

专利法常设委员会

第二十九届会议

2018年12月3日至6日，日内瓦

关于研究例外的参考文件草案

秘书处编拟的文件

导 言

1. 2018年7月9日至12日于日内瓦举行的第二十八届会议上，专利法常设委员会（SCP）商定，秘书处将根据 SCP 第二十六届会议达成的协议，继续编拟关于例外和限制的参考文件。尤其是，委员会同意秘书处，除其他外，将编拟关于研究例外的参考文件草案，并将其提交至 SCP 第二十九届会议。此外，还同意秘书处将请成员国为编拟参考文件草案发来任何补充意见（见文件 SCP/28/11，第21段“专利权的限制与例外”下的第一点）。
2. 根据上述决定，为编拟关于研究例外的参考文件草案，秘书处通过 2018年7月31日发出的 C.8787 号通知，邀请成员国和地区专利局向国际局提交任何补充意见。
3. 因此，本文件附件一是将于 2018年12月3日至6日在日内瓦举行的委员会第二十九届会议上讨论的参考文件草案。经委员会授权，在编拟参考文件草案时，秘书处参考了成员国向 SCP 第二十九届会议提交的意见，这些信息可以从 SCP 电子论坛网站 http://www.wipo.int/scp/en/meetings/session_29/comments_received.html 获得，秘书处还参考了通过 SCP 相关活动收集到的其他意见，这些活动列于文件 SCP/27/3。
4. 参考文件包含以下部分：（i）研究例外概述；（ii）研究例外的目的和目标；（iii）研究例外与国际法律框架；（iv）地区文书中的研究例外；（v）研究例外的国内执行；（vi）成员国在执

行研究例外时面临的挑战；以及 (vii) 执行研究例外的结果。此外，文件还包含一份编有研究例外相关各项法律规定的附件。

[后接附件]

关于研究例外的参考文件草案

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1. 研究概况概述

1. 专利赋予在规定期限内的独占权，以防他人在未经专利权人同意的情况下制造、使用、提供销售、出售或进口已获专利的发明。一般认为，授予此类权利能够激励对创新活动和知识生产的投资。然而，从经济角度来看，这会造成无谓损失。¹专利制度提供了许多机制，来纠正此类专有权造成的市场力量可能存在的低效问题。

2. 特别是，为了调整各利益攸关方之间的不同利益，允许国家/地区专利制度在遵守国际义务的情况下规定权利的各种例外与限制。²人们普遍认为，不分情况地授予充分专有权，并非总能在所有情况下促进创新和增进公共福利这一目标。因此，可执行的专有权范围是根据国家专利法精心制定的，以便在权利人的合法利益与第三方的合法利益之间取得适当平衡，可在规定期限内防止第三方使用专利发明。

3. 在权利的这些例外与限制中，所谓“研究例外”或“实验使用例外”³是专利制度最为广泛规定的例外之一，无论是通过成文法还是判例法。虽然在不同国家和地区法律下，这些规定的确切范围有所不同，但一般而言，研究例外使研究人员能够检查专利中所述专利发明的效果，并对此专利发明进行改进，而不必担心侵犯专利权。如果没有这样的例外，科学家在研究过程中使用专利发明就可能遭到起诉。此举为研究活动创造了有利环境，有望促进技术知识的传播与发展，并推动技术发展，从而有助于实现专利制度的目标。

2. 研究例外的目的和目标

4. 研究例外的支持者认为，研究例外和实验使用例外无疑包含在专利制度的交换条件中，因为此外再没有任何其他理由能够说明专利制度对自由获取发明公开信息的重视。^{4,5}

5. 授予专利持有人专有权，以防止他人利用专利发明，而作为对专有权的回报，专利持有人必须公开与发明相关的信息。信息公开被认为是专利制度的基本要素。它是兼顾发明人利益与社会利益的基础。就每个专利而言，申请人都必须提供发明的技术细节，这些技术细节在申请日起18个月后通过公布专利申请向社会公开。⁶

6. 有人认为，必须允许在专利期限内进行一些未经授权的使用，以核实专利公开信息的真实性，以及其是否足以达成实施的目的。在此方面，Bently教授认为，需要“实验使用”例外来维持专利制度本身的运行。他解释道：

“现代专利制度的普遍前提是，专利权人向公众公开发明，以使其能够实施发明，因此，显然有必要让人们可以对发明进行试验，确定它是否实际有效（并且充分公开）。由于专利局并不承担

¹ 对专利制度的经济原理的综合性讨论，见《国际专利制度报告》第二章（SCP/12/3 Rev. 2）。

² 专利性或公开要求，除其它外，是专利制度在授权前阶段纳入的其他机制。

³ 用来描述这一概念的术语并不统一：有些情况下，是“研究豁免”，有些情况下，是“研究例外”，还有些情况下，是“实验使用例外”；本文交替使用这几种说法。

⁴ Rebecca S. Eisenberg, ‘Patents and the Progress of Science: Exclusive rights and Experimental use’. *Chicago Law Review* (1989), Vol 56, p. 1017. 另见 J. C. Lai et al “Intellectual Property and Access to Im/material Goods”, 2016, p. 103.

⁵ 多数专利法要求以足够清楚、完整的方式描述发明，使具备所需技能的人可以实施发明，有些司法管辖区还要求在描述中表明实施发明的最佳方法。

⁶ 多数司法管辖区都规定在 18 个月后向公众公开。然而，不同国家的具体时间可能有所不同。

这项任务，因此必须赋予竞争者这一自由，因为只有他们有动力调查并最终质疑专利的有效性。此外，必须从授予专利即刻起予以他人研究此项发明的能力。毕竟，要求这些竞争者等到专利失效之后才能对其提出质疑是没有意义的。”⁷

栏 1. 加拿大的例外政策目标

“发明人提交专利申请时，就已同意公布发明。实验使用例外允许他人利用公开信息对该项发明进行探究。因此，实验使用例外有助于平衡专利制度中的权利与义务。”⁸

7. 在此方面，一些国家在产权组织专利法常设委员会（SCP）进行的一项关于专利权的限制与例外的问卷调查（以下简称“问卷调查”）中作出的答复也表示，应允许第三方实施发明，从而更好地理解专利发明的内容和所述效果，以便获得知识，促进许可或质疑专利的有效性。⁹

8. 此外，解释研究例外的原理还用到了“平衡”角度。也就是说，为了服务于总体公共利益，这一例外旨在适当平衡技术知识生产者和使用者的利益，以实现社会效益最大化。由于大多数（如果不是全部）发明都建立在先前检索或现有知识的基础上，有人认为，为确保专利发明的完整性而不允许其他研究人员以任何方式使用专利发明，是对后续发明的过度限制。¹⁰特别是，不应限制为产生新发明而开展的科研活动使用专利发明。如果总体社会目标是尽可能地多发明，那么专利法应在此方面受到限制：否则专利法最终恰恰会限制其旨在促进的各种活动。¹¹因此，在许多国家，规定实验使用例外或研究例外的公共政策目标是促进科学研究和技术进步并鼓励发明活动。¹²

栏 2. 大韩民国的例外政策目标

“为了更好地理解专利发明的内容和效果，应允许第三方实施发明。并且，有可能在实施专利发明的基础上开发出进一步的发明。专利发明的实施对技术进步大有帮助，并且只要基于该发明的实施成果而开发的产品不投放到市场，专利权人就不会遭受直接损失。”¹³

9. 在此方面，一些评论员还指出，作为公共政策问题，大多数领域本质上由量变推动的技术发展需要保持创新能力，而“阻碍后续创新的专利制度会有悖其初衷”。¹⁴同样，中国在问卷调查的答复中解释说，“科学技术创新通常建立在过去的技术基础之上”，因此，“如果必须获得专利持有人的同意才能使用某项专利进行科研实验，可能会阻碍研究和发展的进程，无助于科学技术进步，有违专利法的立

⁷ Professor L. Bently et al. “Exclusions from Patentability and Exceptions and Limitations to Patentees’ Rights, SCP/15/3. Bently 还进一步解释道，“实验使用例外的正当性当然只适用于‘关于发明主题’的实验中的很小一部分。然而，它完全也可以适用于终极目标是商业目的的实验。毕竟，竞争者的动力来自于竞争”，第 59 页，可见：http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex1.pdf。

⁸ 呼应加拿大在问卷调查中的答复。

⁹ 见大韩民国和俄罗斯联邦对问卷调查的答复。在某些情况下，如果第三方可以在办理之前检查专利发明的效果，专利权人在注册或分派其专利发明时可能会成功率更大。见俄罗斯联邦对调查问卷的答复。

¹⁰ J. C. Lai et al. “Intellectual Property and Access to Im/material Goods”, 2016, p. 103.

