civil procedures.

The Egyptian Group is of the opinion that only criminal law can provide strength to the enforcement of cease and desist orders.
Great Britain  
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Report Q134

by the British Group

Enforcement of intellectual property rights - TRIPS

Introduction and Summary of this Report

The breadth of this question and the complicated issues that it raises is probably reflected in the fact that no resolution could be found at the Vienna Executive Committee Meeting. However, the issues raised are important and finding a consistency in relation to these issues is a vital element to the proper working of TRIPS.

The British Group has studied the questions and in summary has come to the following conclusions:

1. Rights of action, including the ability to recover damages should be assignable;

2. The owner of a patent and patented article should be able to repair it provided that such a repair does not amount to a replacement of "an essential element of the invention";

3. For a product to be an infringing product because it has been made by a patented process, the process must have imparted either a change in the essential characteristics of the product or conferred on the product one of its essential characteristics;

4. Manufacture of a sign or mark (without the proprietor's consent) should be an infringement;

5. Application of a mark to goods for export only will not avoid infringement;

6. Damages: this section is sub-divided. However, in short the British Group believes that fair compensation should be made to intellectual property owners. They should be put back into the position they would have been had no infringement taken place. A reasonably generous view of that compensation should be taken with a reasonable degree of proof of damages being required;

7. The British Group strongly oppose the idea that patent infringement should be a criminal offence.
1. In the absence of any stipulation in the contract or assignment as to compensation for infringement prior to the assignment, the right to compensation remains with the assignor.

Section 30 (7) of the UK Patents Act 1977 expressly provides that an assignee of a patent may bring proceedings in respect of infringements occurring prior to the date of such assignment provided that this right is included within the relevant grant of title. If the accrued right of action for infringements committed prior to the assignment is not expressly included within the relevant assignment then the right to sue for such infringements remains with the assignor.

The right to bring proceedings for a previous infringement should be an independent matter which is not automatic on any assignment. There may be circumstances in which an assignor will wish to retain the right to commence or continue proceedings for prior infringements.

In calculating damages for infringements occurring prior to the date of an assignment the Court should assess damages at the moment the acts of infringement took place. Any assignee should be entitled to the same damages as would have been required to restore the proprietor to the position he would have occupied but for the wrongful acts of the infringer provided always that such loss was foreseeable, caused by the wrong, and not excluded from recovery by public policy.

2. Is it possible to determine a criterion which permits to distinguish between the legally permitted repair of a patented product and the reproduction if such a product which constitutes an act of infringement?

The principle under UK law is that you may prolong the life of a patented article but you must not make a new one under the guise of repair. The application of this principle is difficult and comes down to a question of fact and degree.

It is clear that replacement of what amounts to an "essential element of the invention" (a term used in the UK Patents Act 1977) cannot fairly be termed a repair and therefore must amount to an infringing act. However, a person does not have to go that far before what has been done ceases to amount to keeping an article in repair and therefore falls outside the exception. The British Group suggests that to assist in defining what is a repair and what is not a repair there could be a rule that when a product is physically replaced then this will not be a repair. When an essential element of the invention is not replaced as such then this will be considered to be a repair, i.e. the differences between reshaping a damaged physical item rather than simply replacing it.

3. Definition of the product infringing a patent because it has been produced under a patented process

The connection between process and product must be direct.

It is recommended that just paragraphs (i) and (ii) of the draft Resolution presented in Vienna (19 April 1997) should be amended as follows (amendments shown underlined):
(a) a product is obtained "directly" by a patented process,

(i) when the process is [the last one] to effect a change in the essential characteristics, nature or composition of the product, or

(ii) when the process is an intermediary process which confers on the product one of the essential characteristics of the product.

The British Group believes that (iii) of the Vienna draft Resolution adds nothing to (i) and (ii) above. Further it is uncertain as to the meaning of paragraph (b) which says: "In this context "product" includes the intellectual output of a process". Perhaps this is directed to the question of patented computer programs. However, read literally, it seems to the British Group that merely thinking of a patented process could be said to be an infringement! This is clearly unacceptable.

4. *Does the reproduction of a sign which constitutes a trade mark for the intention of commercial exploitation constitute an act of infringement in the absence of actual use?*

Under UK law a plaintiff who can prove that the defendant has acted or threatens to act in such a way as to infringe the plaintiff's registered Trade Mark has the right to sue for infringement seeking remedies of inter alia an injection, damages and delivery up. In such a *quia timet* action it is necessary to show a reasonable probability of injury.

Section 10(5) of the UK Trade Marks Act 1994 provides that "a person who applies a registered trade mark to material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, shall be treated as a party to any use of the material which infringes the registered trade mark if when he applied the mark he knew or had reason to believe that the application of the mark was not duly authorised by the proprietor or a licensee".

5. *Does the application of the sign constituting a trade mark on a product earmarked for export constitute an act of infringement?*

Section 10(4) of the UK Trade Marks Act 1994 provides that "a person uses a sign if, in particular, he ...

(c) imports or exports goods under the sign; or ...

Therefore the answer is "yes".

6. *Damages for the infringement of patents and trade marks.*

The overriding principle which should be applied in assessing damages is that the plaintiff should be compensated in monetary terms for the full and actual damage which he has suffered as a result of the wrongful acts of the infringer. It is essential to avoid the development of an "infringers' charter".
(a) Is it desirable that the patentee or trade mark-owner has a right to choose between (or claim both) compensation of the injury proven and the unlawful profits obtained by the defendant. If (only) a choice between these two possibilities would be desirable at what time and on the basis of which information does the plaintiff [have] to make his choice.

It is desirable that the plaintiff has the option of claiming damages to compensate for his loss or injury, or alternatively an account of profits made by the infringer.

