

Special Committee Question Q228

National Group: Netherlands

Title: Prior user rights

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Questions

The Groups are invited to answer the following questions under their national laws. If both national and regional laws apply to a question, please answer the question separately for each set of laws.

Please number your answers with the same numbers used for the corresponding 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")?**

Yes, the Netherlands Patent Act 1995 (NPA 1995) provides for prior use exceptions under specific circumstances. The main article is Article 55 NPA, which provides:

"1. Any person who, in the Netherlands, Curaçao or Sint Maarten, has already manufactured or applied or commenced implementation of his intention to manufacture or apply, in or for his business, the subject matter of a patent application filed by another, on the date of filing of that application or, if the applicant has a right

of priority under Article 9(1) or Article 87 EPC, on the date of filing of the priority application, shall, notwithstanding the patent, continue to have the right to perform the acts referred to in Article 53(1), this right being based on prior use, unless his knowledge was obtained from matter already made or applied by the applicant or from the applicant's descriptions, drawings or models.

2. Paragraph 1 shall apply mutatis mutandis to that part of the continental shelf contiguous to the Netherlands, Curaçao or Sint Maarten, to which the Realm has sovereign rights, but exclusive to the extent that such acts are directed at and are performed during exploration for or recovery of natural resources.

3. [...]

4. The rights referred to in paragraphs 1 and 3 may only be transferred to other parties together with said business."

Article 71(5) and Article 72(4) NPA 1995 provide that the right of the proprietor of a Dutch or European patent to demand reasonable compensation from a person who used the patented technology in the period between the registration of the application and the (publication of the) grant of the patent does not extend to acts performed by a person entitled to do so by virtue of Article 55 or by agreement.

Please note that there exist other prior user rights, which are not further discussed in this Questionnaire:

- Article 23(5) NPA 1995: right to continue acts started in good faith after the lapse of the patent, but before the re-establishment of the patent
- Article 55(3) NPA 1995: right to continue good faith use of activities which did not violate the erroneous Dutch translation of a European patent, which was used to validate the patent in the Netherlands, which activities are commenced before an improved translation has been entered in the patent register
- Article 53(6) NPA 1995: right to continue acts with respect to products, which are manufactured prior to the grant of a Dutch patent, or prior to the date of publication of the mention of the grant of the European patent
- Articles 75(8) and Article 78(3) NPA 1995: prior user right of the proprietor of a patent, which is revoked or transferred because he was not entitled to it, but who acted in good faith when filing his application or who obtained the patent in good faith from a previous proprietor.
- Article 112a(6) EPC: any person who has in good faith used an invention which is the subject of a published European patent application or a European patent in the period between the decision of the Board of Appeal concerning a petition for review by the Enlarged Board of Appeal, and publication in the European Patent Bulletin of the mention of the decision of the Enlarged Board of Appeal on the petition, may continue such use in the course of his business or for the needs thereof. However, we note that this provision has not yet been implemented in the Netherlands Patent Act.

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?

Under the previous Patent Act 1910, it was possible to obtain a declaratory statement of prior use. This statement was issued by the Patent Council (Octrooiraad) and the issuing of such a statement was annotated in the register. There are, however, no statistics regarding the numbers of statements which were issued. From older case law it is apparent that defendants occasionally invoked a defense on the basis of such an issued statement of prior use. Under the Patent Act 1995 it is not possible to obtain a statement of prior use. Excluding about 50 older decisions of the Patent Council, we found about 35 court decisions on prior user rights in the period 1930-2014. The recent case shows that defendants occasionally

invoke a defense on the basis of prior use, but there are no reliable statistics. It is likely that defendants focus their effort on invalidity and non-infringement and use a prior use defense as a last resort, which may be caused by inter-alia the geographical limitation of a prior user right.

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?

For a prior user right to arise, Article 55 NPA prescribes that the party wishing to invoke a prior user right "has already manufactured or applied or commenced implementation of his intention to manufacture or apply, in or for his business, the subject matter of a patent application filed by another" on the filing or priority date (hereafter: critical date) of such patent application.

It is therefore clear that the *mere conception of an embodiment is insufficient* for a prior user right to arise. However, Dutch law does *not require that the product or the method has been commercialized*.

Case law on what should be considered as "commencement of implementation of the intention to manufacture or apply" is relatively scarce and very much depends on the facts of the case.

