

## Die Seite der AIPPI / La page de l'AIPPI

### Selection Inventions – the Inventive Step Requirement, other Patentability Criteria and Scope of Protection (Q 209)

#### REPORT OF SWISS GROUP\*

##### I. General

##### 1. Legal developments on selection inventions

**What specific types of inventions are recognized under the concept of selection invention and are patentable in your jurisdiction? Do you have any examples of selection inventions in a field other than chemical, pharmaceutical or material science fields?**

According to Swiss law, there is no limitation with regard to the technical field of application of selection inventions. In addition to the typical fields of chemical compounds and pharmaceuticals, it is envisageable that selection inventions could also apply to a variety of other technical fields.

Specific examples include a spacer for a multiple pane insulating glazing assembly (EP 0 852 280 B1) and a dynamic mixing head for continuous operation (EP 0 689 865 B1) in the mechanical field, and a singlemode lightwaveguide-coupling element (WO99/08141) in the optical/telecommunication field.

Other technical fields include, for example, the food sector and biotechnology, where composition ranges, Markush claims and process parameters are very common.

##### 2. Novelty

**Groups are asked to discuss any issues that should be considered with respect to the novelty of selection inventions. For example, is merely carving a range out of a broad prior art disclosure sufficient to make a selection invention novel? Is a different advantage or use, or the same advantage with an unpredictable improvement required for a selection invention to be novel?**

In terms of novelty, the Swiss approach is compatible with that at the EPO, and references will be made to the European Patent Office (EPO) Case Law and Guidelines for Examination.

A first aspect to consider when assessing novelty is the availability (or disclosure) of the information in the prior art: the prior art is considered to disclose both express and implied content, such as, for example, a product that would inevitably result from a disclosed process (T 666/89).

Also, it should be emphasised that a selection from a single list of specifically disclosed elements generally does not confer novelty. However, novelty may arise for a combination of features when the selection is derived from "two or more lists of a certain length" (the so-called "two list principle", T12/81, T427/86).

A sub-range selected from a broader numerical range of the prior art is considered novel if each of the following criteria is satisfied (T198/84; T279/89): 1) the selected sub-range is narrow compared to the known range; 2) the selected sub-range is sufficiently far removed from any specific examples disclosed in the prior art and from the end-points of the known range; and 3) the selected range is not an arbitrary specimen of the prior art, but a purposive selection (i.e. another invention). Points 1) and 2) are decided on a case-by-case basis. As for point 3) it is accepted that a technical effect occurring in the selected sub-range, but not in the whole of the known range, can confirm that the criterion is met. Such technical effect need not be different to that which is found in the whole range: it could simply be an improvement of a known technical effect. The technical effect need not be surprising either, as this is a requirement for an inventive step, not for novelty.

The same principles apply in the case of overlapping ranges. In this case, novelty is destroyed by an explicitly mentioned end-point of the known range (T240/95), explicitly mentioned intermediate values or a specific example of the prior art in the overlap (Guidelines C-IV, 9.8[iii]). Also, another aspect to be considered is whether the skilled person “would seriously contemplate” applying the technical teaching of the prior art document in the range of overlap. If he would do so, then no novelty exists. Again, this concept should not be confused with that used in the assessment of inventive step. In the assessment of novelty, there is no issue as to whether the skilled person would have tried that range in the expectation of success, but more simply whether he would have considered applying the technical teaching in that range (T26/85).

### 3. Inventive step or non-obviousness

**Groups are asked to discuss the inventive step or non-obviousness requirements in their jurisdiction. If experimental data is used to back up the inventive step or non-obviousness requirement can it be submitted after initial patent filing? Are there any prerequisites or limitations on the late submission of data?**

Also in terms of inventive step/obviousness, the Swiss approach is compatible with that at the EPO. Again, reference will be made to the EPO Case Law and Guidelines for Examination. In particular, if the selection is connected to a particular technical effect, and if no hints exist leading the skilled person to the selection, then inventive step is recognised. The technical effect of the claimed range can but does not need to be different to that which occurs in the broader known range. Important is that it is unexpectedly different or is the same, but of an unexpected degree (Guidelines C-IV, 11.11).