An infringer should not be allowed to profit from his wrongful acts. It may be that an infringer's profits are large whereas the plaintiff's loss is small. It would be logical if, at the end of the substantive trial of the action, the defendant was forced to disclose information on the profits made by him during the relevant period. Only after the defendant has disclosed this information should the plaintiff have to elect between either damages in respect of the actual infringements of his patent or an account of profits. Such a practice would assist a plaintiff in analysing the degree of "creative accounting" used by the defendant.

(b) Should in relation to the question of compensation for infringement a distinction be made between innocent, negligent, knowledgeable or wilful infringement?

The question asks whether a plaintiff should be entitled to a scale of damages according to the defendant's conduct. So long as the plaintiff is entitled to the actual damages he has suffered, or, at his option an account of profits (and not merely a reasonable royalty payment) then such provision is not necessary. The patentee should not be entitled to a "free ride" merely as a result of a defendant's state of mind. Any distinction on the basis of the defendant's state of mind would be for the State to impose in the course of an independent criminal examination (see 7 below).

In order to prevent a patentee being put repeatedly to the expense of defending successive attacks on the validity of his patent, Section 65 of the UK Patents Act 1977 provides that a Court may, in any proceedings, certify that the validity of any claim was contested in those proceedings and, if in any subsequent proceedings for infringement or for revocation of the patent the patentee is successful, he is entitled to costs as between solicitor and client so far as that claim is concerned.

(c) What constitutes compensation of injury proven (such as lost profits) and what constitutes unlawful profits of the defendant?

Compensation of injury proven is the monetary compensation awarded to restore the plaintiff to the position which he would have occupied but for the wrongful acts of the defendant. The compensation covers:

- lost profits on lost sales;
- price erosion on sales;
- lost profits on sales of unpatented items, such as spare parts and service revenues ("ancillary sales");
"bridgehead damages" relating to lost profits and lost sales post-expiry of the patent as a consequence of a defendant's bridgehead, illegally established during the life of the patent.

Unlawful profits amounts to an account of the profits made by the infringer during the relevant period. Often these unlawful profits are over and above the damage caused to the patentee. Such unlawful profits can, at the plaintiff's option, be recovered on an account of profits.

(d) **Is with respect to the establishment of the amount of damages full proof required or should a court have certain discretionary powers?**

In principle, the plaintiff should have to prove his damage. However, as the accounts presented on inquiries as to damages become more and more complex the Judge needs to have some discretion to allow him to form a view as to the correct level of damages to be awarded.

(e) **Should a patentee or trade mark owner who exploits its patent or trademark through subsidiary companies be able to claim as compensation the lost profits of such companies?**

The British Group think that all those companies who consider themselves to have lost as a result of patent or trade mark infringement should be joined in as parties to any proceedings. The British Group believes that if a party has suffered loss then it will be down to that party to prove its loss to the Court. If it is not a party to the action then it will be impossible for it to deliver the necessary proof.

(f) **What should be the rights of (exclusive) licensees to claim compensation in respect of infringement of the rights under which they are licensed?**

The British Group believe that exclusive licensees should be able to claim compensation by being joined in as Plaintiffs in proceedings for patent infringement alongside the patentee himself. Non-exclusive licensees should seek their redress from the patentee under the terms of the licence.

(g) **Should a patentee or trade mark owner always be at least entitled to reasonable royalties and what are reasonable (realistic) royalties.**

A reasonable royalty is that which would flow between a willing licensor and a willing licensee. It is not possible to fix what a reasonable royalty might be. For example, in relation to mechanical inventions it may be approximately 2%, whereas for pharmaceutical products it may be up to 30%.

Although a reasonable royalty may be an appropriate measure of damages in some cases, the overriding principle is that a plaintiff should be entitled to full compensation for the damage he has suffered. Accordingly, a reasonable royalty will usually not be sufficient.
(h) Are punitive damages desirable?

The comments set out in relation to (b) above are also relevant to this question. Punitive damages are not desirable.

(i) What compensation should be awarded to a defendant who has been wrongly submitted to provisional measures?

Such a defendant must be reimbursed for the actual damage he has suffered as a result of the wrongful submission. Such damages must be calculated according to the principles set out above.

(j) What attorney fees and costs (and to which extent) should be reimbursed to the prevailing party?

It is important to maintain the principle whereby the losing party pays the other side's costs in order to avoid litigation on a contingency basis with the consequent increase in superfluous and frivolous litigation. Sometimes costs orders should be made payable instantly as a further deterrent.

On the other hand, it is accepted that this principle may deter many individuals or small companies from commencing legal proceedings.

The principle of the loser paying the winners costs should be retained whilst relying on the State and the judiciary to reform the legal system in order to reduce the costs of litigation generally.

7. Is it desirable that apart from civil remedies wilful infringement of a patent should constitute also a criminal offence?

Such a provision would appear to escalate what is essentially a civil dispute to much too high a level. A defendant in a patent infringement action is not immediately depriving the plaintiff of his property. The situation only becomes firm where the plaintiff has already obtained an injunction against the defendant. However, criminal sanctions are already available in the UK for breach of an injunction.

A patentee should not have the right to bring criminal proceedings. Instead such proceedings should be left to independent officials, for example, the Health & Safety Executive or the Trading Standards Authorities.

It is, however, important that Civil Codes provide a plaintiff with the ability to enter premises in order to preserve and/or collate evidence in difficult cases. In the UK the Civil Anton Pillar Order offers sufficient flexibility so that a criminal provision is not required.