In some situations tests, drawings and the manufacturing of samples were considered sufficient to show that a party has commenced the implementation of its intention to manufacture or apply, while in other situations they were not sufficient. Generally, the larger the scale of the tests or the more detailed the drawings, the better the chance that a court will conclude that a prior user right exists.

For example large scale experiments in a chemical factory (AA 13 July 1935, BIE 1936, p. 65), experiments on a semi-technical scale (AA 24 August 1944, BIE 1946, 43), construction drawings (AA 2 January 1940, BIE 1942), a detailed drawing for a construction which would only be manufactured on demand (AA 20 March 1951, BIE 1952, p. 55), and drawings, prototypes based thereon and application of the method during an exhibition (Pres. District Court The Hague 27 October 2006, BIE 2007, p. 353) all qualified as prior use.

On the other hand, raw sketches (Pres. District Court The Hague 4 January 1988, BIE 1989, p. 280) even for the purpose of an offer to a client (AA 9 March 1939, BIE 1942, p. 186; Pres. District Court The Hague 28 August 1990, BIE 1992, p. 315), an order for a product (District Court The Hague 8 June 2011, IEPT20110608, IEF 9778); (draft) patent applications (AvB 6 March 1937, BIE 1938, p. 35; Pres. District Court The Hague 28 August 1990, BIE 1992, p. 315), tests which were not followed up by commercialization (District Court The Hague 11 January 2006, BIE 2007, p. 22) were not sufficient to demonstrate that a party had commenced with its intention to manufacture a product or apply a method.

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?**

Yes, this makes a difference. Article 55 NPA requires inter alia that the prior use occurred before the priority date. Therefore, if the prior use occurred after the priority date, but before the filing date, no prior user right arises.

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?

Yes, Article 55(1) NPA provides that the prior user must have manufactured the patented device or have applied the patented method, or at least have commenced implementation of his intention to manufacture or apply in the territory of the Netherlands, Curaçao or Sint Maarten (hereafter: the Netherlands). In addition, Article 55(2) provides that a prior user right can also be obtained for activities in that part of the continental shelf contiguous to the Netherlands, in which the Kingdom has sovereign rights, but exclusively for acts associated with and performed during the exploration for natural resources or the recovery thereof. If the prior user has used the invention in a foreign country before the critical date, no prior user rights can be claimed in the Netherlands.

Dutch courts have applied this criterion rather strict. The Netherlands Supreme Court has held that prior user rights must be evaluated on a country by country basis and that therefore a prior use in Germany cannot result in any prior right of the same party in the Netherlands (Supreme Court 20 June 1930, NJ 1930, p. 1217). In another case, an alleged prior user argued that it was part of a corporate group in which information was shared, and that another entity of that group had commenced using the invention before the critical date in another country. According to the Hague District Court, such a situation - if true - would not lead to a prior user right (Hague District Court 8 June 2005, BIE 2007, p. 97).

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?

Yes. Article 55(1) NPA 1995 provides that a prior user right shall be available for the prior user "unless his knowledge was obtained from matter already made or applied by the applicant or from the applicant's descriptions, drawings or models." Article 8 NPA 1995 provides that, in principle, "the applicant shall be deemed to be the inventor and in that capacity to be the person entitled to the patent." Hence, the exclusion of Article 55(1) also applies in case the prior user has derived his knowledge from the inventor or patent holder (even if the prior user acted in good faith). However, if the knowledge is derived from a third party, not being the patent holder or the inventor, a prior user right may be recognized (AvB 4 June 1955, BIE 1955 p. 96).

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

Article 55(1) NPA 1995 does not impose any good faith requirement to establish a prior user right. It is sufficient that the knowledge is not obtained from matter already made or applied by the applicant or from the applicant's descriptions, drawings or models. However, the Hague District Court has ruled that the prior user who acted in bad faith is not entitled to any prior user rights (Hague District Court 2 May 2007, BIE 2007, p. 700: in this case, the prior user was an ex-employee).

- 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?**

The Netherlands Patent Act does not impose any material limitation on the prior user right.

The Netherlands Supreme Court has ruled that the prior user right is not limited to the *embodiments* for which the prior user right was originally established before the critical date (Supreme Court 20 June 1947, NJ 1948, 92). The Court expressly noted that the prior user has the right to change or improve the prior used embodiments. However, the Court drew a line to exclude from the prior user right any improvements and embodiments that were protected by the patent and expressed an independent inventive concept that was not known to the prior user. In this case, this applied to the independent inventive concepts expressed in the inventive dependent claims of the patent. The Court noted that the right to apply other or better implementations was tied to the fact that the Netherlands Patent Act allowed a prior user right already in the case of commencement of the implementation of the invention. The prior user right would be without value if a primitive embodiment from that time, which showed that the prior user possessed the principle of the invention, could not be improved or replaced by a better embodiment.

