

## INFRINGEMENT

### Section 60: Meaning of infringement

- s.67 60.01 This section is the first of a group (ss.60 to 71) relating to infringement. Section 60 governs what constitutes infringement of a patent for an invention under the Act while the patent is in force. Its provisions also apply, to the extent defined by section 69, in relation to a patent application under the Act which has been published but not granted. References to the proprietor of a patent are therefore to be construed as including references to the applicant. References to the proprietor are also to be construed as including references to an exclusive licensee and, in the case of two or more joint proprietors, are to be construed as set out in section 66.
- s.77(1) 60.02 Sections 60 to 71 also apply in relation to European patents (UK) and  
s.78(2) sections 60 to 69 also apply in relation to applications for European patents (UK).
- 60.03 [deleted]
- s.130(7) 60.04 Section 60 is so framed as to have, as nearly as practicable, the same effect in the UK as the corresponding provisions of the EPC, CPC and PCT. Articles 29 to 31 of the CPC (renumbered in December 1989 as Articles 25 to 27 [1989]) and Article 64 of the EPC are in question and are commented on below, see 60.11 to 60.14, 60.16, 60.17, 60.20, 60.21, 60.23, 60.24 and 60.30.
- 60.05 Prior to the Patents Act 1977, the meaning of infringement was a matter of common law.

### ***Extent of protection***

60.06 Whether or not a patent is infringed depends on the construction placed on the extent of the protection afforded by the patent. That protection is determined in accordance with the s.125(1) definition of an invention as that specified in a claim as interpreted by the description and any drawings. See 2.11 to 2.17, 14.111 to 14.120 and 125.02 to 125.06 with regard to construction in this respect, 76A.07 to 76A.09 with regard to patents for biotechnological inventions.

60.07 Matter which falls in some material respect outside the scope of the claims, when they have been interpreted in the light of s.125(1), is not protected. The following observation of Viscount Radcliffe in the House of Lords in *Van der Lely N V v Bamfords Ltd* [1963] RPC 61 at page 78 states: "one must be very careful to see that the inventor has not by the actual form of his claim left open to the world the appropriation of just that property that he says has been filched from him by piracy or theft. After all, it is he who has committed himself to the unequivocal description of what he claims to have invented, and he must submit in the first place to be judged by his own action and words".

60.08 In *Codex Corporation v Racal-Milgo Ltd* [1983] RPC 369 at page 381, the Court of Appeal (in considering the construction of a 1949 Act patent) held that one should not look only to the essence or principle of a patent in suit and hold there to have been an infringement merely because that essence or principle has been made use of by the alleged infringer. The Court instead followed Lord Diplock's approach of purposive construction of the claims, as laid down in *Catnic Components Ltd and another v Hill and Smith Ltd* [1982] RPC 183, see 14.115 and 125.13-15.

60.09 Something which differs in an unessential respect from a patented invention may still infringe the patent; it is a question of considering substance rather than mere form. In the House of Lords in *Rodi & Wienerberger AG v Henry Showell Ltd* [1969] RPC 367 at

page 380, Lord Morris of Borth-y-Gest endorsed the observations made in *Marconi v British Radio Telegraph and Telephone Co Ltd* (1911) 28 RPC 181 to the effect that no one who borrows the substance of a patented invention can escape the consequences of infringement by making immaterial variations, and that everyone who produces the same results by using the essential parts of the combination or process is an infringer, even though he has replaced some unessential part by an equivalent part.

### **Section 60(1)**

*Subject to the provision of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say -*

*(a) where the invention is a product, he makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise;*

*(b) where the invention is a process, he uses the process or he offers it for use in the United Kingdom when he knows, or it is obvious to a reasonable person in the circumstances, that its use there without the consent of the proprietor would be an infringement of the patent;*

*(c) where the invention is a process, he disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.*

## **ACTS CONSTITUTING INFRINGEMENT**

### ***Direct use of the invention (substantive infringement)***

60.10 A person infringes if he performs any of certain acts in the UK without the consent of the proprietor of the patent or, by virtue of s.69 in the case of a published application, the consent of the applicant. The acts in question are as set out in s.60(1)(a) where the invention is a product and as set out in s.60(1)(b) and (c) where the invention is a process.