The British Group believe that to escalate infringement of patent to a criminal offence could have dangerous ramifications. The important point to concentrate on is whether in infringing a patent some other criminal act is committed, such as fraud.
Enforcement of intellectual property rights - TRIPS

The general issue of the enforcement of intellectual property rights has been addressed by the Italian law 198/96, by given occasion of the implementation of the TRIPS Agreement.

As far as to the additional questions annexe to Q 134, the Italian group maintains:

1. The question of damages and compensation for infringement of a patent in the absence of any stipulation is ruled by the law as laid down under the Italian Civil code. In so far as the patent is not assigned to the assignee, all the rights related to and derived from the patent, included the right to compensation for its infringement, remain with the patentee.

2. It is not possible to establish a criterion which permits to distinguish between the legally permitted repair of a patented product and the unauthorized reproduction of such product, being the distinction to be based only on the legal existence, provided for by law or any stipulation, of a specific authorization there upon.

3. No comment.

4. The mere intention of commercial exploitation of a sign which constitutes a trademark does not represent an act of infringement, unless such intention results in unquestionable and objective preparatory acts to actual use (i.e.: an advertising campaign to introduce a new brand on the market).

5. Yes, the application of a sign constituting a trademark on a product market for export constitute an act of infringement and the Italian trademark was amended accordingly on 1994.

6. No comment.
Whether the criminal law should apply or not to the infringement of a patent depends from how effective and efficient the criminal system is in each country.

In Italy criminal remedies may be productive in certain cases (clothing, cosmetics, software) where collecting evidence on infringement is spread over the whole territory or a deterrent impact is suitable. In general, there are no objections against an extension of the patent protection also through criminal law.
Obwohl zu dieser Frage eine genauere Aufstellung der zur Diskussion stehenden Probleme noch aussteht, könnte ganz kurz folgendes gesagt werden:

Enforcement of intellectual property rights - TRIPS

The Working committee suggests to continue the discussion of this Question Q 134B during the congress of Rio de Janeiro.

In general the Working Committee feels that more harmonization also in the field of procedure and sanctions is desirable and that it is worthwhile to identify specific areas where more harmonization should be achieved.

The Working Committee suggests to further discuss (among others) the following subjects, to which the Norwegian group has the following comments:

1. Which provisional measures apart from preliminary injunctions are desirable in order to prevent damages and/or to preserve evidence?

A: We have no proposals for further provisional measures.

2. How does a court acquire the desired training and/or expertise for handling patent or trademark cases? Should the court consist of (technically) specialised judges or is a system with judges trained and/or with expertise in patent or trademark law with access to (court appointed technical) experts be preferred?

A: Through improved education at Universities generally and at Law Schools specially.

Through experience in actual cases. Patent and trademark cases should be centralized to a few courts in each country (in small countries probably to one court only). This should be so not only for validity cases, but also for infringement cases. Possibly criminal cases would have to be exempted.

The courts could consist of a combination of ordinary judges with a broad legal competence and technically specialised judges with expertise in the patent or trademark field. In patent cases the specialised judges should also be specialists in the relevant technical field.
3. **Is it desirable that a court in one country - under certain circumstances - be competent to hear cases involving infringements in another country of i.p. rights granted for such other country («crossborder injunctions»)?**

A: We do not believe that the courts should have such competence. When making their decisions, the courts of one country should, however, take into consideration the results of corresponding cases in other countries, if any, in particular in other countries belonging to the same economic cooperation area.

4. **What rules are desirable with respect to the (burden of proof) of infringement? What means of proof should be available?**

A: The courts should have discetional powers to assess all proofs and evidence produced. The onus of «non-proof» should be on the party best able to produce such proof or evidence.

5. **With what degree of precision should an injunction restraining infringement be phrased?**

A: This must be considered from case to case by the court.

6. **The question of compensation of injury resulting from the infringement of patents and trademarks raises many questions such as:**

   a) **Is it desirable that the patentee or trademark owner has the right to choose between (or claim both) compensation of the injury proven and the unlawful profits obtained by the defendant? If (only) a choice between these two possibilities would be desirable at what time and on the basis of which information does the plaintiff have to make his choice?**

A: As a general rule, the courts should have discretionionary powers in such questions. In each particular case, the answer would depend on the circumstances of the case, i. a. on the situation outlined in question b).

   b) **Should in relation to the question of compensation for infringement a distinction be made between innocent, negligent, knowledgeable or wilful infringement?**

A: Yes, such distinction should be made. Thus, by innocent infringement the infringer should be sentenced to make compensation for the injury caused only.

   c) **What constitutes compensation of injury proven (such as lost profits) and what constitutes unlawful profits of the defendant?**

A: No general answer can be given. Unlawful profits may sometimes be ascertained from the accounts of the defendant.
d) Is with respect to the establishment of the amount of damages full proof required or should a court have certain discretionary powers?

A: The court should have discretionary powers to assess all proofs and evidence produced. The onus of «non-proof» should be on the party best able to produce such evidence or proof.

e) Should a patentee or trademark owner who exploits its patent or trademark through subsidiary companies be able to claim as compensation the lost profits of such companies?

A: No, only profits actually lost by a party should be compensated. The subsidiary companies should be directly compensated for their own loss.

f) What should be the rights of (exclusive) licensees to claim compensation in respect of infringement of the rights under which they are licensed?

A: Generally, at least an exclusive licensee should have the same right to claim compensation as the right holder himself. The precise answer could, in particular for non-exclusive licensees, depend on the wording of the license. The court would have to use its discretionary power.

g) Should a patentee or trademark owner always be at least entitled to reasonable royalties, and what are reasonable (realistic) royalties?

A: In stipulating the minimum compensation, the court should take as its point of departure a reasonable royalty, taking into account royalties for voluntary licenses currently given in the relevant field.

h) Are punitive damages desirable?