¹¹ Professor L. Bently et al. “Exclusions from Patentability and Exceptions and Limitations to Patentee’ s’ Rights, SCP/15/3, p. 59.

¹² 例如，见阿尔及利亚、奥地利、不丹、巴西、德国、洪都拉斯、匈牙利、意大利、日本、荷兰、波兰、葡萄牙、大韩民国、塞尔维亚、西班牙、瑞典、瑞士、乌干达、乌克兰、联合王国和津巴布韦对问卷调查有关专利权的例外与限制的答复。在此方面，挪威答复称，“专利权授予的专有权仅涵盖发明的商业价值”，不包括“将发明用作进一步研究与开发的知识基础”。德国答复称，“研究例外[……]限制专利保护，并促进在专利发明的基础上开发新技术。”

¹³ 呼应大韩民国在问卷调查中的答复。

¹⁴ 见 Correa, C., ‘The International Dimension of the Research Exception’. AAAS/SIPPI Paper, January 2004, p. 16.

法初衷”。巴西在答复中解释道，由于专利制度旨在通过提供确保发明利益造福全社会的框架从而促进研究和创新，那么研究例外的目的就是“限制一项专利所赋予的权利，以利于科学或技术研究的发展，从而适当平衡权利持有人和第三方的利益，促进社会进步。¹⁵来自其他国家的回复通常强调无需担心专利侵权的研究自由的重要性。¹⁶

10. . 一些国家将教学纳入研究豁免的范围，并指出研究例外会促进教育，提高教学水平。¹⁷

栏 3. 哥斯达黎加的例外政策目标

“也许主要挑战恰恰是，如何实施这一学术例外，使专利文献成为教学和学习过程中有用的工具，并作为产生新知识的灵感和创造力的源泉。而这需要努力教育教职员工，使专利成为教室和实验室中首要使用的资源。”¹⁸

14. 与此相关，在TRIPS协定的谈判记录中，后来成为第30条的规定最初拟纳入说明性的例外清单，其中包括“科学用途”例外。然而最终还是放弃了说明性清单，转而采用TRIPS协定现行第30条规定中概括性更强的措辞，TRIPS协定的谈判记录未对此决定的原因作出解释。²²

4. 地区性文书中的研究例外

15. 若干地区性文书除其他外也规定了研究例外。这些地区性文书包括：《关于建立安第斯共同体共同工业产权制度的第 486 号决定》（下称《安第斯共同体第 486 号决定》）；《关于修订〈1977 年 3 月 2 日成立非洲知识产权组织班吉协定〉的协议》（1999 年）（下称《班吉协议》）；《海湾阿拉伯国家合作委员会专利条例》《欧亚专利公约专利条例》；和《北美自由贸易协定》。²³

16. 不同文书相关规定的措辞有所不同，并且在这些地区性文书中，没有找到与这些任何规定有关的划定例外可能范围的解释性指导方针和判例。²⁴

表 1. 地区文书

<p>《安第斯共同体第 486 号决定》²⁵</p>	<p>第 53 条：</p> <p>“专利持有人不可行使前述条款中提及的关于以下行为的权利：</p> <p>[……]</p> <p>(b) 仅为实验目的开展的关于专利发明主题的行为；</p> <p>(c) 仅为教学或科学或学术研究目的开展的行为；”</p>
<p>《海湾阿拉伯国家合作委员会专利条例》²⁶</p>	<p>第 14 条第 (1) 款：</p> <p>“专利权不得扩展至：</p> <p>(1) 专为科学研究目的开展的行为。”</p>

en/scp_15/scp_15_3-annex1.pdf；或 Correa, C., ‘The International Dimension of the Research Exception’. AAAS/SIPPI Paper, January 2004, p.19.

²² 世贸组织文件 WT/DS114/R, 第 7.70 段。

²³ 欧洲《关于共同体专利的协定》(89/695/EEC) (1989 年 12 月 15 日通过) 第 27 条规定了研究例外。尽管该协定并未生效，但一些缔约国根据协定调整了国内法律。《统一专利法庭 (UPC) 协议》有望取得进一步统一的作用，除其它外，它将会就欧洲专利和具有统一效力的欧洲专利，统一大量有关权利的范围和例外的专利法律，以及侵权情况下的救济办法。关于研究例外，《UPC 协议》第五章第 27 条表明：“专利授予的权利不得扩展至以下任何情况：[……] (b) 为与专利发明主题相关的实验目的开展的行为；[……]”。截至 2018 年 11 月 25 日，《UPC 协议》还未生效。

²⁴ 然而，至少关于《班吉协议》，UNCTAD - ICTSD 政策简讯表明，在没有更合适的语言的情况下，该法律文书中所载的语言将为几乎所有科学和技术研究活动提供免于专利侵权的安全港。2010 年 UNCTAD - ICTSD 政策简讯 (7)，2010 年 3 月。The Research and Experimentation Exceptions in Patent Law: Jurisdictional Variations and the WIPO Development Agenda.

²⁵ 安迪斯共同体由玻利维亚、哥伦比亚、厄瓜多尔和秘鲁组成。

²⁶ 海湾阿拉伯国家合作委员会由阿拉伯联合酋长国、巴林国、沙特阿拉伯王国、阿曼苏丹国、卡塔尔国和科威特国组成。

《班吉协议》 ²⁷	<p>第 8 条第 (1) 款 (c) 项：</p> <p>“ (1) 专利权不得扩展至：</p> <p>[……]</p> <p>(c) 科学技术研究过程中为实验目的开展的关于专利发明的行为； ”</p>
《欧亚专利公约专利条例》 ²⁸	<p>第 19 条：</p> <p>“ 以下使用专利发明的情况不构成对欧亚专利的侵权：</p> <p>——为科学研究和实验目的而使用； ”</p>

5. 研究例外的国家执行

5.1 规定研究例外的法律框架

17.. 总共已有 113 个国家根据其各自法律框架对研究例外作出了规定。其中大多数国家的知识产权或专利立法中都包含有关此例外的具体法律规定。英美法系国家通过判例法规定研究例外，其中有些国家还将例外编入了成文法。²⁹本文件的附录中含有关于研究例外的国家和地区法律规定。

表 2. 对研究例外作出规定的国家名单

阿尔巴尼亚、阿尔及利亚、安道尔、安提瓜和巴布达、阿根廷、亚美尼亚、澳大利亚、阿塞拜疆、巴巴多斯、白俄罗斯、比利时、伯利兹、不丹、玻利维亚、波斯尼亚和黑塞哥维那、博茨瓦纳、巴西、保加利亚、布基纳法索、加拿大、中国、香港（中国）、哥伦比亚、哥斯达黎加、克罗地亚、古巴、塞浦路斯、捷克共和国、朝鲜民主主义人民共和国、丹麦、多米尼克、多米尼加共和国、厄瓜多尔、埃及、萨尔瓦多、爱沙尼亚、埃塞俄比亚、芬兰、法国、德国、加纳、希腊、危地马拉、洪都拉斯、匈牙利、冰岛、印度、印度尼西亚、爱尔兰、以色列、意大利、日本、约旦、哈萨克斯坦、肯尼亚、吉尔吉斯斯坦、拉脱维亚、黎巴嫩、利比里亚、立陶宛、卢森堡、马来西亚、马耳他、毛里求斯、墨西哥、蒙古、摩洛哥、莫桑比克、纳米比亚、荷兰、新西兰、尼加拉瓜、挪威、阿曼、巴基斯坦、巴拿马、巴布亚新几内亚、巴拉圭、秘鲁、菲律宾、波兰、葡萄牙、大韩民国、摩尔多瓦共和国、罗马尼亚、俄罗斯联邦、圣卢西亚、圣多美和普林西比、沙特阿拉伯、塞尔维亚、新加坡、斯洛伐克、斯洛文尼亚、西班牙、斯里兰卡、瑞典、瑞士、塔吉克斯坦、泰国、前南斯拉夫的马其顿共和国、汤加、特立尼达和多巴哥、突尼斯、土耳其、乌干达、乌克兰、联合王国、美利坚合众国、坦桑尼亚联合共和国、乌拉圭、乌兹别克斯坦、越南和赞比亚。