60.11 CPC Article 29 (renumbered as Article 25 [1989]) corresponds to s.60(1) although its wording is somewhat different. The Article is headed "Prohibition of direct use of the invention".

60.12 Where the invention is a product, the infringing acts according to s.60(1)(a) are to make, dispose of, offer to dispose of, use or import the product or keep it whether for disposal or otherwise; whereas according to CPC a.29(a) (renumbered as a.25(a) [1989]) they are to make, offer, put on the market or use the product, or import or stock the product for these purposes. Comparison of these corresponding provisions may serve as an aid in construction since they should have the same effect, see 60.04.

60.12.1 In *United Wire Ltd v Screen Repair Services (Scotland) Ltd* ([2001] RPC 24) the view of the Court of Appeal (subsequently endorsed by the House of Lords) was that "genuine repair" of a patented product does not amount to making that product and so does not constitute an infringing act. However, Aldous LJ observed that acts prohibited by s.60

are infringing acts whether or not they can be categorised as 'repairs' and stated:

"It is therefore better to consider whether the acts of a defendant amount to manufacture of the product rather than whether they can be called repair, particularly as what could be said to be repair can depend upon the perception of the person answering the question. Even so, when deciding whether there has been manufacture of the product of the invention, it will be necessary to take into account the nature of the invention as claimed and what was done by the defendant."

The case in question centred around mesh screen assemblies used in vibratory sifting or filtering machines, comprising two tensioned filter meshes bound to a frame. The defendants 'repair' of the screen involved stripping the frame, re-coating with adhesive and applying new meshes, followed by tensioning and heating to cure the adhesive. This process was found to be equivalent to purchasing the frames on the open market and then using them to produce an assembly, and thus constituting an infringing act.

60.13 In *Smith, Kline and French Laboratories Ltd v R D Harbottle (Mercantile) Ltd and Others* [1980] RPC 363, the corresponding wording of CPC a.29 (renumbered as a.25 [1989]) was one of the reasons for the conclusion of the Patents Court that "keeps" in s.60(1)(a) connotes a keeping in some capacity and for a purpose other than that of a mere custodian or warehouseman; it was held that what the draftsman had in mind was "keeping" in the sense of "keeping in stock" so as to give effect to the words of the Convention "stocking the product for these purposes". A further reason for that conclusion was the lack of evidence of any intention to effect a revolutionary change from the situation before 1977 that a carrier or warehouseman who did no more than innocently carry or store infringing goods for a consignor or consignee was not liable as an infringer.

60.14 In *Kalman and another v PCL Packaging (UK) Ltd and another* [1982] FSR 406, the Patents Court considered the meaning to be given to the phrase "dispose of" in s.60(1)(a) and the equivalent expression "putting on the market" in CPC a.29(a) (renumbered as a.25(a) [1989]), and concluded that "dispose of" must at least include selling. In endorsing the conclusions reached in the *Smith, Kline and French* case (see 60.13) the Court held that mere carriers did not themselves "dispose of" the goods which they carried. The Court further held that "offers to dispose of" in s.60(1)(a) means "offers in the United Kingdom to dispose of the product in the United Kingdom".