A: Punitive damages are desirable in criminal cases only, cf question 7.

i) What compensation should be awarded to a defendant who has been wrongly submitted to provisional measures?

A: Such defendant should be compensated both for his costs, including reasonable attorney fees (cf question j), and any loss caused by the provisional measures. A right holder seeking provisional measures should be obliged to deposit guaranties to assure that such compensations will be payed.

j) What attorney fees and costs (and to which extent) should be reimbursed to the prevailing party?

A: Generally, all attorney fees and costs should be reimbursed. In order to avoid abuse, the court should, however, have discretionary power to reduce the amounts claimed if they are found unreasonable.
7. *Is it desirable that apart from civil remedies, wilful infringement of a patent should constitute also a criminal offence?*

A: Yes, wilful infringement should constitute a criminal offence. Furthermore, the upper limit for punishment should be high enough to act as a realistic deterrent.
Enforcement of intellectual property rights - TRIPS

1. **Damages for infringement prior to the assignment of rights**

The Korean Group believes the two aforesaid to be reasonable. Namely, the Korean Group agrees that the Committee form its opinion as follows:

(1) with regard to the right of an assignee to take action with respect to acts done prior to the assignment of a patent, the question of compensation for infringement committed prior to the assignment depends on the terms of the contract between the assignor and the assignee; and

(2) in the absence of any stipulation in the contract of assignment as to compensation for infringement prior to the assignment, the right to compensation remains with the assignor.

2. **Is it possible to determine a criterion which permits to distinguish between the legally permitted repair of a patented product and the reproduction of such a product which constitutes an act of infringement?**

This is a question which will primarily have to be answered by courts on a case by case basis.

However, the following criteria could be considered:

(a) Repair of the portions other than the patented portion should be permitted because they do not belong to the category of the claim.

(b) Repair of the patented portion

   (1) Disassembly, cleaning or reassembly of a part or all of the patented portion should be permitted because such an act cannot be deemed to be new production.
Replacement of all or substantially all of the patented portion should be considered to be infringement in principle. However, the following exceptions can be considered:

- Replacement within the guaranteed period of durability;
- Replacement within the period of durability which is generally expected; and
- Replacement where the generally expected period of durability of the patented portion is very short in comparison with that of non-patented portion and where there is a custom of trade or social common sense which allows a user to freely repair the patented portion.

Repair only of a part of the patented portion should be permitted because the patent right cannot be extended to the remaining unrepaired portion.

Where the extent of repair lies between the second and the third categories, the determination should be made on a case by case basis depending upon whether or not the patent right is deemed to be extended to the remaining unrepaired portion.

Where there is a difference in importance between the repaired portion and the unrepaired portion, the level of quality should be considered as well as the number of such portion.

Definition of the product infringing a patent because it has been produced under a patented process.

The Korean Group also believes that the draft Resolution which was not adopted in Vienna may well serve as a useful basis for the work in Rio de Janeiro.

Does the reproduction of a sign which constitutes a trademark with the intention of commercial exploitation constitute an act of infringement in the absence of actual use?

Yes. In Korea, it is deemed to be an infringement to deliver, sell, reproduce or possess a mark identical or similar to the registered mark with the intention of using, or causing a third party to use, such mark on goods identical or similar to the designated goods of the registered mark (Article 66, Paragraph 2 of the Korean Trademark Act).

Does the application of a sign constituting a trademark on a product earmarked for export constitute an act of infringement?

Yes. (Note: Article 66, Paragraph 1; Article 2, Paragraph 1, Subpart 6, Items 1 and 2 of the Korean Trademark Act)

Damages for the infringement of patents and trademarks

Is it desirable that the patentee or trademark owner has the right to choose between (or claim both) compensation of the injury proven and the unlawful profits
obtained by the defendant? If (only) a choice between these two possibilities would be desirable, at what time and on the basis of which information does the plaintiff have to make his choice?

Yes, it is desirable that the patentee or trademark-owner has the right to choose between compensation of the injury proven and the unlawful profits obtained by the defendant. However, it is not desirable to allow the patentee or trademark owner to claim both compensation of the injury proven and the unlawful profits because the patentee or trademark owner may be given an excessive compensation through such an approach.

Further, it is desirable that the patentee or trademark owner may freely make his choice without any restriction or limitation because such restriction or limitation may hinder the patentee or trademark owner in obtaining appropriate compensation.

(b) Should in relation to the question of compensation for infringement a distinction be made between innocent, negligent, knowledgeable or wilful infringement?

Yes.

(c) What constitutes compensation of injury proven (such as lost profits) and what constitutes unlawful profits of the defendant?

Compensation of injury proven is constituted by compensation of the following damages:

- decrease of the value of the patented product
- costs of investigating infringement
- damage of business reputation
- lost profits

Unlawful profits of the defendant consist of sales amount of the infringing products x defendant's or plaintiff's margin rate.

(d) Is with respect to the establishment of the amount of damages full proof required or should a court have certain discretionary powers?

With respect to the establishment of the amount of damages, full proof is required in principle. However, it is desirable that a court has certain discretionary power in some exceptional cases within the reasonable scope.

(e) Should a patentee or trademark owner who exploits its patent or trademark through subsidiary companies be able to claim as compensation the lost profits of such companies?

If the subsidiary companies are not allowed to initiate litigation against the infringer (i.e., if they are non-exclusive licensees), the patentee or trademark owner should be able to claim the lost profits of such companies as compensation. However, if the subsidiary company is allowed to initiate litigation against the infringer in its own
name (i.e., if it is an exclusive licensee), the patentee or trademark owner should not be able to claim the lost profits of the subsidiary company, and only the subsidiary company may claim its lost profits.