In the case of overlapping ranges, it should also be considered whether the skilled person would have been guided by the state of the art to choose the range of overlap in the hope of solving the technical problem or would have expected some improvement or advantage.

In the case of European patents validated in Switzerland, experimental data backing the inventive step requirement, though recommended, need not to be present in the specification as filed, since supporting data can be submitted to the EPO in the course of the grant procedure. In the opinion of the Swiss group, however, the particular technical effect should be explicitly disclosed in the application as filed.

The Swiss patent office does not examine inventions for novelty and inventive step. Lack of experimental data supporting the inventiveness of an invention is not detected by the patent office. After grant, third parties may challenge the patentability of an invention in Court. In this case, any necessary experimental data can be provided during invalidity proceedings to prove the non-obviousness of the invention.

### 4. Sufficiency and/or written description requirements

**Groups are asked to discuss the sufficiency or written description requirements in their jurisdiction. There may be several aspects to this question:**

- a) *the threshold for sufficiency;*
- b) *the allowable timing for submission of experimental data;*
- c) *the time frame within which sufficiency or written description requirements must be satisfied; and*
- d) *the breadth of claim scope that can be supported by a limited number of examples of asserted or proven advantages.*

*With respect to item a), please discuss to what extent all members of the class selected by the patentee are required to possess the requisite advantage in your jurisdiction. Is there an absolute requirement that all of the selected class possess the relevant advantage, or is the patentee excused if one or two examples fall short? Also, with respect to item d) above, if a new utility is asserted as a selection invention, would it suffice to claim a particular range or selection of components which have*

*been found to be associated with such a new utility or would it be necessary to recite such a new utility in the claims?*

a) Generally speaking, the specification should disclose the invention in a manner sufficiently clear and complete for the person skilled in the art to be able to carry out the whole subject-matter of the claims without undue burden, availing himself of common general knowledge and the literature cited in the description. In other words, to avoid an objection for insufficiency of disclosure, the disclosure must be enabling. Insufficiency of disclosure also arises when the successful outcome of the invention, although possible, is merely linked to chance; or when the skilled person is left without guidance to choose among a large range of options, only a few of which are leading to the invention; or when he must carry out a great number of trials and experiments, when he must choose without guidance among various assay/measurement methods, and different results are obtained depending on the method chosen, and the like.

The skilled person, when assessing sufficiency of disclosure, has knowledge of the invention as disclosed and is aware of documents cited in the patent and the common general knowledge in the art (T6/84; T171/84).

In the opinion of the Swiss group, it is not necessary that all the members of the narrower selection from a known broader class possess the requisite distinguishing advantage. Some examples may fall short of this requirement. This principle is also confirmed by the Guidelines for Examination in the EPO, Chapter D V 4.4.1.

b) Experimental data are not necessary for supporting sufficiency of disclosure.

c) From the above, follows that the time frame within which sufficiency or written description requirements must be satisfied is the filing date.

d) In theory, one example may suffice to cover the whole breadth of the claimed scope of protection so long as it enables the skilled person to perform the invention over the whole claimed range (T435/91). A claim is considered to be supported unless there are reasons to believe that the skilled person would be unable to extend the invention to the scope of the claims on the basis of the description exercising routine methods.

A claim to a chemical product defined by one or more parameter range/value/element selection need not include the use or advantage conferred by that range/value/element selection(s).

## 5. Infringement

**If a certain advantage or superior results were the reasons for the grant of a patent on a selection invention, does such advantage or superior result have to be implicitly or explicitly utilised by a third party for an infringement to be established? If a selection invention is claimed as a new use, what are the requirements to establish infringement? Would a manufacturer of a product that may be used for the new use infringe the patent? Does the intention of an alleged infringer play any role in the determination of infringement?**

It depends on the subject-matter and/or the wording of the claim. If the claim is directed to a product, then the particular type of use of the product by the alleged infringer is not determinant in the evaluation of infringement.