60.15 According to s.60(1)(a), importing a patented product is an infringing act. Article 28 of the Treaty establishing the European Community prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States, but Article 30 of that Treaty provides that Article 28 shall not preclude prohibitions or restrictions on imports or goods in transit justified on grounds of inter alia the protection of industrial and commercial property. When considering Articles 28 and 30 of the Treaty (then Articles 30 and 36, respectively) in the case of *Allen and Hanburys' Salbutamol Patent* [1988] FSR 312, the European Court of Justice held that a person importing from another Member State of the then European Economic Community should be treated the same as one manufacturing in the UK: such importation can only be banned by injunction or by the terms of a licence if such manufacture would be. This applies even if the product being imported is not patentable in the Member State in which it was manufactured (see 46.53). In *SABAF SpA v Meneghetti SpA* [2003] RPC 14 one defendant had sold some goods and then arranged carriage and importation of those goods into the UK for the owner. The Court of Appeal held that the seller had no title to those goods and so was not an infringer. It was artificial to regard someone as an importer within the meaning of s.60(1)(a) if they had no legal or beneficial interest in the goods. It was the owner of the goods who would be regarded as the importer in these circumstances. On appeal to the House of Lords, reported as *SABAF SpA v MFI Furniture Centres Ltd* [2005] RPC 10, the argument that the seller was the sole importer was rejected since the owner was the importer and it was accepted they were not jointly liable.

60.16 Where the invention is a process, the infringing acts in respect of any product obtained directly by means of that process are given in s.60(1)(c) and are the same

(except for the omission of making the product) as those given in s.60(1)(a) and discussed above. The corresponding CPC provision is Article 29(c) (renumbered as Article 25(c) [1989]) which likewise refers to the same acts (except for making the product) as those in Article 29(a) (renumbered as Article 25(a) [1989]), see 60.12. EPC Article 64(2) provides that the protection conferred extends to products directly obtained by such process. After considering the French and German texts of the corresponding EPC provision Aldous J in *Pioneer Electronics Capital Inc and anr. v Warner Music Manufacturing Europe GmbH and anr.* [1995] RPC 487 considered it appropriate to assign to the word "directly" the meaning "without intermediary", and the Court of Appeal [1997] RPC 757 agreed with and adopted this interpretation in this case. Thus to infringe, a product must be the direct product of the claimed process and not a product resulting from further material and important steps. The Patents Court in *Halliburton Energy Services Inc v Smith International (North Sea) Ltd* [2006] RPC 2 held that section 60(1)(c) should be given an interpretation that went as far as a product by process claim might go, but no further (see 2.15 and 14.121-14.122).

s.60(1)(b) 60.17 It is also an infringing act, where the invention is a process, for a person to use that process or, subject to certain conditions, to offer it for use in the UK. Those conditions are that the person knows, or it is "obvious to a reasonable person in the circumstances" that the use of the process in the UK without the consent of the proprietor or applicant as the case may be would be an infringement. The corresponding CPC provision is Article 29(b) (renumbered as Article 25(b) [1989]) which is similar but uses the expression "obvious in the circumstances" without any reference to a "reasonable person".

### **Section 60(2)**

*Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.*

### **Indirect use of the invention (contributory infringement)**

60.18 [deleted]

60.19 Under section 60(2) a person may infringe if, without consent, he supplies or offers to supply in the UK a person not entitled to work the invention with means relating to an essential element of an invention for putting the invention into effect in the UK. A person does not infringe unless he knows, or it is "obvious to a reasonable person in the circumstances", that those means are suitable and intended for putting the invention into effect in the UK. The supply must occur in the UK (judgment of the Patents Court in the *Kalman* case, see 60.14). The meaning of "putting the invention into effect in the UK" was considered in *Menashe Business Mercantile Ltd v William Hill Organization Ltd* by the Court of Appeal [2003] RPC 31. The patent in suit related to a host computer in communication with one or more terminal computers, and a program for operating the terminal computer. The alleged infringer provided a program in the UK which turned a user's computer into the terminal computer, but the host computer was located abroad. The court considered that locating the host computer abroad provided no defence to an allegation of infringement under s.60(2) and held that s.60(2) was concerned with "putting the invention into effect in the United Kingdom" and not something which merely has an effect in the UK. Aldous LJ determined that the invention had been put into effect in the United Kingdom as the terminal computer was being operated by the user in the UK, so the user could also be considered to be using the host computer in the UK; the actual location of the host computer was of no relevance to the functioning of the invention. See 60.29-31 with regard to persons entitled to

work the invention for the purposes of s.60(2).