(f) What should be the rights of (exclusive) licensees to claim compensation in respect of infringement of the rights under which they are licensed?

The rights of exclusive licensees are the same as those of the patentee or trademark owner.

(g) Should a patentee or trademark owner always be at least entitled to reasonable royalties and what are reasonable (realistic) royalties?

Yes, a patentee or trademark owner should always be at least entitled to reasonable royalties because it is practically very difficult to prove the amount of its damages or unlawful profits obtained by the defendant. Reasonable royalties should be determined in view of the royalty rates prevailing in the trade of the same or similar products.

(h) Are punitive damages desirable?

Yes. Because it is practically difficult to fully prove damages.

(i) What compensation should be awarded to a defendant who has been wrongly submitted to provisional measures?

The profits which a defendant could have obtained if he had not been wrongly submitted to provisional measures (i.e., lost profits) should be awarded to the defendant.

(j) What attorney fees and costs (and to which extent) should be reimbursed to the prevailing party?

All of the costs paid to the court and the court sheriff should be reimbursed to the prevailing party. Attorney fees should also be reimbursed to reasonable extent in view of the actual amount paid to an attorney.

7. Is it desirable that the intentional infringement of a patent constitutes a criminal act in addition to the civil remedies available?

Yes, but criminal punishment should be discreetly imposed considering that the patent right may be invalidated and that the determination of infringement is not always easy.

In Korea, a person who has infringed a patent right is liable to imprisonment for a period of up to five years or to a fine not exceeding fifty million Korean Won (approximately US$55,000 (Article 225, Paragraph 1 of the Korean Patent Act).
I. What are acts of infringement?

A) Acts of infringement In respect of patents

In respect of patents the acts which are prohibited by Romanian Patent Law No. 64/1991 are essentially similar to those specified by Article 28 of the TRIPS agreement when the subject matter of a patent is a product.

Also the patent law underlines that the proprietor of the patent has exclusive rights to prevent third parties to perform without his written consent the following acts: manufacture, use, marketing, offer for sale, import and storage with the purpose of selling, offering for sale or using.

The exclusive rights conferred by a patent shall not be extended to the followings:

- exploitation of the invention in the construction and operation of land vehicles or aircraft and ships or in devices used in the above that belong to member states of the international conventions to which Romania is a party, when the vehicles, aircraft and ships enter the Romanian territory either temporary or accidentally, provided the such exploitation is exclusively for the needs of vehicles, aircraft or ships;

- exploitation of invention by a person who has applied it or has taken real or effective steps towards exploitation it in good faith, within the territory of Romania independently of the owner of the patent and before a national filing date has been effected or before the recognised priority date. In this case the invention may continue to be exploited by that person to the same extent as on the date of the national filing date or recognised priority, but the right of use may not be transferred otherwise than with the assets of that person or the part of the said assets assigned to the exploitation of the invention;

- production or use of the invention for exclusively experimental purposes;

- marketing or offering for sale within the Romanian territory with or without the consent of the patent owner of samples of the products constituting the subject matter of the invention previously sold by the patent owner;
• exploitation or taking real or effective steps to exploit the invention by third parties in between the forfeiture of the patent owner's right and reinstatement of the said patent. In this case the invention may continue to be used to the same extent by third parties but should not be transferred without the assets or part of the assets of the person using the invention.

B) In respect of trademarks

The Romanian trademark law no. 28/1967 is going to be changed very soon. A new trademark draft-law completely harmonised with the TRIPS has been passed to the Romanian Parliament for approval.

In conformity with the trademark law in force, the definition of the prohibited acts as specified by Article 16, paragraph 1 of TRIPS is not in harmonised. The national law on unfair competition provides the acts of infringement as specified by Article 5: (a) use of a firm, symbol or special designations or packages capable to produce confusion in connection with the legitimate signs used by the other merchant; (b) manufacturing, importation, storage, selling of any merchandise bearing false mentions concerning patents, origin of merchandise and the name of the merchant with the purpose to make confusion among the other merchants and consumers.

The foregoing rights will not prejudice any prior existing right and will not affect the possibility on the part of the members of subordinating the existence of the rights to use. If these rights were obtained with dishonesty or with the infringement of the legal regulations the third parties can ask for the rights cancellation (Article 28, Law No.28/1967).

The paragraphs 2 and 3 of Article 16 of TRIPS are not applied in our country.

The National trademark law defines in Article 17 the signs which can not be registered as trademarks, as follows:

a) those which are not sufficient distinctive or other trademarks representing identical or similar products, works or services registered in Romania or protected under international convention, provided that when registration is requested or allowed by the owners of the trademarks;

b) those which constitute copies, imitations or counterfeitters of another foreign mark of products, works or services identical or similar well known in Romania;

c) those which comprises only of denominations and which become customary necessary or generic for those products works or services or which are referring exclusively to the way, time or place of manufacturing or to the kind, means, price, quality, quantity and weight of the goods;

d) those which comprise of name, portraits of leaders without the approval of entitled bodies; name of administrative organisations, reproduction or imitation of flags, orders, medals, signs, official signs of marking or checking the quality control or warranty;
e) those which comprise of the elements presented above concerning other states or international organisations forbidden by international conventions to which Romania is a party;

f) those which comprise of false or deceiving indications or are against the laws, the public or regulation of social order.

The national law in Article 17, explicitly is referring to Article 17 of TRIPS stressing that the descriptive terms would not be registered as trademarks.

The validity of a trademark registration is 10 years from the date of filing and may be renewed for indefinitely for other periods of 10 years.

