

My Comments on “Patents in Experimental Use –Issues Paper”

Q1 (a) Very unclear. I would have believed that I could test the science behind a patented invention without restriction. On the other hand I would expect to have to pay royalty to actually use the patented invention as a stepping stone for further development.

Q1(b) Based on impressions gained from reading and seminars, Not certain at all

Q1(c) Yes, when using something already existent in patent in some form, even if we developed the same thing or a similar thing from scratch for use as a stepping stone we don't admit to its existence and don't publish and don't disclose anything that would allow the conclusion to be drawn that we were using the innovation. If things got to commercialisable stage we would then talk licenses/deals etc

Q2 USA looked too complicated. I didn't get thru it. The Japan /German approaches look favourable with experimental exemptions. If a company owns patent rights, anyone working on the patent device experimentally can potentially broaden the market. When and if the new items become commercialised the patent owner still gets benefit and, no doubt, a share of new invention that must utilise the original work patented.

Q3 Compliance with TRIPS Article 30 could mean that researchers may not be allowed to publish adverse findings about a patented device. This type of situation, although not ideal, is still favourable to that of being prevented access to the invention for research. I think you could live with it. This is probably better than I believe now exists, Q1.

Q4 Can't comment

Q5 Can't comment

Q6 I think the fair use concept is very close to what you need in experimental exemption. Experimental exemption is probably too strong as all patent rights are waived. A fair use concept is one where your work with a patented item allows you to progress research but prevents you from financially damaging the owner of the patent. This if achieved would mirror fair use ideas in copyright practice. The differences between copyright and Patent is the potential sums of money involved and the relatively short time available to patent owners to exploit their monopoly. The fair use provision applied here may end up being very restrictive on publication.

Q7, Not as such. Patentable inventions vary considerably anyway.

Q8 My impression of this is that the patent thicket is there and is potentially a large problem. The system seems to still allow inventions to be exploited because not all rights are prosecuted, unless big \$\$ are involved. A patent may infringe others but issues are driven economically –its not work chasing. This tends to allow research and development to proceed and even be ignored by stakeholders with patents in near proximity. It is only when the possibility of cash emerges that rights are pursued. The converse is also true, large companies will use patent law to destabilise and bankrupt small companies even if patent rights are not clear over not actually overlapping.

Q9 Not my area

Q10 It would allow supplementary inventions (improvements) to be developed without licensing.

Q11 I would like to see the experimenting *with* included.

Q12 No, I think limiting to experimenting *on itself* is very restrictive.

Q13 Yes, this would be 'fair dealing'

Q14 Not applicable see Q13

Q15 and Q16 – Yes, Licensing is another way. It could be used to establish 'fair dealing' criteria to suit the invention owners. It may be a better way than complying with TRIPS article 30. It adds the problem of legal drafting not a welcome change or cost. To make this work simplified license agreements would be a must. Standard forms maybe. Variations could be added. (We use this with house purchase and mortgage contracts).

Q17. Patent pools lend themselves to things like:

Engineering software,

Emerging technology products, smart transducers etc.

In both these examples, things could be developed more rapidly by gaining access the best sub components that could be found in the pool.

Q18. Benefits/disadvantages would depend on stakeholders and suitability of the projects. Having the capability would be good. Application would need to be on a case by case basis.

Q19. No

Q20. Unless there is a drastic change in the way taxpayers money is put toward research, industry money will be needed. This being so, industry partners will want the innovation to yield return and profit and give competitive advantage. Public domain/open source will not attract industry speculation and cash. Public domain therefore will have use in getting ideas started and partly developed to attract industry support etc.