The Netherlands Patent Act does not impose any limitation on the type of infringing *act*. Article 55(1) NPA provides that the prior user who has already "manufactured or applied or commenced implementation of his intention to manufacture or apply" in the Netherlands shall have the prior user right to perform all the exclusive acts of the patent proprietor. In the aforementioned case, the Netherlands Supreme Court confirmed that a prior user right that arose from the mere in-house use of a machine extended to the right to sell this kind of machine, even though the prior user had made no preparations to sell such machines before the critical date.

- 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?**

Any prior user right within the meaning of 55(1) NPA 1995 shall continue to exist as long as it is *not abandoned*. It will be allowed to temporarily discontinue or interrupt the use as long as it has not been given up definitively (cf. Court of Appeal Arnhem 2 May 1934, BIE 1935, p. 2; Court of Appeal Amsterdam 18 January 1967, BIE 1967, p. 224; Pres. District Court The Hague 2 March 1987, BIE 1988, p. 273).

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

Article 55(4) NPA determines that prior user rights "may only be transferred to other parties together with said business". If the "business" is transferred to another party, the assignor loses the prior user rights. The Court of Appeal The Hague held that prior user rights cannot be split. However, an exception was made for the situation where a company has a prior user right to manufacture a patented product and to use a patented process. The Court of

Appeal held that these are in fact two prior user rights that can be assigned separately as long as the part of the business where the prior user right is used will also be transferred (Court of Appeal The Hague 16 January 1980, BIE 1981, p. 66). See further at question 11.

It is not possible to license a prior user right to another person.

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?

No, there are no exceptions or provisions with regard to the licensing or transferring the prior user right to another company within a corporate group. Therefore, the answer to question 10 also applies to these situations. However, under Dutch law, the concept of a "business" does not equate to a legal entity (legal person). It is possible that one legal entity runs one business, however, in practice it is also possible that different legal entities are involved in running a single business or even multiple businesses. Since the prior user right arose due to acts performed within the context of a business, it will usually be the case that each of the legal entities running the business, will be able to rely on a shared prior user right as long as it is connected to this business. Therefore, depending on specific circumstances of the case, there may be no need to transfer a prior user right.

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

No, there are no special exceptions for specific fields of technology or types of entity. However, we note that Article 55(2) NPA expands the territory within which prior user rights may be established to include "the continental shelf contiguous to the Netherlands, Curaçao or Sint Maarten" for "exploration for or recovery of natural resources" only.

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

With respect to the prior user right of Article 55(1) and (2) NPA there are no further requirements other than those discussed above.

Note that we do not discuss the prior user right of Article 53(6) NPA 1995, which does recognize (in Articles 71 and 72 NPA 1995) a right to demand a reasonable compensation (see also question 1).

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?**

Yes, the Dutch Group believes that there should be a prior user right system.

In the Netherlands, the two main justifications for the recognition of a prior user right according to the legislative history are to bring *fairness and economic efficiency* into a first-to-file system without introducing an obligation to file for patents.

The prior use exception did not exist in the Patent Act of 1817, and was introduced in the Patent Act of 1910. In the Explanatory Memorandum of 1905, the government stated that without a prior user right, a first-to-file patent system would develop into a system where the main purpose for filing a patent application would not be to obtain exclusive rights but to obtain protection against exclusive rights of others. However, there can be many valid

reasons not to apply for a patent (e.g. unfamiliarity with the patent system, not being aware of the inventiveness of the invention, not sufficient interest to obtain patent rights or the intention to keep the invention secret) and that under Dutch law, applying for a patent is a "right", "not an obligation". The government stated that in such a system "whatever the reasons were for keeping an invention secret, there exist grounds of *equity and fairness* ("billijkheid") to limit the monopoly of the patent holder against such prior users." (MvT: Handelingen der Staten-Generaal, 1904-1905, no. 197, no. 3, p. 18-19).

In our view, it is equitable and fair that a party, which was already in possession of an invention (see further at question 18) before the critical date of the patent, and which chose for whatever reason not to obtain a patent, should not be barred from continuing its acts after a later patent application by another party. If the first party had applied for a patent, it would have prevented the patentee from obtaining its patent. A system without prior user rights forces any party, which has developed a new technology to apply for a patent, merely to safeguard its own freedom to use the technology, even in cases where a party is not interested in a monopoly for the technology. This would create unnecessary monopolies which would form an obstruction to free competition.