²⁷ 《关于修订〈1977 年 3 月 2 日成立非洲知识产权组织班吉协定〉的协议》，1999 年。非洲知识产权组织（OAPI）成员国包括贝宁、布基纳法索、喀麦隆、中非共和国、乍得、刚果、科特迪瓦、赤道几内亚、加蓬、几内亚、几内亚比绍、马里、毛里塔尼亚、尼日尔、塞内加尔、多哥和科摩罗。

²⁸ 欧亚专利组织成员国包括土库曼斯坦、白俄罗斯共和国、塔吉克斯坦共和国、俄罗斯联邦、阿塞拜疆共和国、哈萨克斯坦共和国、吉尔吉斯斯坦和亚美尼亚。

²⁹ 这些英美法系国家包括：澳大利亚、加拿大和新西兰。

18. 表2列出的大多数国家都有关于研究例外的单独规定，但在有些国家，研究例外与监管审查例外合并为一项条款。³⁰

19. 在一些其他国家，相关法律文书中没有关于研究例外的具体规定。但是，并不应就此推断在这些国家为研究和实验目的而使用专利发明必然构成专利侵权。为了实现相同的政策目标，专有权范围可包括为商业目的而开展的行为，即只有在作商业用途的情况下才构成侵权。³¹因此，不同国家规定研究例外的法律框架有所不同，反映了各国不同的法律传统。

5.2 研究例外的范围

20. 虽然各国法律中研究豁免的总体政策目标或多或少与上述说明一致，但这些规定的文本并不总是完全相同。例如，以下国家规定可以显示出文本的变化：

- “如果是以教育、研究、实验或分析为目的使用专利，并且不损害专利持有人的正常利益，则可作为第（1）段和第（2）段中所述规定的例外；”³²
- “专利权人的权利不应扩展至：
[……]
（b）仅为科学研究和实验目的而使用专利发明；”³³
- “在此法下授予的专利权受制于以下条件——
[……]
（3）若仅为实验或研究（包括教学）目的，任何人都可以制造或使用获得专利授权或以经专利授权的流程制造的任何机器、设备或其他物品，并且任何人都可以使用任何获得专利授权的流程；”³⁴
- “专有权不适用于：
[……]
（3）在与此发明有关的实验中使用；”³⁵

21. 因此，尽管各国法律都包含研究例外部分，但这些规定在表达方式上的差异可能导致例外的解读方式和覆盖范围不同。

22. 总体而言，对法律和判例的分析表明，各国的例外范围由某些特征界定。具体可以通过以下方式确定例外的范围：

- 研究或实验目的；
- 是否允许进行具有商业意图的实验或研究；和/或
- 实验行为与专利发明有何关联（即，是否允许借助或针对专利发明进行实验或研究）

³⁰ 这些国家是：波斯尼亚和黑塞哥维那、克罗地亚、捷克共和国、匈牙利、冰岛、葡萄牙、大韩民国、塞尔维亚、斯洛伐克、斯洛文尼亚、前南斯拉夫的马其顿共和国、乌拉圭和越南。有关监管审查例外的更多信息，请见文件 SCP/28/3。

³¹ 马达加斯加民主共和国 1989 年 7 月 31 日在介绍工业产权保护的 89-019 号法案第 30 条第 1 款表明，“来自专利或发明人证书的权利只能覆盖为工业和商业目的开展的行为。”

³² 印度尼西亚 2001 年 8 月 1 日第 14 号法案《专利法》第 16 条第（3）款。

³³ 埃塞俄比亚 1995 年 5 月 10 日第 123 号法案《工业产权法（宣言）》第 25 条第（1）款（b）项。

³⁴ 印度 1970 年 4 月 20 日第 39 号法案《专利法》第 47 条（2005 年修订）。

³⁵ 《专利法》第 3 条第（2）款（芬兰 1967 年 12 月 15 日第 1967/550 号法案，于 2013 年 1 月 31 日由第 2013/101 号法案进行最新修订）。

23. 本节其余部分将描述界定各国研究例外范围的特征。

研究或实验目的

24. 在许多成文法中包含实验使用例外和/或研究例外的国家，相关规定一般表明，专利赋予的权利不扩展至：为“实验或研究目的”开展的活动³⁶、为“科学研究或实验”开展的行为³⁷、出于“科学研究和实验目的”的使用³⁸、为“实验目的”开展的行为³⁹、为“科学研究目的”开展的行为⁴⁰、为“与科学或技术研究有关的实验目的”开展的行为⁴¹，或“为评估、分析、研究、教学、测试和试制而使用发明”⁴²。

25. 此外，一些国家的规定表明，只有活动“仅”以实验或研究为目的时，才可适用例外。各国法律中的规定包括：“仅以试验或实验为目的”⁴³、“仅服务于专利主题研究，包括使用专利流程直接获得的产品”⁴⁴、“仅为与专利发明相关的研究或实验目的”⁴⁵、“纯粹为实验目的或科学研究开展的制造或使用”活动⁴⁶、“仅为与本发明主题相关的实验目的开展的”活动⁴⁷、“仅为实验目的开展的”活动⁴⁸、“仅为科学研究目的”而开展的行为⁴⁹，和“只为科学研究目的而开展的行为”⁵⁰。

26. 虽然各国法律都使用了“研究”和“实验”这两个词，而大多数司法管辖区并未就如何根据相关法律来界定这些术语提供进一步的实质性指导。不过，在某些司法管辖区，可以在成文法或判例法中找到此类指导。例如，澳大利亚《专利法》⁵¹第119条C款规定，与发明主题有关的以实验为目的的行为不构成侵权，“实验目的”包括但不限于：

- (a) 确定发明的性质；
- (b) 确定与发明权利要求的范围；
- (c) 对发明进行改进或修改；
- (d) 确定专利的有效性，或发明权利要求的有效性；
- (e) 确定发明专利是否会被或已被某种行为侵权。

³⁶ 见日本《专利法》第 69 条第 (1) 款和保加利亚《专利和实用新型法》第 20 条第 (2) 款。

³⁷ 见亚美尼亚《发明、实用新型和工业品外观设计法》第 17 条第 (2) 款、大韩民国《发明法》第 33-b 条、吉尔吉斯共和国《专利法》第 13 条、俄罗斯联邦《民法》第 1359 条第 (2) 款。

³⁸ 乌克兰《发明和实用新型权利保护法》第 31 条第 (2) 款和《欧亚专利公约专利条例》第 19 条。

³⁹ 见澳大利亚《专利法》第 119C 条、丹麦《统一专利法》第 3 条第 (3) 款第 (iii) 项、法国《知识产权法典》第 L613-5 条、德国《专利法》第 11 条第 (2) 款、意大利《工业产权法典》第 68 条第 (1) 款 (a) 项、阿曼《工业产权法》第 11 条 (a) 款第 (4) 项 (iii)、摩尔多瓦共和国第 50/2008 号《发明保护法》第 22 条、土耳其《专利法》第 75 条 (b) 款。