60.20 The corresponding provision of the CPC is paragraph 1 of Article 30 (renumbered as Article 26 [1989]), the wording of which is similar to that of s.60(2) although it does not mention a “reasonable person” (cf 60.17) and refers to a “party entitled to exploit the patented invention” instead of to a “licensee or other person entitled to work the invention”. The Article is headed “Prohibition of indirect use of the invention”.

### **Section 60(3)**

*Subsection (2) above shall not apply to the supply or offer of a staple commercial product unless the supply or the offer is made for the purpose of inducing the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent by virtue of subsection (1) above.*

60.21 The supply or offer of a staple commercial product does not constitute an infringing act under s.60(2) unless it is for the purpose of inducing the recipient to do an infringing act under s.60(1). CPC Article 30 (renumbered as Article 26 [1989]), paragraph 2, corresponds to s.60(3).

### **[Section 60(4) Repealed]**

60.22 Section 60(4) was repealed by the Patents Act 2004. This subsection was concerned with the application of exhaustion of rights provisions of the Community Patent Convention, which has never come into force.

### **Section 60(5)**

*An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not do so if -*

- (a) it is done privately and for purposes which are not commercial;*
- (b) it is done for experimental purposes relating to the subject-matter of the invention;*
- (c) it consists of the extemporaneous preparation in a pharmacy of a medicine for an individual in accordance with a prescription given by a registered medical or dental practitioner or consists of dealing with a medicine so prepared;*
- (d) it consists of the use, exclusively for the needs of a relevant ship, of a product or process in the body of such a ship or in its machinery, tackle, apparatus or other accessories, in a case where the ship has temporarily or accidentally entered the internal or territorial waters of the United Kingdom;*
- (e) it consists of the use of a product or process in the body or operation of a relevant aircraft, hovercraft or vehicle which has temporarily or accidentally entered or is crossing the United Kingdom (including the air space above it and its territorial waters) or the use of accessories for such a relevant aircraft, hovercraft or vehicle;*
- (f) it consists of the use of an exempted aircraft which has lawfully entered or is lawfully crossing the United Kingdom as aforesaid or of the importation into the United Kingdom, or the use or storage there, of any part or accessory for such an aircraft;*

(g) *it consists of the use by a farmer of the product of his harvest for propagation or multiplication by him on his own holding, where there has been a sale of plant propagating material to the farmer by the proprietor of the patent or with his consent for agricultural use;*

(h) *it consists of the use of an animal or animal reproductive material by a farmer for an agricultural purpose following a sale to the farmer, by the proprietor of the patent or with his consent, of breeding stock or other animal reproductive material which constitutes or contains the patented invention.*

(i) *it consists of -*

(i) *an act done in conducting a study, test or trial which is necessary for and is conducted with a view to the application of paragraphs 1 to 5 of article 13 of Directive 2001/82/EC or paragraphs 1 to 4 of article 10 of Directive 2001/83/EC, or*

(ii) *any other act which is required for the purpose of the application of those paragraphs.*

### **Section 60(6)**

*For the purposes of subsection (2) above a person who does an act in relation to an invention which is prevented only by virtue of paragraph (a), (b) or (c) of subsection (5) above from constituting an infringement of a patent for the invention shall not be treated as a person entitled to work the invention, but -*

(a) *the reference in that subsection to a person entitled to work an invention includes a reference to a person so entitled by virtue of section 55 above, and*

(b) *a person who by virtue of section 20B(4) or (5) above or section 28A(4) or (5) above or section 64 below or section 117A(4) or (5) below is entitled to do an act in relation to the invention without it constituting such an infringement shall, so far as concerns that act, be treated as a person entitled to work the invention.*

### **Section 60(6A)**

*Schedule A1 contains -*

(a) *provisions restricting the circumstances in which subsection (5)(g) applies; and*

(b) *provisions which apply where an act would constitute an infringement of a patent but for subsection (5)(g).*

### **Section 60(6B)**

*For the purposes of subsection (5)(h), use for an agricultural purpose -*

(a) *includes making an animal or animal reproductive material available for the purposes of pursuing the farmer's agricultural activity; but*

(b) does not include sale within the framework, or for the purposes, of a commercial reproduction activity.