If the claim is directed to a new use of a product, then it may be necessary to prove that the alleged infringer uses the product in a certain way (for example, at a certain concentration), to obtain the effect connected with the claimed new use.

A manufacturer of a product that may or may not be used according to the claimed new use does not infringe the patent if the product is not claimed as such in the patent. However, it may be a different case if the product is not a staple product and if it can be reasonably assumed from the circumstances that the product is likely to be used to infringe the patent. In this latter case, manufacturing the product may in fact be considered contributory infringement.

Pursuant to Swiss case law and literature, there must be a sufficiently close (adequate) causal connection between the contributory action and the direct infringement. Swiss courts commonly use the formula that the contributory action must objectively have favoured the occurrence of the direct in-

fringement in light of the ordinary way things go and the experience of life. According to precedents of Swiss courts this is the case if, for example, means are explicitly offered for an infringing use or if means may only be used in such a manner. On the other hand, an adequate causal connection is denied if a non-infringing staple product is (mis)used for committing a direct infringement of an intellectual property right. In between these rather clear cases lays a grey area in which it must be assessed on a case-by-case basis whether in light of the ordinary way things go and the experience of life it had to be expected that the respective contributory action objectively favoured a direct infringement (DFT 129 III 588, wherein DFT is the acronym for Decision of the Swiss Federal Tribunal).

The intention on the part of the person supplied is not relevant for determining whether an action constitutes a contributory infringement or not. Under Swiss case law subjective elements as such are not a prerequisite for liability as contributory infringer. Therefore, knowledge of infringement or intention is not taken into account. They may, however, play a role in the assessment of the causal connection between the contributory action and the direct infringement. Pursuant to an obiter dictum in DFT 129 III 588, such connection is sufficiently close if the contributor knows or should know both that the supplied means are suitable for an infringing use and that the supplied person intends such use.

## 6. Policy

**Groups are asked to give a short commentary as to the policy that lies behind the law on selection inventions in their jurisdictions, and then to consider whether or not such policy considerations are still valid today as technology continues to advance.**

The Swiss group is of the opinion that the law and practice which is applicable to selection inventions in Switzerland, which corresponds to the law and practice in all contracting states of the EPC, is appropriately based on the principle of giving adequate protection to such inventions. The policy behind the applied law has an increased importance in view of the developing technology which tends to be more and more a selection from the ever growing state of the art. Furthermore, heavy and increasing competition in closely related areas of technology significantly increases the occurrence of selection inventions.

## II. With Reference to the Examples

### 1. Novelty

**In example 1, would the prior disclosure of the compounds containing the generic class of radicals anticipate any claim to a specific compound having a particular radical, or group of specific compounds having a selection of particular radicals in your jurisdiction? In the analysis, does it matter how wide the prior disclosed generic class of compounds is – i.e. would the analysis be different if the prior disclosed generic class consisted of 100000 possible compounds (very few of which were specifically disclosed) as opposed to merely, say, 10?**

No, the genus does not anticipate the species, unless such species is mentioned in the prior art (e.g. in the examples).

Yes, the size of a class of compounds is determinant in the assessment of novelty, as well as the number of such classes which are involved in the claimed features of the alleged invention (the “two list principle”, as already mentioned in response to Question 2).

### 2. Inventive step or non-obviousness

**In example 2, would any of the three possibilities constitute an inventive step over the prior art in your jurisdiction? Further, if, say, scenario (iii) does constitute an inventive step over the prior art, what scope of protection should the inventor be able to obtain? Should the inventor be able to obtain protection for the products per se (that happen to have this advantageous property), or should any patent protection available be limited to the use of the products for the advantageous property (as an adhesive) not possessed by, and not obvious over the prior art?**

Inventive step could be found in the case of (iii). As already mentioned before, it is not necessary that the advantageous property of the selection is different from that of the broader known range for the

purpose of novelty. Inventive step can be conferred by a greater degree of such advantage. Inventive step would be recognised if such greater degree was found to be unexpected in that particular selection and there were no pointers hinting towards such a selection. Under these circumstances, also case (i) could be inventive. Case (ii) would not be inventive as it is stated that such properties were to be expected in that selection.