⁴⁰ 见肯尼亚 2008 年《工业产权法》第 58 条和圣多美和普林西比《第 4/2011 号法》第 8.4 条 (c) 款。

⁴¹ 见巴西 9.279 号法案第 43 条第 2 段。

⁴² 见巴西 9.279 号法案第 43 条第 2 段。

⁴³ 葡萄牙《工业产权法典》(CPI) 第 102 条。

⁴⁴ 荷兰《专利法》第 53 条第 (3) 款。

⁴⁵ 毛里求斯 2002 年《专利、工艺品外观设计和商标法》第 21 条第 (4) 款 (d) 项。

⁴⁶ 塞浦路斯《专利法》第 27 条第 (3) 款第 (iii) 项。

⁴⁷ 阿尔巴尼亚第 9947 号《工业产权法》第 38 条 (b) 款。

⁴⁸ 不丹《工业产权法》第 13 条第 (4) 款和巴基斯坦 2000 年《专利条例》第 31 条第 (5) 款 (c) 项。

⁴⁹ 阿尔及利亚 2003 年 7 月 19 日第 03-07 号《专利条例》第 12 条第 (1) 款。

⁵⁰ 斯里兰卡 2003 年第 36 号《知识产权法》第 86 条第 (1) 款第 (i) 项

⁵¹ 1990 年《专利法》第 119C 条。

27. 同样，新西兰《专利法》第143条对实验使用例外作出了规定，并以非详尽清单列出了可视为出于实验目的的行为。⁵²

28. 联合王国在判例法中为术语“实验目的”的解释提供了指导。⁵³在 Monsanto 公司诉 Stauffer 化学公司⁵⁴等一案中，认为只有产生全新信息的实验才能纳入豁免范围，例如，为了发现未知事物或检验一种假设而开展的试验。该豁免不适用于旨在验证现有知识的实验（例如，向第三方证明产品确有所称功效），因此，为了获得监管批准而进行的临床试验就不能算作为实验目的开展的行为。然而，在 CoreValve 诉 Edwards Lifesciences 一案⁵⁵中，“在临床试验中使用某种专利药用活性物质，其目的是确定这种物质是否、或以何种形式用于治愈或减轻人类的某些其他疾病”（即第二类适应症），在这种情况下，视此为出于实验目的开展的合法行为。此外，在另一案件⁵⁶中，认为“为诉讼而进行的实验也可纳入例外范围，条件是其涉及据称遭受侵权的专利主张的发明主题，并且这一关联是真实而直接的。”

栏 4. Monsanto 公司诉 Stauffer 化学公司等案

“为发现某种未知事物，或为测试某个假设，或为找出已知能在特定条件下生效的事物是否能在不同条件下生效而进行的试验……都可被视为实验。”但是，为向第三方展示产品有效，或为收集信息以满足第三方要求而进行的试验（无论第三方是顾客还是 PSPS 或 ACAS 这样的机构），都不能被视为“为实验目的”开展的行为。⁵⁷

29. 德国《专利法》第 11 条第（2）款规定了实验使用豁免。⁵⁸联邦法院的两项判决，即临床试验一⁵⁹和临床试验二⁶⁰，澄清了德国的例外范围。在临床试验一中，法院表明，“任何旨在获得新信息的系统性过程都视作实验”。根据法院判决，该术语必须从广义上解释，并且作为一项规定，涵盖所有实验行为，无论所获知识的最终动机和目的是什么。⁶¹因此，实验、测试或试验等行为，但凡旨在消除现有的不确定性（例如通过寻找未知事物或测试一项假设），都可以纳入例外。⁶²

30. 根据荷兰的判例法，如果研究目的是正当的，则可适用研究例外。⁶³正当目的指的是对发明进行真正的科学研究，并且目的与荷兰《专利法》的目标相一致，诸如探究发明是否能够实现或探究是否能够改进发明（实现技术进步）。所附国会文件如此介绍研究例外，“研究被解释为包括在业务中或为业务而进行的科研”。

⁵² 新西兰 2013 年《专利法》第 143 条第（2）款内容为：“（1）为实验目的开展与发明主题相关的活动不构成专利侵权。（2）本节中，与发明主题相关的以实验性目的开展的行为包括以下目的开展的行为——（a）确定发明如何实施；（b）确定发明的范围；（c）确定权利要求的有效性；（d）寻求对发明加以改进（例如确定发明的新性质或新用途）。”

⁵³ 联合王国《专利法》第 60 条第（5）款（b）项规定“本规定以外的行为会构成对发明专利的侵权行为，除下列情况以外：（b）出于与发明主题相关的实验目的而开展的行为”。

⁵⁴ Monsanto Co vs Stauffer Chemical Co and Another [1985] RPC 515.

⁵⁵ CoreValve v Edwards Lifesciences [2009] EWHC 6 Pat Ct.

⁵⁶ Smith Kline & French Laboratories Ltd vs Attorney General (1991) 4 TCLR 199.

⁵⁷ Monsanto Co v Stauffer Chemical Co and Another [1985] RPC 515, p. 517.

⁵⁸ BGH, judgement of 17 April 1997 - X ZR 68/94 - *Klinische Versuche II*.

⁵⁹ BGH, judgement of 11 July 1995 - X ZR 99/92 - *Klinische Versuche I*.

⁶⁰ BGH, judgement of 17 April 1997 - X ZR 68/94 - *Klinische Versuche II*.

⁶¹ BGH, *Klinische Versuche I and II*.

⁶² Scharen, loc.cit., Sec.11 marginal no. 6. 另见德国向 SCP/28 提交的意见：http://www.wipo.int/scp/en/meetings/session_29/comments_received.html。进一步了解法院对临床试验一和临床试验二的判决，可见本文件第 42 段。

⁶³ Supreme Court, 18 December 1992, BIE 1993/81 (ICI/Medicopharma).

31. 根据西班牙的法律规则⁶⁴和判例法⁶⁵，该例外的目的在于设立规则，以便在相互冲突的利益之间实现平衡，限制或约束主观权利，因此要以限制性的方式进行解读。所以，必须符合以下两条规定才可被理解为例外：(i) 行为必须以实验或试验为目的，并且只能是技术或科学性质的；以及(ii) 行为必须与专利发明主题相关，即必须是“针对”而非只是“借助”发明本身开展的行为。因此，如果实验行为不是以改进或加强与发明本身相关的技术为唯一目的，就必须被排除在例外范围之外。

32. 在日本，人们普遍接受的理论是，专利权的“实验或研究”例外应限于以“提升技术”为目的的实验和研究，即专利性检索、功能检索，以及为进步和发展而进行的实验活动。⁶⁶

33. 俄罗斯联邦规定，该例外适用于以开展科研或实验为目的的行为。俄罗斯联邦国家法律⁶⁷将“科学（研究）活动”这一术语定义为“旨在获得和应用新知识的活动”，“基础科学知识”和“应用科学知识”都包括在内。此外，“实验和开发工作”这一术语被定义为“以从科学研究或实际经验获取的知识为基础，旨在保护生命和人类健康，以及创造新的材料、产品、流程、装置、服务、系统或方法，并将其进一步发展而开展的活动”。虽然该项法律没有给出“科学实验”的法律定义，但其认为科学实验是指“有助于在受控的条件下对真实现象进行研究的的学习方法”。根据俄罗斯联邦的答复，“科学研究与实验之间的区别在于，研究是针对纯粹形态（没有任何外力影响）下的主题进行研究，而实验是将主题置于某种条件下，即主题受到某种外来力量的影响。

34. 瑞士法律中关于研究例外的规定同样表明，该例外涵盖以研究或实验为目的开展的行为，“以便获得包括其可能用途在内的发明主题方面的知识；特别是允许任何与发明主题相关的科学研究”。⁶⁸以色列《专利法》规定，“为改进发明或开发另一项发明而进行的与发明相关的实验行为”不构成“对发明的利用”。特拉维夫地区法院裁定，使用现有和受专利保护的流程或产品的实验性操作，如果其目的在于改进该流程或产品或开发另一种流程或产品，则受法律允许。⁶⁹在一些其他国家，相关例外的范围并不由研究目的决定。例如，在斯洛文尼亚，此类例外允许任何为研究或实验目的进行的与专利主题相关的行为，“无论其最终目的是什么”。⁷⁰

表3. 各国法律规定了例外所涵盖研究的不同目的

-确定专利发明的可行性

-确定专利发明范围

-确定专利权利要求的有效性

-寻求改进专利发明

-围绕专利发明进行的再发明

⁶⁴ Fernández-Nóvoa, C.; Otero Lastres, O.L.; y Botana Agra, M.: Manual de la Propiedad Industrial, Marcial Pons, 2009, p.168.