Second, in the Explanatory Memorandum of 1905, the government also stated that without any prior user right, prior users, who use a legitimately created or obtained invention without filing for any patent application, may "suddenly" be blocked from any further use by the patent owner. In our view, the *economic justification* for the recognition of a prior user right in a first-to-file system is to *prevent that good faith investments in an unpatented invention which has not been made public are lost* by another person's later patent application. Patent rights should not destroy economic investments and create any disincentive to further invest in innovative R&D.

Further, we think that a prior user right may also serve the public interest. Generally, the patent system strikes a balance between the public interest to promote innovation and the public interest to avoid monopolies: a patent monopoly is granted only if it does not detract from the public domain products/processes that were known/published at the critical date (e.g. via the requirements of novelty and inventive step). In the case of commencement of commercial use before the critical date, the prior use is not yet in the public domain, but may show a commitment from the prior user to make the fruits of his prior use available to the public domain. A prior user right can further add to achieve an appropriate balance of rights by introducing a limited exception to the patent monopoly, to retain the public access to such fruits from the prior user. The prior user's decision not to file an earlier patent application should not detract from the public's interest in the fruits of the activities of the prior user.

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

It is difficult to qualify, let alone quantify, the perceived value of prior user rights. There are not so many court decision on prior user rights (see question 2). It is our impression that prior user rights are not frequently invoked in litigation and only slightly more frequently invoked in licensing/settlement negotiations. Nevertheless, the Dutch Group believes such rights are of great value as a moral right that supports acceptance of the first-to-file patent system as a whole by the general public.

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?

The Dutch Group holds that the system of prior user rights in the Netherlands generally works well. We think that the biggest improvement will come from harmonization itself, applying the same rules in different countries. Once prior user rights are harmonized, the

next step could be solving the problem for prior users, who work internationally. Although the territorial effect of prior user rights may be of little use to multinational companies, we find it difficult to expand prior user rights to other countries in a system that is based on national patent rights. See further at question 21, where also the unitary patent is mentioned.

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?

Yes, harmonization is desirable and important as long as the basic principle of prior user rights is recognized, since a system without any prior user rights is not desirable. A major advantage of international harmonization of substantive patent law is that it will reduce legal uncertainty and costs for legal advice.

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

After lengthy discussions, the Netherlands group believes that mere conception should not be sufficient. However, there should be no requirement that the product or the method has already been commercialized: the conception of the idea plus the commenced implementation of the intention to manufacture or apply the subject matter of a patent application for commercial purposes, should be sufficient.

The Netherlands group believes that a party, which has conceived the invention, but which not only failed to apply for a patent application, but also has not taken any subsequent steps before the critical date which show an intent to manufacture or apply the subject matter of a patent application for commercial purposes, has not shown sufficient interest in the invention to such an extent that the justifications for a prior user right (see at question 14) are compelling. We feel that the equity justification bears less significance in such a case and that a party, which has not shown its will to invest in bringing the invention to the market, should not be able to profit from a prior user right, especially not in a case where another party has made all efforts to successfully market the invention. Further, the economic justification that damage to good faith economic investments should be prevented, is not applicable in case of mere conception.

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?)

The critical date should be the priority date (Article 4A(1) jo. Article 4C(1) Paris Convention). This will allow an applicant to enter the market directly after filing a patent application without fear of having to prove that third parties, who start using the invention during the pre-publication period, obtained their knowledge from the applicant.

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?

The prior user right should only lapse after a clear and voluntary abandonment (waiver) for whatever reason. There can only be an abandonment if the intent to use is no longer apparent. Temporary cessation of the prior use, for whatever reason, e.g. no demand during

recession, even during a longer period, should not be regarded as abandonment.

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?

In our view it is fair to treat prior user rights on a country-by-country basis as long as the same is true for national patent rights. At this point, we cannot accept cross-border (or even world-wide) prior user rights.