II. What persons can act in respect of infringement?

A) In respect of patents
According to the Romanian Patent Law, Article 45, the rights deriving from a patent may be transferable either wholly or in part. Transfers may be effected by assignments, by the grants of exclusive or non exclusive licences or by legal testamentary succession.

a) There are no advertising formalities to permit opposition to an application to register an assignment or a licence to be lodged. Records of assignments and licences can be opposed by third parties before the Romanian PTO;

b) Proceedings for infringement of a patent in Romania may be brought by the patentee. In addition, the holder of an exclusive licence may initiate an action for infringement if it is stipulated in the licence agreement, after the date of the licence;

c) When a patent is assigned, the rights to take action in respect of the acts of infringement committed prior to the assignment are transferable to the assignee in accordance with the civil law proceedings relating to assignments of claims.

B) In respect of trademarks
Regulations concerning trademarks are similar to those given above.

III. What are the persons against whom action can be taken in respect of patent infringement?

A) In respect of patent infringement
Romanian law provide differences with regard to certain acts depending when whether the person who committed the infringement did or did not act with full knowledge (see I, A2). Patentee may claim damages in the event of patent infringement based on the provision of civil law.

Up to publication of application, 18 months after filing date, third parties - unless they have been informed by the patent owner may not be charged for infringements. After the publication of applications any third party's infringements are liable for damages under the civil
law provision but the payment of damages should be enforceable after the grant of the patent.

B) What are the persons against whom action can be taken in respect of trademark infringement?

The trademark law No 28/1967 does not contain a provision limiting the availability of damages or in account of profits to the situation where the defendant is aware of the relevant trademarks. In practice an account of profits is refused if at the time of the infringement the defendant was unaware of the plaintiff's trademark.

It is not necessary to address a formal notice prior to the commencement of an action for infringement.

Q 134 B Procedure and sanctions

The Romanian laws are not fully in compliance with the provisions of the TRIPS Agreement relating to the enforcement of intellectual property rights. The Romanian laws were recently reviewed in the Council on TRIPS of May 26, 1997, finding that the Government of our country has passed a number of intellectual property laws through the Parliament.

I. The competent Courts

The jurisdiction having competence to take decisions in the matter of patent infringement is the civil courts and in some cases of violation of forgery of the patent falling under the jurisdiction of the criminal court. In cases of nullity actions the courts being required to access the validity of a patent is the Metropolitan Court of Bucharest City. In the first instance the competence is of the court of the place where the defendant has his domicile. The Metropolitan Court of Bucharest City has the exclusive jurisdiction of a PTO's decisions to grant as a court of appeal for such decisions. Patent appeals go to the Court of appeals and the Romanian Supreme Court has the power to review all decisions in these matters.

The same principles of competence are valid for the trademarks too.

II. Time limitation of the infringement action

In case of validity of a patent there is a three months limitation from the date of PTO's decisions. The Romanian legal system does not provide for a time limitation in the fields of patents and trademarks.

III. Fair and equitable proceeding

The law does not sufficiently protect confidential information. At present a bill is being considered which will introduce a statutory privilege for trade secrets. In principle, art. 42 of TRIPS have been respected by the Romanian Courts in order to balance the interests of the parties involved. It will be appreciated that the new Trademark Law make expressly provision that steps suitable to ensure the protection of confidential information should be taken.
IV. Means of proof

The law in Romania does not provide the burden of proof as such. It has been recommended that the law be amended soon. Therefore a change has been made in the Court's behaviour concerning the means of proof in both patents and trademarks cases. One party can obtain from the Judge an order for exhibition of documents or acquisition of information by interrogation of the other party.

Public polls are taken by the parties as evidence at trials. They do not weigh heavily in the decision of the Court. Expert reports are usually recommended by the courts in patent cases. The decisions are always made by judge based on an expert report whose expertise derives from experiences in the field, studies and diplomas.

Regarding the reversal of burden of proof it should be observed that the Romanian legislators have in their views to adopt in our legal system the Anglo-Saxon principle. Such a new system shall be integrated with the traditional regulation of Romanian civil procedure code.

V. Progress in Civil and Criminal Proceedings

There is no statistics available on the average time for concluding actions in the first instance, in the courts of appeal, or in the Supreme Court of Justice. With reference to the costs, in the first instance the minimum a party would pay is around $5,000.00. In an infringement action for trademark the average time and costs may be lower than the values indicated in case of patent infringement.

VI. Indemnification of a defendant

Generally, the winning party does not recover attorneys charges in patent and trademark cases. Costs awarded to the winning party are determined by the court at its discretion.

VII. Provisional measures

Preliminary injunction is available in both patents and trademarks cases. In trademark infringement actions seizure orders may be granted. Preliminary injunctions have an important advantage in preventing against future injuries rather than affording a remedy for the past ones. The injunction proceedings are quick, their duration is a few weeks and particularly efficient.

VIII. Sanctions (art. 46)

The sanctions referred to in art. 46 are provided by criminal laws relating to patent and trademark infringements. The Romanian Court can require infringing articles to be delivered up to the complaining party or destroyed.

IX. Damages

Under Romanian system a winning party is entitled to damages for the infringement but does not regard an order to pay damages as depended upon the infringer's knowledge of the facts. Generally, the Romanian Court orders confiscation of the products realized by the infringer establishing the victim's compensation to the extent of the prejudice suffered.
X. Customs seizure

In Romania it is only possible to carry out customs seizure bearing a counterfeited patents and trademarks. It is recommended a new instruction for customs for implementing the TRIPS Agreement.