⁶⁵ *Passim*, Supreme Court Ruling No. 39/2012 (Civil Chamber, Division No.1) of February 10, 2012.

⁶⁶ 见日本向 SCP/29 提交的意见: http://www.wipo.int/scp/en/meetings/session_29/comments_received.html.

⁶⁷ 1996 年第 127-FZ 号《联邦法》第 2 条，“On Science and State Science and Technology Policy”.

⁶⁸ 1954 年 6 月 25 日《联邦发明专利法》第 9 条第 (1) 款 (b) 项（截至 2017 年 1 月 1 日）。

⁶⁹ M.C.P. 19682/05, Transkaryotic Therapies INC vs. Genzyme Corporation (2006) Nevo.

⁷⁰ 斯洛文尼亚《工业产权法》(ZIL-1-UPB3) 第 19 条 (b) 项（2013 年 12 月 6 日进行最新修订）。

-调查专利发明的未知效果或新用途

-为营销许可获取临床试验数据

研究或实验的商业用途和/或非商业用途

35. 界定例外范围的另一个重要标准是，例外是否包含为商业目的而开展的实验行为。

36. 在一些国家，关于研究豁免的文本明确指出，豁免适用于没有商业或牟利意图的实验。例如，阿根廷《专利和实用新型法》第36条（a）款规定，专利所赋予的权利不应以下方面产生任何效力：

“（a）第三方在私人或学术领域，开展纯粹以实验、测试或教学而非商业为目的的科学或技术研究，并为此目的制造或使用与专利产品或流程相同的产品或流程。”（着重号后加）

37. 另一个例子见于罗马尼亚《专利法》第34条：

“以下行为不构成对第32和33条所规定权利的侵犯：

e) 仅为非商业性实验目的使用专利发明的主题（着重号后加）

38. 其他一些国家则明确规定，研究豁免也适用于预期将在未来进行商业性利用的行为。例如，乌干达《工业产权法》第44条（a）款规定：

“在下列任何情况下未经专利持有人授权使用专利发明，都不属于侵犯专利权：

[……]

（a）开展与专利发明的实验性使用或研究相关的任何行为，不论是出于科学目的还是商业目的；”
（着重号后加）

39. 同样，桑给巴尔《工业产权法》第12条第（4）款第（a）项第（iii）部分也表明：

“专利权应延伸至：

[……]

（iii）与针对或关于专利发明的实验性使用相关的行为，无论是出于科学目的还是商业目的；”
（着重号后加）

40. 然而，许多其他国家的规定并未明确，具有商业意图的活动是否包含在例外范围之内。在此方面，有些国家的法院提供了一定指导。在联合王国，受理Monsanto公司诉Stauffer化学公司一案的法院认为，例外可以涵盖具有商业目的的实验性工作，但并非所有以商业为目的的试验。⁷¹此外，在CoreValve诉Edwards Lifesciences一案中，法院认为，《专利法》第60条第（5）款（b）项规定的例外不适用于本案中的临床试验，因为这些实验的目的之一就是“产生相当可观的直接收益”。也就是说，在确定是否适用例外时必须考虑商业因素。⁷²

⁷¹ Monsanto Co v Stauffer Chemical Co and Another [1985] RPC 515.，见本文件第29段。

⁷² CoreValve v Edwards Lifesciences [2009] EWHC 6 Pat Ct.

41. 德国联邦法院在对临床试验一的判决中也确认《专利法》第11条第(2)款同样适用于旨在探寻一项专利药品是否可以治愈或减轻其他疾病(第二类适应症)的人体实验。⁷³关于豁免的规定甚至还适用于本质上超出纯粹研究并追求经济利益的实验。对此例外的宽泛解释在联邦法院于1997年对临床试验二的判决中得到了证实。根据联邦法院,《专利法》第11条第(2)款也适用于为了获取数据从而获得药品上市授权而开展的关于药物组合物的试验。具体而言,联邦法院表明,如果一项活动的“目标是消除与专利发明对象相关的不确定性,或为所述对象带来新的发现”,则其可以算作例外的实验使用,只要这些以研究为目的的活动是关于专利发明对象的,并且为与专利发明所用相同适应症而开展的临床试验也可包含在实验使用豁免中。在此背景下,联邦法院坚持其观点,认为经济利益作为一项准则,与《专利法》第11条第(2)款并不矛盾。然而,联邦法院明确表示,例外规定不适用于仅为澄清市场需要、价格可接受度以及分销选择等商业元素而开展的实验。⁷⁴

42. 在新西兰的Smith Kline & French Laboratories有限公司诉总检察长一案中,法官确认了“商业”和“非商业”研究之间的界限。⁷⁵

栏 5. Smith Kline & French Laboratories 有限公司诉总检察长案

本案中,法官表明,“毫无疑问,实验总是以商业用途为根本目标;例外和侵权的边界必然通常是程度问题。如果相关人员只是为了精进自己的知识或技术而私下开展活动,即便他的终极目标可能是商业利益,也不构成侵权。但如果他的行为超出了这一范围,目的是在真实的市场上取得进展,则构成侵权”。⁷⁶

43. 在澳大利亚,对于《专利法》第119C条,有人解释说,如果活动的主要目的是将发明商业化,或是为了销售或商业目的而制造,则不适用该例外。此外,针对专利发明的“市场研究”(例如制造和使用发明来测试对产品可能产生的商业需求)也不享受豁免,因为这主要也是出于商业目的而为之。⁷⁷

44. 此外,其他一些国家的相关法律规定,研究例外的范围仅限于不以商业为目的的活动。⁷⁸例如,在法国,研究例外应“经过严格评估,并且仅可适用于目的是参与验证发明或其发展以增进知识的实验行为,而不适用于以商业为导向的行为。”⁷⁹

45. 在美利坚合众国,没有关于研究例外的成文规定,但在判例法规定的实验活动方面存在“相当狭义的”例外。⁸⁰具体而言,在Madley诉Duke⁸¹一案中,这一概念被定义为“被控侵权方对专利的任何使用,只要有哪怕是最轻微的商业意味或与其正当业务内容相符”,就不能以实验使用作为理由进行辩护。法

⁷³ 具体来说,法院表明“实验是否只是用来检查专利说明,还是用来获得进一步研究结果,又或是否有商业利益等更广泛的目的”并不重要。实验使用可以是为了“探索某物的效果或迄今未知的可能的新用途”。BGH, *Klinische Versuche I*.

⁷⁴ BGH, *Klinische Versuche II*.

⁷⁵ *Smith Kline & French Laboratories Ltd vs Attorney General* (1991) 4 TCLR 199.

⁷⁶ 新西兰在提交的文件中对此案件评论道,“由此判决看出,判定在研究或实验中使用专利发明是否构成侵权,应该以研究的最终目的为依据。‘非商业’研究不构成侵权,而‘商业’研究构成侵权。然而,‘商业’和‘非商业’研究之间的界限尚不清楚。”。见新西兰对问卷调查的答复。

⁷⁷ 见澳大利亚向 SCP/29 提交的文件。

⁷⁸ 见哥斯达黎加、多米尼加共和国、萨尔瓦多、洪都拉斯、墨西哥、摩尔多瓦、罗马尼亚、土耳其和美利坚合众国对问卷调查的答复。另见 UNCTAD 提交的文件 SCP/25/3 第 7 段。

⁷⁹ 见法国对问卷调查关于法国《知识产权法》(2018年9月7日合并版)第 L613-5 (b) 条的答复。

⁸⁰ *Roche Prods., Inc v. Bolar Pharm. Co.*, 773 F.2d 858, 863 (Fed. Cir.1984).

⁸¹ *Madley v. Duke*, 307 F. 3d 1351 (Fed. Cir. 2002).