As already mentioned, the inventor of a selection invention should be able to obtain protection for the products per se, i.e. the protection should not be limited to the use of the products.

### 3. Sufficiency and/or written description requirements

**To what extent are all members of the class selected by the patentee required to possess the requisite advantage in your jurisdiction? Is there an absolute requirement that all of the selected class possess the relevant advantage, or is the patentee excused if one or two examples fall short?**

As stated in the response to Question 4, item 1, it is not necessary that all the members of the narrower selection from a known broader class possess the requisite distinguishing advantage. Some examples may fall short of this requirement.

### 4. Infringement

**By reference to example 3, to what extent is evidence of the knowledge of the advantageous property of the selection, or intention of the infringer as to its supply, required to find infringement in your jurisdiction?**

As already mentioned in Question 5, under Swiss case law, subjective elements as such are not a prerequisite for liability as contributory infringer. Therefore, knowledge of the advantageous property of the selection or intention of the infringer as to its supply is not taken into account. They may, however, play a role in the assessment of the causal connection between the contributory action and the direct infringement. Pursuant to an obiter dictum in DFT 129 III 588 such connection is sufficiently close if the contributor knows or should know both that the supplied means are suitable for an infringing use and that the supplied person intends such use.

### 5. Policy

**Groups are asked to consider, in respect of example 1/2, whether it matters how much effort the inventor has invested in arriving at his selection in order to found a valid selection patent. The answer to this question is closely related to the policy considerations that underpin the grant of selection patents and the incentive/reward equation involved. The inventor may have expended considerable time and money in trawling through the whole host of possible compounds encompassed by the prior disclosed generic class, and the particular selection that he has made may constitute a leap-forward in the field. Surely, the inventor should be rewarded for his efforts and obtain protection? On the other hand, it could be argued that such considerations may have been relevant in an age when the inventor's efforts actually involved many man-years of careful and painstaking laboratory work, but are now increasingly irrelevant in an age of combinatorial synthesis when large varieties of different compounds can be manufactured in a fraction of the time. Are such considerations relevant?**

In the opinion of the Swiss group the above considerations are not essential in connection with the assessment of patentability for selection inventions.

The effort invested in arriving at the selection is accounted for in the requirements already in place for novelty and inventive step. Such strict requirements, in fact, constitute a safeguard against the possibility of claiming an arbitrary selection from the prior art, as they entail that a certain inventive effort must have been exercised to arrive at the selection of the invention.

Other criteria, such as the time involved to arrive at the invention and financial investment, are not considered prima facie evidence of patentability, but rather as mere indicia.



### III. Harmonisation

**Groups are asked to analyse what should be the harmonised standards for the patentability of selection inventions. In particular, the items discussed in Questions I.1.–6. and the examples discussed in Questions II.1.–4. above should be referred to.**

The Swiss group is of the opinion that the existing law consisting of the EPC and the practice of the EPO should be the basis for harmonised standards for the patentability of selection inventions.

**IV. Groups are also asked to recommend any issues for harmonisation not referred to in Question II.5. above.**

Not applicable in view of our answer to Question II.5.

**V. Groups are asked to outline any other potential issues that merit discussion within AIPPI as regards selection inventions.**

Range-limiting values are often given as such without any basis in experimental data. Most often, they are merely values for defining the scope of protection in the claims. According to the case law of the Boards of Appeal in the EPO, such values are given the same significance as values given by way of the examples, i.e. they may destroy novelty of a range of an ulterior invention. However, such limiting values actually are merely allegations, or assertions of the inventor. Hence, it is the position of the Swiss group that range-limiting values not having a basis in exemplary embodiments shall not necessarily be considered novelty destroying, i.e. it shall not be appropriate to give them the same importance in examining an ulterior patent application as values of exemplary embodiments. Guiding principle for assessing novelty in a case of overlapping ranges between a claim and a prior art document shall be whether a person skilled in the art would, in the light of all technical facts at his disposal, seriously contemplate applying the technical teaching of the prior art in the range of overlap.

