

Question Q228

National Group: Argentina
Title: Prior User Rights
Contributors:
Date: April 30, 2014

Questions

I. Analysis of current law and case law

Groups are invited to answer the following questions under their national laws:

1. Is there a provision in your national patent law that makes an exception to the exclusive right of a patent holder for parties who have used the invention before the filing/priority date of the patent (“prior user rights”)?

No, there are no provisions regarding prior user rights in Argentina.

2. How frequently are prior user rights used in your country? Is there empirical data on how often prior user rights are asserted as a defense in negotiations or court proceedings?

N/A

3. To what degree must someone claiming a prior user right have developed the embodiment which is asserted as having been used prior to the filing/priority date of the patent? Is it sufficient to have conceived of the embodiment, or must it have been reduced to practice or commercialized?

N/A

4. Does it make a difference in your country if
 - the prior use occurred before the priority date; or
 - it occurred after the priority date, but before the filing date?

N/A

5. Is there a territorial limitation with regard to the scope of prior user rights in your country? In other words, if a party has used the patented invention before the filing/priority date in a foreign country, can it then claim a prior user right in your country?

N/A

6. Is there a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor?

N/A

7. Is it necessary that the prior user has acted in good faith to be granted a prior user right?

N/A

8. Is there a material limitation with regard to prior user rights in your country? More specifically, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, can he then claim a prior user right to anything covered by the patent? In particular, is the owner of a prior user right entitled to alter/change the embodiment of the patented invention used before the filing/priority date of the patent to other embodiments that would also fall within the patent's scope of protection or is he strictly limited to the concrete use enacted or prepared before the patent's application or priority date? In the event that changes/alterations are permitted by your national law, to what degree?

N/A

9. Does a prior user right in your country require the continued use (or the necessary preparations of the use) of the invention claimed by the patent at the moment in which the objection of the prior user right is asserted or is it sufficient if the invention claimed by the patent has been used before the priority/filing date of the patent but has been abandoned at a later stage?

N/A

10. Is a prior user right transferable and/or licensable in your country? If yes, under what circumstances?

N/A

11. Does your national law provide any exceptions or special provisions with regard to a prior user right owned by a company within a corporate group? In

particular, can a prior user right be transferred or licensed to another group company?

N/A

12. Are there any exceptions for any specific fields of technology or types of entity with regard to prior user rights in your country?

N/A

13. The Groups are invited to explain any further requirements placed on prior user rights by their national law.

II. Policy considerations and proposals for improvements to your current system

14. Should a prior user right exist in any legal system? If yes, what is the main legal justification for a prior user right?

In our opinion, prior user rights should exist but should be applied with limitations in order not to weaken the patent system.

The main legal justification for a prior user right would be to strike a balance between the effects of the first-to-file system principle on the one hand and third-party considerations (prior users) on the other hand.

15. What is the perceived value of prior user rights in your country?

There is no provision neither discussion on this issue in Argentina.

16. Are there certain aspects that should be altered or changed with regard to the existing implementation of the prior user right in your country? In particular, are there certain measures or ways that could lead to an improvement and/or strengthening of your current system?

N/A

III. Proposals for harmonization

Groups are invited to put forward proposals for the adoption of harmonized rules in relation to prior user rights. More specifically, the Groups are invited to answer the following questions:

17. Is harmonization of "prior user rights" desirable?

We think that harmonization of prior user rights is desirable.

18. What should be the standard definition of “use” in relation to prior user rights? Must the use be commercial?

Serious and effective preparations should be sufficient to acquire prior user rights, as occurs in Germany.

19. What should be the definition of “date” (or “critical date”) for prior user rights? (*i.e.* when must the invention have been used to establish a prior user right?)

In our opinion, the priority date is preferable as critical date.

20. Should a prior user right persist in the event that the use and/or preparation for use of the invention has already been abandoned at the time of the patent application/priority date or should the prior user right lapse upon the termination of the use and/or preparation of use?

In our opinion, prior user right shall not persist if the user and or preparation for use of the invention has already been abandoned at the time of the critical date.

21. What should be the territorial scope of a prior user right? In particular, if a party has used the patented invention before the decisive date in a foreign country, should it then be entitled to claim a prior user right?

Prior user right should be territorial. Therefore, the patented invention shall have been used in the same country in order to be entitled to claim a prior user right.

22. Should there be a provision that excludes prior user rights for those who have derived their knowledge of the invention from the patent holder and/or the inventor? If yes, should it be necessary that the prior user has acted in good faith to be granted a prior user right?

Good faith should be required.

23. Should there be material limitation with regard to prior use rights? In particular, if someone has used an embodiment of a patented invention before the filing/priority date of the patent, should he then be entitled to claim a prior user right to anything covered by the patent?

The scope of the prior user right should be commensurate with previous use or activity.

24. Should a prior user right be transferable and/ or licensable?

No, prior user rights should not be transferable or licensable.

25. Should there be any exceptions for any specific fields of technology or types of entity with regard to prior user rights?

No, in our opinion there should be no exceptions for any specific fields of technology or types of entity.

26. The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of “prior user rights”.

Procedure

It would be most helpful if the National Groups would fill out the Questionnaire and send in their answers to the General Secretariat of AIPPI by April 30, 2014 to:

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For inquiries, please contact the Chair of Q228

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