院未将实验使用例外适用于杜克大学的活动，因为这些研究活动无疑有助于该机构的正当业务目标，包括教育和启发学生以及参与这些项目的教师。⁸²

栏 6. 美利坚合众国的研究例外

1813 年，最高法院在 *Whittemore 诉 Cutter* 一案中指出，立法机关惩罚制造这一机器的人，意图从不仅仅是为了哲学实验或为了确定这一机器足以实现所述功效。⁸³在 *Sawin 诉 Guild* 一案中，最高法院区分了以获利为意图和仅以哲学实验或确定说明的真实性和准确性为意图这两种情况。⁸⁴因此，最高法院认为意在将发明用于利润或用于商业目的的行为不属于判例法例外。

在 *Madey 诉 Duke* 一案中，问题在于非州立大学的研究活动是否属于例外范围。⁸⁵法院得出结论，只要该行为是为了促进被控侵权方的正当业务，而不仅仅是为了娱乐、满足好奇心，或仅限于哲学探究，那么该行为就不足以严格意义上的、范围极其狭窄的实验使用为由进行辩护。⁸⁶

46. 关于发展中国家例外范围的具体情况，贸发会议向 SCP 提交的文件指出，许多发展中国家将研究例外的范围限于仅为非商业目的开展的研究。文件进一步指出：“这与经济现实不符，实际上，为科学目的开展的研究同时也可以用于商业目的。那些最近修改了专利法的发展中国家一般都反映了这一现实情况，它们允许对专利保护主题进行研究，以促进知识更新换代，即便该研究行为可能具有长远的商业目的。”⁸⁷

实验行为与专利发明的关系（“借助”或“针对”专利发明的实验或研究）

47. 许多国家的相关条款规定，实验行为必须涉及专利发明的主题。例如，巴基斯坦《专利条例》第 30 条第（5）款规定：

“专利授予的权利不得扩展至[……]仅为与专利发明有关的实验目的而开展的行为；”

48. 同样，保加利亚《专利和实用新型注册法》第 20 条第（2）款规定：

“专利的效力不应扩展至[……]为与专利发明主题有关的实验或研究目的而使用发明；”⁸⁸

49. 虽然“与专利发明主题有关”这一表述的确切范围是由相关司法管辖区决定的，但这似乎表明第三方只能对专利发明或就专利发明开展实验，例如为了探求未知效果或进一步发展发明而实施该专利发明。

50. 但是，也存在借助或使用专利发明进行研究的情况。例如，出于研究目的而将一项专利发明用于另一项发明，以进一步探求所述另一项发明。

51. 在生物技术领域研究背景下，特别讨论了实验使用豁免是否包括后一种情况的问题。据观察，特别是在遗传研究领域，授予上游研究成果专利可能会妨碍下游创新，因为使用研究工具对于下游创新

⁸² 同上。

⁸³ *Whittemore v. Cutter*, 29 Fed Cas. 1120 (C.C.D. Mass. 1813).

⁸⁴ *Sawin v. Guild*, 21 F. Cas. 554 (C.C.D. Mass. 1813).

⁸⁵ 根据第十一条修正案，州立大学及其雇员以官方身份行事时，可以免于专利侵权。见 Sean O' Conner 教授在“产权组织专利特别问题‘研究豁免’研讨会”上的介绍。

⁸⁶ *Madey v. Duke University*, 307 F.3d. 1351 (Fed. Cir. 2002).

⁸⁷ 见文件 SCP/25/3，第二页。

⁸⁸ 另见阿尔巴尼亚、安道尔、安提瓜和巴布达、伯利兹、不丹、博茨瓦纳、克罗地亚、丹麦、多米尼克、萨尔瓦多、芬兰、德国、加纳、匈牙利、利比里亚、卢森堡、毛里求斯、莫桑比克、新西兰、挪威、巴布亚新几内亚、摩尔多瓦共和国、圣卢西亚、塞尔维亚、新加坡、斯洛文尼亚、汤加、特立尼达和多巴哥、联合王国和坦桑尼亚联合共和国的相关规定。

（如医药应用）的发展至关重要，在许多情况下，没有办法绕开专利研究工具进行发明。在此方面，评论员指出，“一些最重要的基因研究工具是开辟未知研究领域的基础研究平台”⁸⁹。在这种情况下，下游研究人员不是在针对研究工具专利进行研究，而是在借助研究工具专利进行研究。

52. 从政策角度来看，首先，应适当兼顾创新者进一步开发创新研究工具的动力和其他研究人员利用这些研究工具的利益，其次，应兼顾上游研究人员（包括专利专有权持有人）的合法权利和其他人获取上游研究结果的权利，以促进后续研究。通常有人认为，允许第三方在研究例外情况下免费使用研究工具，可能会削弱对创造研究工具本身进行投资的动力。⁹⁰因此，一些专家特别在界定例外的适宜范围方面提出了一种审慎方法，以免出现不符合TRIPS协定第30条规定的情况，即任何例外均不得“与专利的正常使用产生不合理的矛盾”。⁹¹

53. 对各国立法的分析表明，在此方面，许多法律制度都试图限制研究豁免的执行，使其仅涵盖“针对”而非“借助”发明开展的研究。⁹²虽然获取研究工具的问题似乎并未在各地得到明确解决，但在瑞士，非独占许可权可以确保对研究工具的获取。⁹³

⁸⁹ E. Richard Gold, Yann Joly & Timothy Caulfield, “Genetic Research Tools, the Research Exception and Open Science” (2005) 3:2 *GenEdit*, 1-8. Dreyfuss, R. 注意到研究工具对后续研究的重要性，他指出：“任何想要研究乳腺癌基因的科学家都需要使用[专利]BRCA1 测试”。‘Protecting the Public Domain of Science: Has the time of an experimental use defense arrive?’ 46 *Arizona Law Review* (2004), 457.

⁹⁰ 见 Professor L. Bently et al. “Exclusions from Patentability and Exceptions and Limitations to Patentees’ Rights, SCP/15/3, Annex I, p. 57, and Richard Gold and Yann Joly, Annex VI, p. 41.

⁹¹ Correa, C., ‘The International Dimension of the Research Exception’. AAAS/SIPPI Paper, January 2004.

⁹² 以下各国在对问卷调查第 17 题的答复中明确表示，相关规定只允许“针对”或关于专利发明的研究。这些国家包括：阿尔巴尼亚、多米尼加共和国、德国、香港（中国）、吉尔吉斯共和国、荷兰、挪威、俄罗斯联邦、瑞士和吉克斯坦。

⁹³ 瑞士《专利法》第 40e 条的作用是，在使用专利生物技术发明作为研究工具的情况下，特别是为了开展测试或开发新的医药产品时，利害关系人可以应该首先寻求从专利持有人处获得自愿许可，如果遭到拒绝，则利害关系人可就所涉发明的使用向法院申请发放许可。（瑞士提交的意见可见文件 SCP/23/3 第 6 页）。

栏 7. “针对”或“借助”专利发明的研究：澳大利亚和俄罗斯联邦的答复

在澳大利亚，1990 年《专利法》第 119C 条所载的例外情况不适用于“使用专利‘研究工具’。‘研究工具’是指用于促进实验但本身并非实验主题的东西。例如，研究人员测试特定除草剂对不同植物的功效时，可能会使用专利润湿剂来促进除草剂的吸收。在此处使用润湿剂不应免于侵权，因为它在实验中被用作工具，而实验主题与之无关。”⁹⁴

俄罗斯联邦在对问卷调查的答复中解释道，根据其《民法》第 1359 条规定，该例外适用于“与专利产品或工艺本身有关的实验或科学研究，而不是以其作为开展实验或研究的手段的实验或科学研究，譬如用于测量工具或其他便于开展实验或研究的设备。”⁹⁵

54. 在德国，根据对临床试验一的判决，如果实验行为的对象是对专利权利要求的技术传授，则实验行为与专利发明的主题相关。⁹⁶ 联邦法院以此标准来限制“实验”一词的广泛适用范围。在其对临床试验二的判决中，联邦法院明确表示，如果实验是以如此大的规模进行，以至于不再能以实验目的证明其正当性，则实验行为与专利发明主题无关。如果实验的唯一目的是持久地扰乱另一个人的专利产品销售，则实验与专利发明主题无关。如果专利主题在实验范围内仅用作工具，实验也与专利主题无关。同样的标准也适用于生物等效性研究，此类研究的目的是确定以不同方式制造的含有相同活性物质的药品可以相互替代，不会给患者带来风险。⁹⁷