### **Section 60(6C)**

In paragraphs (g) and (h) of subsection (5) "sale" includes any other form of commercialisation.

### **Exempted acts**

60.23 Exempted from constituting infringement are certain acts done privately for non-commercial purposes (sub-section (5)(a)); for experimental purposes (sub-section (5)(b)); in preparing or dealing with a prescribed medicine (sub-section (5)(c)); in connection with a temporary or accidental incursion into or crossing of UK territory or air space by a ship, aircraft, hovercraft or vehicle as defined in s.60(7) (sub-sections (5)(d), (e) and (f)); by farmers in connection with certain harvested products, animals or animal reproductive material (sub-sections (5)(g) and (h)), or conducting studies, tests and trials on certain medicinal products (sub-section 5(i)). Sub-sections (5)(g) and (h) were added by the Patents Regulations 2000 (SI 2000 No.2037), along with ss.60(6A), 60(6B) and 60(6C). These subsections have effect in the Isle of Man by virtue of the Patents Act 1977 (Isle of Man) Order 2003 (SI 2003 No. 1249). Article 31 of the CPC (renumbered as Article 27 [1989]) corresponds to s.60(5)(a) to (f). Sub-section (5)(i) was added by the Medicines (Marketing Authorisations Etc.) Amendment Regulations 2005 (SI 2005 No. 2759), and came into force on 30 October 2005.

s.130(7)

60.24 In *Monsanto Co v Stauffer Chemical Co and another* [1985] RPC 515, the Court of Appeal considered the meaning and effect of the words "for experimental purposes relating to the subject-matter of the invention" in s.60(5)(b). It was held that earlier decisions on phrases such as "reasonable trial" or "reasonable trial or experiment" were not of any assistance; there was no reason to suppose that the signatories of the CPC were concerning themselves with the minutiae of earlier UK patent law when deciding the wording of Article 31(b) (renumbered as Article 27(b) [1989]) to which s.60(5)(b) corresponds. Moreover, the word "experiment" is an ordinary word in the English language and has never been a term of art in UK patent law. Further, the presence of a reference to "purposes which are not commercial" in sub-section 5(a) but the absence of any such reference in sub-section 5(b) indicates that experimental purposes in the latter may yet have a commercial end in view. Trials carried out in order to discover something unknown or to test a hypothesis or even in order to find out whether something which is known to work in specific conditions will work in different conditions can fairly, it was held, be regarded as experiments. But trials carried out in order to demonstrate to a third party that a product works or, in order to amass information to satisfy a third party, whether a customer or a body regulating the safety etc of such products, that the product works as its maker claims are not, it was held, to be regarded as acts done "for experimental purposes". In *Klinische Versuche (Clinical Trials) I* [1997] RPC 623 the German Supreme Court held (at p.639) that the equivalent provision in the German Patents Act 1981 to s.60(5)(b) "in principle exempts all experimental acts as long as they serve to gain information and thus to carry out scientific research into the subject-matter of the invention" and that this includes research into "possible new uses hitherto unknown". It does not matter whether the experiments are used to check statements in the patent or to obtain further research results. In *Klinische Versuche (Clinical Trials) II* [1998] RPC 423 it was emphasised that this held true irrespective of any commercial purpose that the research might additionally serve. However in *Auchincloss v Agricultural & Veterinary Supplies Ltd* [1997] RPC 649 (upheld on appeal, [1999] RPC 397), it was held that making (and experimenting) merely for the purposes of getting an official

approval is not a defence under s.60(5)(b). See also 60.31.