Decision T 26/85 of the Board of Appeal 3.5.1 in the European Patent Office explicitly mentions that values of a range may “appear at least at first sight to be speculative and of a less practical relevance than others. This applies in particular to the parts lying near the limits of the claimed range.” (T 26/85, Reasons for the decision, point 7.)

The Swiss group is of the opinion that range-limiting values per se should be given the same importance as any other unspecified value within the range.

### Zusammenfassung

*Gemäss Schweizer Recht gibt es keine Begrenzung bezüglich technischem Anwendungsgebiet von Auswählerfindungen.*

*In Bezug auf Neuheit und erfinderische Tätigkeit ist die schweizerische Haltung in Einklang mit jener des Europäischen Patentamts. Insbesondere sind die wichtigsten Grundsätze für die Beurteilung der Neuheit von Auswählerfindungen die folgenden: Eine Offenbarung des Standes der Technik wird bezüglich ausdrücklichem und implizitem Inhalt in Betracht gezogen; Neuheit kann durch Kombination von Merkmalen entstehen, wenn die Auswahl aus „zwei und mehr Listen einer gewissen Länge“ abgeleitet ist (das sogenannte „Zwei-Listen-Prinzip“); ein aus einem breiteren Zahlenbereich des Standes der Technik ausgewählter Unterbereich wird als neu betrachtet, wenn jede der folgenden Bedingungen erfüllt ist: 1) Der ausgewählte Unterbereich ist im Vergleich zum bekannten Bereich klein; 2) der ausgewählte Unterbereich ist genügend weit von irgendwelchen spezifischen Beispielen des Standes der Technik und von den Endpunkten des bekannten Bereichs entfernt; und 3) der ausgewählte Bereich ist nicht ein willkürliches Beispiel des Standes der Technik, sondern eine zielgerichtete Auswahl (d.h. eine andere Erfindung).*

*Im Fall von überlappenden Bereichen gelten die gleichen Grundsätze, und die Neuheit wird durch einen ausdrücklich erwähnten Endpunkt des bekannten Bereiches, ausdrücklich erwähnte Zwischenwerte oder ein spezifisches Beispiel des Standes der Technik im Überlappungsbereich zerstört. Eine ebenso zu berücksichtigende Sichtweise ist, ob eine Fachperson «ernsthaft in Betracht ziehen» würde, die technische Lehre des Dokumentes des Standes der Technik im Überlappungsbereich anzuwenden. Wenn er dies täte, dann gibt es keine Neuheit.*

*Beurteilung der erfinderischen Tätigkeit: Falls die Auswahl mit einer besonderen technischen Wirkung verknüpft ist und falls keine Hinweise vorhanden sind, die die Fachperson zur Auswahl hinführen, so wird erfinderische Tätigkeit anerkannt. Die technische Wirkung des beanspruchten Bereichs muss unerwartet verschieden sein, oder bei gleicher Wirkung sich in einem unerwarteten Ausmass mit Bezug auf die technische Wirkung unterscheiden, welche im bekannten breiteren Bereich vorhanden ist. Im Falle überlappender Bereiche sollte auch berücksichtigt werden, ob die Fachperson durch den Stand der Technik geleitet worden wäre, den Überlappungsbereich in der Hoffnung auf die Lösung des technischen Problems auszuwählen, oder ob sie eine Verbesserung oder einen Vorteil erwartet hätte.*