55. 然而，在一些其他国家，相关规定的文本并未明确，在确定例外范围时是否以“针对”和/或“借助”专利发明作为标准。⁹⁸ 至少在比利时一国，关于研究例外的文本明确规定，例外适用于“出于科学目的的针对或借助专利发明主题完成的行为”。⁹⁹

6. 成员国实施研究例外所面临的挑战

56. 对产权组织成员国立法分析表明，研究豁免虽然在范围上迥然有别，但正如世贸组织争端解决小组所言，已是“国家专利法中最广泛采用的第 30 条类型的例外之一”。¹⁰⁰ 关于在国家一级切实实施这一例外所涉及挑战，大多数成员国都报告说，本国没有遇到任何特别的挑战。¹⁰¹ 此外，大多数成员国都答复说，现有国家法律框架足以实现研究例外的目标，并未设想修改这方面的法律。¹⁰²

57. 然而，在提到挑战时，一些成员国指出，本国的实验使用例外范围存在不确定性。例如，坦桑尼亚提交的材料解释说，其法律第 38 节规定，专利专有权仅适用于为工业或商业目的而开展的行为，而

⁹⁴ 澳大利亚向 SCP/28 提交的意见，可见：http://www.wipo.int/scp/en/meetings/session_29/comments_received.html。

⁹⁵ 俄罗斯联邦对问卷调查的答复，可见 <http://www.wipo.int/scp/en/exceptions/replies/russia.html#Q3>。

⁹⁶ BGH, *Klinische Versuche I and II*; Rincken, loc. cit., Sec. 11 marginal no. 10.

⁹⁷ 然而，生物等效性研究可涵盖在《专利法》第 11 条第 (2) 款 (b) 项的豁免规定（称为“bolar 例外”）中。见德国向 SCP/29 提交的意见。

⁹⁸ 见中国、印度、泰国、乌克兰、乌拉圭和越南的研究例外规定。

⁹⁹ 比利时 2014 年 4 月 19 日法案第 XI.34. § 1er 条。

¹⁰⁰ 加拿大-药品专利保护案。世贸组织文件 WT/DS114/R。

¹⁰¹ 例如，巴基斯坦的答复强调，实验使用例外从来都不是问题。另见成员国对 SCP/28 提交的答复以及以下成员国对调查问卷的答复：阿尔及利亚、澳大利亚、波斯尼亚和黑塞哥维那、加拿大、中国、哥斯达黎加、克罗地亚、丹麦、多米尼加共和国、萨尔瓦多、洪都拉斯、匈牙利、拉脱维亚、荷兰、巴基斯坦、秘鲁、葡萄牙、摩尔多瓦共和国、俄罗斯联邦、圣多美和普林西比、土耳其和美利坚合众国。

¹⁰² 见阿尔及利亚、波斯尼亚和黑塞哥维那、加拿大、中国、哥斯达黎加、克罗地亚、塞浦路斯、丹麦、多米尼加共和国、法国、洪都拉斯、香港（中国）、匈牙利、日本、肯尼亚、拉脱维亚、墨西哥、摩尔多瓦、荷兰、挪威、秘鲁、波兰、葡萄牙、俄罗斯联邦、圣多美和普林西比、西班牙、瑞典、瑞士和土耳其的答复。

特别不适用于为科学研究而开展的行为。由于没有任何法院判决表明出于工业或商业目的的科学研究之间的分界线，因此认为该规定的范围并不确定。^{103,104}在某些国家，这种范围的不确定性导致了立法变革，并在各自法规中规定了明确的研究例外。¹⁰⁵例如，在瑞士，由于调查结果发现，参与者指出了在 DNA 专利方面遇到的困难，及其对于研究和进一步开发造成的影响。所以瑞士立法机构在《专利法》第 9 条第 1 款 (b) 项中引入了法定研究豁免。¹⁰⁶澳大利亚修正了《专利法》，“以便在研究和商业活动之间划清界线。[……]其目的是为研究和实验活动提供广泛而明确的保护，以便最大限度地发挥澳大利亚的研究潜力”。¹⁰⁷

7. 实施研究例外的结果

58. 虽然有许多文献从法律角度讨论了特定国家研究例外的最佳范围，但从经验角度测试实行研究例外对研究和创新的影响的经济数据有限。虽然研究例外一般来说应促进第三方对专利发明的研究使用，但关于第三方在开展研究时是否确实有赖于例外信息，并不一定记录在案和/或公开可即或可进行计算。由于受益于此类例外的活动都发生在研究实验室中，因此收集各利益攸关方使用例外的信息存在着固有的困难。¹⁰⁸

59. 很少有国家在答复 SCP 内部问卷调查时报告例外对研究的影响：澳大利亚提交的材料称，《专利法》第 119C 条中的侵权豁免是“为研究和实验活动提供广泛而明确的保护，以便最大限度地发挥澳大利亚的研究与创新潜力”，并且该条款“为研究人员提供了确定性和明确性”。¹⁰⁹在联合王国，有不少报告断定需要澄清或重修研究例外，联合王国知识产权局作出回应，开展了以实验使用例外为主题的磋商。特别指出的是，缺乏判例法可能会导致实验使用例外的范围不确定。然而，作为回应的磋商中没有提供确凿证据表明现有实验使用例外限制了研究，而缺乏明确证据的情况无法推动立法变革。¹¹⁰

60. 至于有关这一主题的学术文献，一些反对研究豁免概念的学者认为，专利并不妨碍对发明的研究：它们只是增加了研究成本，因为研究人员必须支付垄断价格才能使用专利发明。本质上，他们认为有效的资源分配为所有研究提供适当水平的投资激励，要求研究人员支付所用任何投入的全部成本。如果他们使用另一位研究人员创造的知识，他们就应支付发现的固定成本以及不断增加的边际成本。因此，他们认为研究豁免的存在会对创新产生不利影响。¹¹¹

61. 这种论点进而认为，大学研究人员可以选择支付许可费，围绕专利进行发明，或研究解决另一个问题。如果他们选择从权利人处获得许可，则他们的任何投入都必须向专利持有人付费。为此，研究人员需要吸引更多资金，通常是来自政府的资金。有人认为，如此可以起到有助于激励上游研究人员的效

¹⁰³ 见文件 SCP/23/3 中坦桑尼亚联合共和国提交的意见。

¹⁰⁴ 另见文件 SCP/25/3 中贸发会议提交的材料：“可以说，专利例外与限制虽然载入了国内法，但范围往往不明确，因此难以实施。”

¹⁰⁵ 例如，有关研究例外，澳大利亚、加拿大、瑞士、乌干达和赞比亚都对其法律进行了修订。

¹⁰⁶ 见文件 SCP/23/3 中瑞士提交的意见。

¹⁰⁷ 见澳大利亚对调查问卷的答复。

¹⁰⁸ 然而，只要专利是可执行的，专利申请的最新部分中指明专利发明，就可表明此处使用了研究例外。见文件 SCP/23/3 中萨尔瓦多提交的意见。

¹⁰⁹ 见澳大利亚对调查问卷的答复。

¹¹⁰ 见联合王国对调查问卷的答复。

¹¹¹ Gans, J. (2005), ‘The dynamic effects of intellectual property practices’ *Intellectual Property Research Institute of Australia*, 引自 “Research use of patented knowledge: a review”, STI working paper 2006/2, OECD.