XI. Criminal proceedings

Protection of the industrial property rights by way of criminal proceedings is provided for by a few articles of Romanian criminal code, nos. 299, 300 and 301. These articles provide for imprisonment or fine penalties.
Enforcement of intellectual property rights - TRIPS

1. **Damages for infringement prior to the assignment of rights.**

   *The first alinea was adopted:*

   "With regard to the right of an assignee to take action with respect to acts done prior to the assignment of a patent, the question of compensation for infringement committed prior to the assignment depends on the term of the contract between the assignor and the assignee to the extent allowed by applicable law."

   *The second alinea was sent back to the Committee for further consideration in the discussion in the Plenary Session:*

   "In the absence of any stipulation in the contract of assignment as to compensation for infringement prior to the assignment, the right to compensation remains with the assignor."

   The Thai Law does not provide a provision on the right to claim damages for infringement committed prior to assignment of patent. This would be in accordance with the principle "transfer of claims" laid down by Section 303 of the Civil and Commercial Code.

   **Section 303 of the Civil and Commercial Code**

   "A claim may be transferable, unless its nature does not admit of it."

   When assigning a patent, the patentee may assign the right to claim damages for infringement committed prior to assignment of a patent to the assignment. If the assignment of such right is not stipulated in an agreement, the right remains with the assignor (the patentee). Assignment of the right to claim damages for infringement of a patent must be made in writing.

2. **Is it possible to determine a criterion which permits to distinguish between the legally permitted repair of a patented product and the reproduction of such a product which constitutes an act infringement?**
The Thai Patent Act does not provide explicit provision on a criterion for distinguishing the legally permitted repair of a patented product and the reproduction of such a product which constitutes an act infringement. There is no Supreme Court decision so far for guidance either.

3. **Definition of the product infringing a patent because it has been produced under a patented process.**

The Thai Patent Act does not provide the definition of the product infringing a patent as it has been produced under a patented process. To consider as to whether any product infringing a patented process, it would be based on Section 36bis.

**Section 36bis of the Thai Patent Act**

"The patentee's rights under Section 36 in the patented invention shall be contained within the scope as specified in the claims. Deliberation as to the extent of the invention under the claims shall be based on the features of the invented item as specified in the details of the invention as well as in the presentation of supporting drawings."

The scope of the patented invention should cover the features of the invention, irrespective of the fact that such may not have been specifically mentioned in the claims, but have similar functions and would induce similar results as the features of the invention mentioned under the claims in the opinion of a person who is well-versed at the ordinary level in the art or techniques relating to such invention."

According to Section 36bis, the scope of patent protection for an invention is determined by the claim(s). However, the Act adopts the doctrine of equivalency to the extent that the scope of protection covers not merely what is presented under the specific claim(s). Any invention that has a similar use and effect as that claimed in respect of any patented invention will be deemed an encroachment on that patent and thus will constitute an infringement. Criterion for determination of infringement is whether the product in question bears essential technical similarities to the patented processes. If differences is not insignificant such as lie merely in substituting certain ingredients or parts of the patented product with equivalents thereof, such deviations will be considered artificial, and the product or processes in question will be deemed an infringement.

The Thai Patent Act provides presumption in favour of a patentee in Section 77 which is similar to Article 34 of TRIPS.

**Section 77 of the Thai Patent Act**

"If the patentee for a patent concerning a production process enters into an action in the civil court against a person who has allegedly committed an infringement against his/her patent and the patentee can prove that the product produced by the defendant exhibits the same features or is similar to the product(s) produced through application of the patentee's process, it shall be
initially assumed that the defendant has used the patentee’s process, unless the defendant can prove otherwise."

Under Section 77, should the patentee be able to prove that the product produced by the defendant is the same or similar to the product produced through the patented process of the patentee, the burden of proof on as to whether the defendant used the patented process of the patentee will vest to the defendant.

It should be noted that an applicant may not claim for protection of rights for a pending patent application. However, if any unlawful act is executed subsequent to publication and the person who committed the act knew of the publication or received written notice that the application had been filed, the applicant will be entitled to receive damages from that person. Demand for payment of damages will be submitted to the Court after the patent has already been issued to the applicant.

4. **Does the reproduction of a sign which constitutes a trademark with the intention of commercial exploitation constitute an act of infringement in the absence of actual use?**

While reproduction of a sign which constitutes a trademark in the absence of actual use constitutes criminal offence for forging another person’s trademark, whether doing so is infringement of a trademark is still controversial. Further, in civil case, the effect of reproduction of a registered trademark and an unregistered trademark is different.

In case of registered trademarks, the first school of thought is that reproduction of a trademark without actual use is not an act of infringement of the trademark. The reason given is that there is no use as trademark i.e. use upon or in connection with the goods; infringement of a trademark occurs when the mark in question is used upon or in connection with the goods. The second school of thought is that doing so is an act of infringement as it is deemed that there is an encroachment of the exclusive right of the trademark proprietor. This exclusive right would also mean that the proprietor of the trademark has the exclusive right in making the trademark and permitting others to do so.

In any case, if there is case brought to the attention of the court, the court would focus on issue "with the intention of commercial exploitation", and accordingly it is possible that the court considers that the reproduction of a sign which constitutes a trademark with the intention of commercial exploitation is an act of infringement.

As for unregistered trademarks, reproduction of a sign which constitutes a trademark in the absence of actual use would not constitute an act of infringement. That is because infringement of an unregistered trademark must consist of actual use of a trademark and such use is passing off.

There is no precedent in relation to civil issue. The following Supreme Court’s decision is a criminal case.
The Supreme Court Decision No. 395/2476, Public Prosecutor v. Mr. Kay Koy-sumee, the Defendant printed thousands of the Plaintiff's label and sold them. The Plaintiff alleged that the Defendant forged his trademark. The Defendant argued that a label which could be regarded as trademark must be the label used or proposed to be used upon or in connection with the goods to show that such goods were of the label's owner, otherwise, such label could not be regarded as "trademark." The court ruled that printing the labels without authorization of the label's owner and selling the same of the Defendant was considered as act in bad faith. As such, whether or not the labels were adhered on the goods, it was deemed that the Defendant forged the trademark of the Plaintiff.