60.25 In *Smith, Kline & French Laboratories Ltd v Evans Medical Ltd* [1989] FSR 513, Aldous J said that s.60(5) sets out the exceptions from s.60(1) and rejected the submission that, in addition, all patentees must be taken to have impliedly consented to the carrying out of experiments with a view to challenging the validity of the patent. He also considered that the word “privately” in s.60(5)(a) includes commercial and non-commercial situations; is not synonymous with “secret” or “confidential”; and is used as the opposite of “publicly”, denoting an act done for the person’s own use. With regard to the reference to “purposes which are not commercial” in s.60(5)(a), the purposes of acts had to be considered: there would be infringement if the purposes included any commercial ones in addition to the non-commercial ones. Experiments done for legal proceedings in the High Court or the Office were not done for a commercial purpose. Aldous J also considered that if an act is to fall within s.60(5)(b) it must be done for purposes relating to the subject matter of the invention found in the claims of the patent alleged to be infringed. The purposes must relate to the claimed subject matter in the sense of having a real and direct connection with it.

60.26 In *Stena Rederi Aktiebolag v Irish Ferries Ltd* [2002] RPC 50, the Patents Court considered the meaning and effect of the defence in s.60(5)(d), which relates to ships which have “temporarily or accidentally entered the internal or territorial waters of the United Kingdom”. The judgment of the Patents Court was upheld by the Court of Appeal [2003] RPC 36. The case concerned a high-speed catamaran used to provide a regular ferry service between Eire and the UK, with three or four crossings being made each day. The vessel’s home port was in Dublin, but it spent around three hours in UK territorial waters on each crossing. The vessel’s superstructure was found to fall within the scope of the claimant’s patent, and the claimant argued that the vessel’s regular and frequent crossings took it outside the ambit of s.60(5)(d) because “temporarily” should be interpreted as “on isolated occasions or casually”. The court rejected this argument, stating that the primary purpose of the word “temporarily” was to distinguish between vessels which were engaged in essentially internal operations, and those which travelled between countries. Regard was to be had for the intention of the vessel’s operator; on each crossing, the intention was for the vessel to enter and then leave UK territorial waters, and the fact that each crossing was repeated frequently did not alter the fact that each entry into UK waters was designed to be short-lived. The court therefore held that s.60(5)(d) applied and so infringement had not occurred. The court also rejected an argument that the defence in s.60(5)(d) applied only to “machinery, tackle, apparatus or other accessories” associated with the vessels. A purposive construction made clear that s.60(5)(d) applied as much to vessels as a whole as to any parts used on them.

Sch. A1 60.27 Sub-section (5)(g) relates to the product of plant propagating material  
paras 3-4 (incorporating patented material), where the material has been sold to a farmer by the  
Sch. A1 proprietor of the patent, or with the proprietor’s consent, for agricultural use. A farmer may  
paras 5-8 subsequently use the product of his harvest from such material for further propagation or  
multiplication of the plant on his own land without infringing the patent in question. However,  
under s.60(6A) the infringement exemption provided by sub-section (5)(g) only applies in  
respect of certain varieties which are specified in paragraph 2 of Schedule A1 to the Act.  
Furthermore, the Schedule sets out the conditions which apply where an otherwise infringing  
act falls within the scope of sub-section (5)(g). These include (i) the requirement that a  
farmer (other than a “small farmer”) must pay equitable remuneration to the proprietor (which  
must, however, be less than the farmer would have paid for buying more plant propagating  
material from the proprietor); and (ii) certain specified information must be supplied by the  
farmer and by the proprietor, on request from the other.

60.27.1 Sub-section (5)(h) similarly relates to breeding stock or other animal reproductive material which constitutes or contains a patented invention and which has been sold to a farmer by the proprietor of the patent, or with the proprietor’s consent. A farmer may subsequently use the animal or animal reproductive material for an agricultural purpose without infringing the patent in question. There is no equivalent to Schedule A1 for this sub-section and thus no restriction of the infringement exemption to certain varieties of animal.