*Die Bedingungen für eine genügende Offenlegung werden erfüllt, wenn die Beschreibung die Erfindung so klar und vollständig darlegt, dass die Fachperson in der Lage ist, den gesamten Gegenstand der Ansprüche ohne übermässigen Aufwand auszuführen, nur gestützt auf allgemeines Wissen und die in der Beschreibung zitierte Literatur. Gemäss der Meinung der Schweizer Gruppe ist es nicht notwendig, dass alle Mitglieder einer engeren Auswahl einer bekannten breiteren Klasse den besonderen Vorteil besitzen, der die Auswahl vom Stand der Technik unterscheidet. Einige Beispiele können ausserhalb dieser Bedingung liegen.*

*Bei der Beurteilung einer Verletzung einer Auswählerfindung wird die Art und Weise, wie ein Produkt vom angeblichen Verletzer verwendet wird, nur dann entscheidend sein, falls der angeblich verletzte Anspruch auf eine neue Verwendung eines solchen Produktes gerichtet ist. Ein Hersteller eines Produktes, das gemäss der beanspruchten neuen Verwendung oder auch anderweitig gebraucht werden kann, verletzt das Patent nicht, wenn das Produkt als solches nicht beansprucht ist. Der Fall könnte hingegen anders liegen, falls das Produkt nicht ein Standard-Produkt ist und falls aus den Umständen vernünftigerweise angenommen werden kann, dass das Produkt wahrscheinlich unter Verletzung des Patents verwendet werden wird. Im letzteren Fall kann die Herstellung des Produktes tatsächlich als mittelbare Verletzung (Beihilfe zur Verletzung) betrachtet werden. Dies wird insbesondere der Fall sein, wenn diese Beihilfe objektiv gesehen das Vorkommen der unmittelbaren (direkten) Verletzung im Licht des gewöhnlichen Verlaufs der Dinge und der Lebenserfahrung unterstützt. Die Absicht von Seiten der Person, die das verletzende Produkt erhält, ist nicht von Bedeutung für die Feststellung, ob eine Handlung mittelbare Verletzung darstellt oder nicht.*

*Die Schweizer Gruppe ist der Meinung, dass auf Auswählerfindung anwendbares Gesetz und Praxis in der Schweiz, die Gesetz und Praxis in allen Mitgliedstaaten des EPÜ entsprechen, zweckdienlich auf dem Grundsatz beruhen, angemessenen Schutz für solche Erfindungen zu gewähren, und die Grundlage für harmonisierte Grundsätze für die Patentierbarkeit von Auswählerfindungen darstellen. Aus Sicht der Schweizer Gruppe verdient die Bedeutung von bereichsbegrenzenden Werten, die nicht auf beispielhaften Ausführungsformen des Standes der Technik beruhen, als neuheitsschädliche Werte für eine spätere Auswählerfindung weitere Diskussion im Rahmen der AIPPI.*

## **Résumé**

*Selon la loi Suisse il n'existe pas de limitation en ce qui concerne le champ technologique des inventions de sélection.*

*En termes de la nouveauté et de l'activité inventive l'approche Suisse est compatible avec celle appliquée par l'Office Européen des Brevets. En particulier, les principes fondamentaux pour évaluer la nouveauté des inventions de sélection sont que: l'art antérieure est considéré démontré une contenance explicite et implicite; la nouveauté peut venir d'une combinaison d'éléments quand la sélection est faite à partir de «deux ou plus de listes d'une certaine longueur» (le soit disant «principe des deux listes»); un sous-domaine de valeurs sélectionné parmi un domaine de valeurs générales connu de l'état de la technique est néanmoins considéré comme nouveau si chacun des critères suivants s'appliquent: 1) le sous-domaine de valeurs sélectionné doit être étroit en comparaison avec le domaine général connu, 2) le sous-domaine de valeurs sélectionné doit être suffisamment éloigné du domaine connu qui a été illustré par des exemples spécifique démontré dans l'art antérieur et des points limites du domaine connu; et 3) la zone choisi ne doit pas être prise au hasard dans l'état de la technique, c'est-à-dire qu'il ne doit pas s'agir d'un simple mode de réalisation de l'invention faisant l'objet de la description antérieure, mais d'une autre invention (sélection effectuée dans un certain but).*