5. Does the application of a sign constituting a trademark on a product earmarked for export constitute an act of infringement?

The application of a sign constituting a trademark on a product earmarked for export would constitute an act of infringement. This would be applied in case of registered trademarks only.

Section 44 of the Thai Trademark Act

"... after a trademark has been registered, the applicant is the proprietor of the trademark and has the exclusive rights to the use of the trademark for the goods registered."

Section 4 of the Thai Trademark Act

"trademark" means a mark used or proposed to be used upon or in connection with the goods to show that the goods using the mark of the proprietor of the trademark are different from goods using trademarks of others.

The Thai Trademark Act does not provide the definition of "use" of a trademark. There is no previous decision of the Supreme Court rendered in relation to this specific matter to guide the issue either. However, when the above two provisions are read together, the act in question would be considered as infringement of a trademark. The wording "use in connection with the goods" is broad. Application of a sign constituting a trademark on a product earmarked for export would be considered as use of the sign in connection with the goods, and would be open for the proprietor of the trademark to take action against the person who did so for infringement of the exclusive right.

However, if a trademark in question is an unregistered mark, doing so would not be an act of infringement. The reason is same as 4 above.

6. Damages for the infringement of patents and trademarks.

The Thai Patent Act provides provision for damages of patent infringement according to Section 77ter:
Section 77ter of the Thai Patent Act

"Where there is a violation of the patentee's rights under Sections 36 or 63, the court shall have the power to order the offender to pay compensation to the patentee in the amount which the court thinks reasonable. In determining appropriate compensation, the court will consider the degree of the damages, including loss of interest and expenditures which were necessary to enforce the patentee's rights."

In general matters where claiming damages is under the Civil and Commercial Code, the court will determine the manner and the extent of damages according to the circumstances and the gravity of the infringement. However, for damages of patent infringement, the court will consider the degree of the damages, including loss of interest and expenditures which were necessary to enforce the patentee's rights. Nevertheless, it is assumed that the damages for the infringement of a patent in Thailand are not high as in western countries.

The Thai Trademark Laws do not provide provision for damages for trademark infringement. As such, the damages are in accordance with Section 438 of the Civil and commercial Code

Section 438 of the Civil and Commercial Code

"The Court shall determine the manner and the extent of compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value as well as damages to be granted for any injury caused."

Similarly to patent, the damages for the infringement of a trademark in Thailand are not high as in western countries.

7. Is it desirable that the intentional infringement of a patent constitutes a criminal act in addition to the civil remedies available?

Yes.

Section 36 of the Thai Patent Act

"No other person except the patentee, shall have the following rights:

(1) In the case of patented products, the right to produce, use, sell, possess for sale, offer for sale or import into the Kingdom such patented products; or

(2) In the case of patented process, the right to use the process under the patent, to produce, use, sell, possess for sale, offer for sale or import into the Kingdom such products produced as a result of the application of the patented process."
The provisions of Paragraph 1 will not be applicable in the following cases:

(1) Any acts whatsoever undertaken in the interest of education, research, experimentation or analysis;

(2) Manufacture of patented products or application of the patented processes the manufacturer or user of which has, in good faith, conducted their businesses or possess the equipment/apparatus for the purpose of conducting such businesses before the date the related application was filed in the Kingdom;

(3) Any action whatsoever relating to the product which has been acquired in good faith;

(4) Preparation of medicines for specific cases under a physician's prescription by practitioners of the medical profession or modern medicines including action against such pharmaceutical products; or

(5) Any acts relating to the application to have pharmaceutical products registered in the pharmacopoeia with the applicant entertaining a view to produce, distribute or import the patented pharmaceutical products after the expiry of such patents."

Section 85 of the Thai Patent Act

"A person who has committed any act under Sections 36 or 63 without the patentee's authorization shall be subject to a term of imprisonment not exceeding two years, a fine not exceeding four hundred thousand Baht, or both."
Table of contents

Guidelines Q 134 ................................................................. 5

National and Regional Groups Reports

Australia ............................................................... 15
China ................................................................. 29
Egypt ................................................................. 34
Great Britain ....................................................... 36
Italy ................................................................. 42
Latvia ................................................................. 44
Norway ............................................................... 45
Republic of Korea ................................................ 49
Romania ............................................................. 53
Thailand .............................................................. 59
Table des matières

Orientation de travail Q 134 ............................................................................................................. 8

Rapports des Groupes nationaux et régionaux
Australie ........................................................................................................................................... 15
China.............................................................................................................................................. 29
Egypte ........................................................................................................................................... 34
Grande-Bretagne ........................................................................................................................... 36
Italie................................................................................................................................................. 42
Lettonie .......................................................................................................................................... 44
Norvège .......................................................................................................................................... 45
République de Corée ....................................................................................................................... 49
Roumanie ....................................................................................................................................... 53
Thaïlande ......................................................................................................................................... 59
Inhaltsverzeichnis

Richtlinie Q 134 ......................................................................................................................... 11

Berichte der Landes- und Regionalgruppen

Aegypten ................................................................................................................................. 34
Australien ................................................................................................................................. 15
China ........................................................................................................................................ 29
Grossbritannien ....................................................................................................................... 36
Italien ......................................................................................................................................... 42
Lettland .................................................................................................................................... 44
Norwegen ................................................................................................................................. 45
Republik Korea ......................................................................................................................... 49
Rumänien ................................................................................................................................... 53
Thailand .................................................................................................................................... 59