However, s.60(6B) makes clear that the farmer is not allowed subsequently to sell any animals or animal reproductive material derived from his "agricultural use" of the original animal or material as part of a commercial reproduction activity.

60.28 Sub-section (5)(i) relates to clinical trials on patented medicinal products, and implements the so-called "Bolar" exemption proposed in article 13 paragraph 6 of Directive 2001/82/EC on veterinary medicinal products and in article 10 paragraph 5 of Directive 2001/83/EC on medicinal products for human use (see also 60.32). This exempts from patent infringement studies, tests and trials on generic medicines required to show that the generic product is bioequivalent to an approved patented product where these acts are required to obtain marketing authorisation.

### ***Persons entitled to work the invention***

60.29 Section 60(2), concerning indirect or contributory infringement, refers to a person entitled to work the invention (see 60.19). A person authorised under s.55 to use the invention for the services of the Crown is regarded as a person so entitled. In addition, a person who has acquired rights during the period between termination of an application and publication of the notice to request reinstatement (under s.20B(4) or (5)), during the interim period prior to the publication of the notice of the application for restoration of a patent (under s.28A(4) or (5)), before the priority date of the invention (under s.64), or between withdrawal of a patent application and publication of notice under s. 117(3) of a request to correct an error or mistake in a withdrawal of a patent (under s. 117A(4) or (5)) to do an act without it constituting infringement is treated as a person entitled to work the invention but only so far as concerns that act. The reference to s.28A in s.60(6)(b) replaced the corresponding previous reference to s.28 as a result of paragraphs 6 to 8 of Schedule 5 to the CDP Act. The references to s.20B and s.117A in s.60(6)(b) were inserted by the Regulatory Reform (Patents ) Order 2004.

60.30 A person who does something which, but for exemption under s.60(5)(a)(b) or (c), would be an infringing act is not treated as entitled to work the invention for the purposes of s.60(2). Paragraph 3 of CPC Article 30 (renumbered as Article 26 [1989]) corresponds to this provision.

60.31 As a consequence of s.60(5)(b) and (6), a person doing an act for experimental purposes does not thereby become entitled to work the invention. It may therefore be an infringing act under s.60(2) to supply that person with the material for carrying out that experimental act. In the Monsanto case (see 60.24) where the material was a herbicide and the person carrying out tests would benefit by eradication of weeds on his land, it was observed that there was at least force in the argument that such supply would constitute infringement.

### ***Section 60(7)***

*In this section -*

*"relevant ship" and "relevant aircraft, hovercraft or vehicle" mean respectively a ship and an aircraft, hovercraft or vehicle registered in, or belonging to, any country, other than the United Kingdom, which is a party to the Convention for the Protection of Industrial Property signed at Paris on 20 March 1883 or which is a member of the World Trade Organisation; and*

*"exempted aircraft" means an aircraft to which section 89 of the Civil Aviation Act 1982 (aircraft exempted from seizure in respect of patent claims) applies.*

*"Directive 2001/82/EC" means Directive 2001/82/EC of the European Parliament and of the Council on the Community code relating to veterinary medicinal products as amended by Directive 2004/28 of the European Parliament and of the Council;*

*"Directive 2001/83/EC" means Directive 2001/83/EC of the European Parliament and of the Council on the Community code relating to medicinal products for human use, as amended by Directive 2002/98/EC of the European Parliament and of the Council, by Commission Directive 2003/63/EC, and by Directives 2004/24/EC and 2004/27/EC of the European Parliament and of the Council.*

60.32 As a result of the Civil Aviation Act 1982, the original reference to the Civil Aviation Act 1949 in section 60(7) was replaced by the reference to the 1982 Act. The words "or which is a member of the World Trade Organisation" were inserted by the Patents and Trade Marks (World Trade Organisation) Regulations 1999. The references to Directives 2001/82/EC and 2001/83/EC were inserted by the Medicines (Marketing Authorisations Etc.) Amendment Regulations 2005 (SI 2005 No. 2759).