*Dans le cas où les plages se chevauchent, les mêmes principes s'appliquent et la nouveauté est détruite par un point limite spécifiquement mentionné de la plage connue, par des valeurs intermédiaires explicitement mentionnées ou par un exemple de l'art antérieure qui tombe dans le chevauchement. Un autre aspect à considérer est si l'homme du métier «envisagerait sérieusement» a appliquer l'enseignement technique dévoilé dans le document antérieur dans le domaine de chevauchement. Dans le cas où la réponse à cette question est positive, il n'existe pas de nouveauté.*

*Pour l'évaluation de l'activité inventive, en cas où la sélection est liée à un certain effet technique et pourvu qu'il n'existe pas des indications qui conduisent l'homme du métier en direction de la sélection, l'activité inventive est reconnue. L'effet technique dans le domaine revendiqué doit être inattendu ou si l'effet est identique l'ampleur doit être inattendue en comparaison avec l'effet technique connu dans le domaine général. Dans le cas de chevauchement de domaines, on devrait de nouveau se poser la question si l'homme du métier guidé par l'art antérieur serait apte à choisir le domaine chevauché en espérant résoudre le problème technique ou s'il s'attendait à trouver un avantage inattendu.*

*La condition de suffisance d'exposée est satisfaite quand la description démontre l'invention de façon suffisamment claire et complète pour qu'un homme du métier puisse exécuter tous ce qui est couvert par les revendications sans effort excessif en utilisant les connaissances générales et la littérature citée dans la description. Le groupe Suisse est d'avis qu'il n'est pas nécessaire que tous les membres d'une sélection étroite d'un domaine général possèdent l'avantage réclamé. Quelques exemples ne démontrant pas l'avantage seraient admis.*

*Dans l'évaluation de la contrefaçon d'inventions de sélections, la façon dont le produit est utilisé par le contrefacteur allégué ne peut être déterminante que dans le cas où la revendication prétendue être contrefaite est dirigée vers une nouvelle application d'un tel produit. Le fabricant d'un produit qui peut ou ne peut pas être utilisé comme dans la nouvelle utilisation revendiqué dans le brevet ne peut contrefaire le brevet si le produit n'est pas revendiqué comme tel dans le brevet. Par contre, cela peut être différent si le produit n'est pas une matière première et si on peut raisonnablement assumer en vue des circonstances que le produit est probablement utilisé pour contrefaire le brevet. Dans ce dernier cas, fabriquer le produit peut être considéré comme contrefaçon contributive. En particulier, cela s'avère être le cas si l'action de contribution a objectivement favorisé l'occurrence de la contrefaçon directe en vue de la façon normale du déroulement des affaires et de l'expérience de la vie. L'intention de la personne recevant un produit qui fait contrefaçon n'est pas considérée comme importante pour déterminer si l'action constitue contrefaçon contributive ou pas.*

*Le groupe Suisse est d'avis que la loi et la pratique des inventions de sélection comme utilisée actuellement en Suisse et qui correspond avec la loi et la pratique appliquée dans les autres pays membre de la CBE, est basé sur le principe de fournir une protection adéquate pour un tel type d'inventions et que cela devrait former la base d'un standard d'harmonisation pour les inventions de sélections.*

*Pour le groupe Suisse, l'importance des points limites des plages de valeurs qui ne sont pas basés sur des exemples, et qui sont considérés comme nuisibles pour la nouveauté d'une prochaine invention de sélection, mérite discussion au sein de l'AIPPI.*

\* Members of the working group: Konrad Becker, Jan D'haemer, Thomas Kretschmer, Sava V. Kulhavy, Paul Pliska, Beat Rauber, Cornelis Schüller, Hannes Spillmann, Michael Störzbach, Marco Zardi (chairman).