However, we think that once we get a single patent that is valid in different countries, a harmonized prior user right should also be granted for the whole territory where this patent will be valid. For example, European patents with unitary effect shall be valid in those EU countries, which are bound by Regulation (EU) No 1257/2012 of December 17, 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection and which will ratify the Unified Patent Court Agreement (UPCA) (at least Germany, France UK and ten other EU countries). In some literature, it has been argued that an advantage of a Unitary Patent is that it will be no longer necessary that the infringing acts are committed in a single Contracting Member State, but that injunctive relief shall also be available if different elements of an infringing act have been conducted in different countries where the Unitary Patent is valid. However, Article 28 UPCA provides that "[a]ny person, who, if a national patent had been granted in respect of an invention, would have had, in a Contracting Member State, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that Contracting Member State, the same rights in respect of a patent for the same invention." The result of this national treatment is that persons, who have fulfilled all requirements for a prior user right to exist within the territory of two or more countries where the Unitary Patent is valid, but not in one single country, shall not have any prior user rights, while at the same time they may be held liable for infringing a Unitary Patent, even if they did not fulfill all elements of an infringing act in a single Contracting Member State. In our view, this is not in balance, which may cause problems for companies that operate on a multinational basis. Therefore, under the new Unitary Patent system, we think it is fair to expand harmonized prior user rights to the whole territory of the Unitary Patent (similar to Article 12 of the Commission's Proposal for a Council Regulation on the Community Patent, COM(2000)414).

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?

In our view, a prior user right should not be granted to persons who have derived their knowledge from the inventor, and/or rightful applicant.

We could accept an extension of prior user rights in those rare cases where the prior user can show that he acted in good faith even though he obtained the knowledge from the inventor/applicant. An example would be a case where the inventor has disclosed his invention to a party bound to confidentiality, which starts using the invention in good faith and thereafter the inventor files a patent application for the invention.

The proposal for a EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, currently provides in article 3 section 3 that the use or disclosure of a trade secret shall be considered unlawful whenever carried out, without the consent of the trade secret holder by a person who is found to meet any of the following conditions: (a) has acquired the trade secret unlawfully; (b) is in breach of a confidentiality agreement or any other duty to not disclose the trade secret or (c) is in breach of a contractual or any other duty to limit the use of the trade secret. Goods that are manufactured using such a trade secret will be infringing goods

under article 2 section 3. The example of disclosure to a party bound by confidentiality mentioned above may very likely fall within the categories of article 3 section 3 under (b) or (c). Therefore, such use may qualify as a trade secret infringement. If it does, it would be hard to conceive that at the same time this would be prior use in good faith under patent law. Thus, the future Trade Secrets Directive may considerably limit the options for prior use under a confidentiality agreement, as it may not constitute patent infringement, but at the same time may constitute trade secret infringement, unless of course the confidentiality agreement does allow for applying the know how and thereby also the patent, the application for which was later based on this know how.

Another example would be a case where the inventor has published his invention and another person starts using this publication in good faith for commercial purposes, and thereafter the inventor files for a patent while invoking the grace period rule as proposed in Resolution Q233 on Grace period for patents of 10 September 2013 (Helsinki). The recognition of a prior user right under the proposed grace period rule (not yet in force) would create an incentive to file for patents and not to rely on the grace period rule. Further, good faith could exist where the prior user obtained the knowledge with consent of the inventor/applicant without any obligation to keep the information secret, e.g. because the inventor subsequently changed his mind and filed a patent application invoking the proposed grace period rule.

23. Should there be material limitation with regard to prior user 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?

In our view, on the one hand, the prior user should not be limited to acts identical to those which were performed before the critical date, while at the other hand, a prior user right should not be extended to the whole scope of the patent, in particular not to improvements, which are inventive over the embodiments known to the prior user before the critical date. Therefore, obvious improvements should be allowed, while it should not be allowed to use inventive embodiments disclosed in the patent, which were not envisaged by the prior user before the priority date.

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

In our view, a prior user right should not be licensable, but should be transferable to another legal entity together with the entire "business" of the company (see further at question 11), where such use has been carried out. We could accept an additional good faith requirement in order to prevent legal constructions to circumvent that it is not possible to assign a prior user right without the business. If the owner of a prior user right is a natural person, we think that the right should be transferable by hereditary or testamentary succession together with the business.

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

No. We think that no exceptions for specific fields of technology are justified. Further, we do not think that prior user rights should be granted to specific entities only, e.g. universities or non-profit organization.

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".

We note that no specific question addresses the standard of proof issue. We could accept that no specific rules (e.g. up to the hilt, clear and convincing, etc.) are adopted for prior user rights.

Further, it appears desirable that the legislator should provide for a procedure for obtaining an early declaratory judgment about the existence and scope of prior user rights, and rules about initial ownership, e.g. in the case of prior use that comes into existence during work performed by an independent contractor.