果，并将研究资金集中用在被认为最有潜力的项目上。因此，没有研究例外的许可提供了一种平衡兼顾投资激励措施与适当溢出效应的有效办法。¹¹²

62. 其他一些学者倡导实施研究例外，他们关注的重点在于无谓损失、交易成本和基本不确定性，认为例外可以缓解强行索取垄断价格的情况。¹¹³ 具体而言，他们指出，由于许多研究本质上是累积性的，在开展实际研究之前谈判和缔结多项专利许可可能会产生巨额交易成本。此外，据称，大多数研究在本质上具有基本不确定性，因为一开始无法知道哪条研究路线会取得成功，利用现有知识储备的可能性越大，实现突破的可能性越大。¹¹⁴

63. 此外，还有许多学术论文讨论美利坚合众国实行的以狭义上的实验使用为辩护理由，并建议该国采取各种措施。¹¹⁵

64. 总之，似乎需要进一步的经济分析来确定研究豁免对科学探究的影响。可以肯定的是，创新政策应旨在兼顾激励投资创新活动与促进溢出效应。最佳研究例外应该提供投资动力，同时又不限制那些只会对这一投资动力产生微小影响的知识溢出。¹¹⁶

65. 此外，从法律角度来看，任何研究例外都必须符合国际法律义务，特别是《TRIPS 协定》的要求。此外，为了实现政策目标，应在国家层面明确研究例外的范围。对专利权人和依赖例外进行研究的第三方来说，这将能够确保法律的确信性和可预测性。

[后接附录]

¹¹² 同上。

¹¹³ 关于专利制度经济合理性的一般性讨论，见《关于国际专利制度的报告》第二章（SCP/12/3 Rev. 2）。

¹¹⁴ “Research use of patented knowledge: a review”，STI working paper 2006/2, OECD。另见 L. Bently 教授，他说“一般而言，可以认为非商业使用即便能为专利垄断提供更多“激励”，也不会增加多少。与此同时，允许专利涵盖此类活动将会强制索取巨额费用：最明显的是，监督和许可此类使用会产生交易成本。”他进一步断定，基于市场失灵的推理可能证明某些狭义的“实验使用”例外是合理的。L. Bently 教授等人。“Exclusions from Patentability and Exceptions and Limitations to Patentees’ Rights”，SCP/15/3，第 57 页。另见 Correa，他说，狭义的研究例外可能会使重要研究放缓，限制或延迟获取有时无法获得许可或获取许可费用太高的必要专利技术。Correa, C., ‘The International Dimension of the Research Exception’。AAAS/SIPPI Paper, 2004 年 1 月。

¹¹⁵ L. Bently 教授全面概述了研究美利坚合众国实行的实验使用保护的论文：“某些人认为，美国实行的臭名昭著的狭义实验使用保护（尚）未造成重大困难。[……]然而，至少学者们对美国法律的现状普遍存在不满。自从 Eisenberg 教授 1989 年发表了关于这一专题的开创性文章以来，[……]一位又一位学者自告奋勇，提出某种改进方式，为此提供更多的灵活性。[……]2000 年，Maureen O’Rourke 教授提议通过专利侵权的“合理使用”例外。三年后，Rochelle Dreyfuss 教授，或受到 GPL 和知识共享中使用的病毒许可的启发，提出公共机构可以在实验中使用专利发明，只要它们承诺把这些研究的任何成果本身放入公共领域。[……]翌年，Richard Nelson 提出了一个类似计划，却认为非营利机构例外的条件是承诺以非专有的方式授予许可，并且研究的任何专利成果都仅收取合理的使用费。[……]Katherine Strandburg 教授提议将“针对专利发明”的实验（例如在德国和联合王国实行的例外）与“借助专利发明”的强制许可结合起来。”见“Exclusions from Patentability and Exceptions and Limitations to Patentees’ Rights”，SCP/15/3。

¹¹⁶ “Research use of patented knowledge: a review”，STI working paper 2006/2, OECD。

COMPILATION OF VARIOUS LEGAL PROVISIONS ON THE RESEARCH EXCEPTION

COMPILATION DE DIVERSES DISPOSITIONS JURIDIQUES CONCERNANT L'EXCEPTION
EN FAVEUR DE LA RECHERCHE

COMPILACIÓN DE LAS DIFERENTES DISPOSICIONES LEGALES SOBRE LA EXCEPCIÓN CON FINES DE
INVESTIGACIÓN

تجميع لمختلف الأحكام القانونية بشأن الاستثناء لأغراض البحث

研究例外不同法律规定汇编

КОМПИЛЯЦИЯ РАЗЛИЧНЫХ ПРАВОВЫХ ПОЛОЖЕНИЙ ОБ ИСКЛЮЧЕНИИ ДЛЯ
НАУЧНО-ИССЛЕДОВАТЕЛЬСКИХ ЦЕЛЕЙ

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ALBANIA

Article 38 (1) b) of the Patent Law № 9947 of 7 July 2008 (as amended up to Law № 55/2014 of 29 May 2014)

38. Limitation of the Effects of the Patent.

The rights conferred by the patent shall not extend to:

[...]

b) acts performed merely for experimental purposes relating to the subject matter of the invention.

ALGERIA

Article 12 (1) n. 1 of the Ordinance № 03-07 of 19 Joumada El Oula 1424 corresponding to July 19, 2003 on Patents

12. Les droits découlant d'un brevet d'invention ne s'étendent qu'aux actes accomplis à des fins industrielles ou commerciales.

Les droits découlant d'un brevet d'invention ne s'étendent qu'aux actes accomplis à des fins industrielles ou commerciales.

Ces droits ne s'étendent pas:

1°) aux actes accomplis aux seules fins de la recherche scientifique;

[...]

ANDORRA

Article 23 (4) of the Patent Act of 10 June 1999

23. Rights conferred by a patent.

[...]

(4) The rights conferred by a patent shall not extend to:

(c) acts done for experimental purposes relating to the subject-matter of the patented invention;

[...]

ANTIGUA AND BARBUDA

Section 11 (4) (c) of the Patent Act № 23 of 23 December 2003

11 (4) (1) (c) The rights under the patent shall not extend:

[...]

(c) to acts done only for experimental purposes relating to a patented invention;

[...]

ARGENTINA

Article 36 (a) of the Law No 24.481 of 30 March 1995 on Patents and Utility Models (as amended up to Decree No 27/2018 of 10 January 2018)

36. El derecho que confiere una patente no producirá efecto alguno contra:

a) Un tercero que, en el ámbito privado o académico y con fines no comerciales, realice actividades de investigación científica o tecnológica puramente experimentales, de ensayo o de enseñanza, y para ello fabrique o utilice un producto o use un proceso igual al patentado.

[...]

ARMENIA

Article 17 (2) of the Law of the Republic of Armenia of June 10, 2008, on Inventions, Utility Models and Industrial Designs

17. Acts not Recognized as Infringements on the Exclusive Right Conferred by Patent.

The use of patented invention, utility model shall not constitute an infringement of the exclusive rights of the patent owner under Article 16 of this Law if used:

[...]

(2) as a subject of scientific research or scientific experiment;

[...]

AUSTRALIA

Section 119C of the Patents Act 1990 (consolidated as of 24 February 2017)

119C Infringement exemptions: acts for experimental purposes.

(1) A person may, without infringing a patent for an invention, do an act that would infringe the patent apart from this subsection, if the act is done for experimental purposes relating to the subject matter of the invention.

(2) For the purposes of this section, experimental purposes relating to the subject matter of the invention include, but are not limited to, the following:

(a) determining the properties of the invention;

- (b) determining the scope of a claim relating to the invention;
- (c) improving or modifying the invention;
- (d) determining the validity of the patent or of a claim relating to the invention;
- (e) determining whether the patent for the invention would be, or has been, infringed by the doing of an act.

[...]

AZERBAIJAN

Article 23 of the Law of the Republic of Azerbaijan on Patents 1997

23. Acts not constituting infringement of the exclusive rights of patent owners.

The following shall not be deemed as infringements of the exclusive rights of the patent owner:

[...]

- the use of product containing a patented subject matter of industrial property for the scientific experiments or research purposes, as well as in the testing of a patented subject matter of industrial property;

[...]

BARBADOS

Article 6 (1) of the Patents Act 2001 (Cap. 314) (as amended by Act No 2 of 2006)

6 (1): The rights vested in the owner of a patent by section 5 in respect of any invention do not apply to:

(a) the use of the invention for scientific research only;

[...]

BELARUS

Article 10 of the Law of the Republic of Belarus No 160-Z of 16 December 2002 on Patents for Inventions, Utility Models, Industrial Designs (as amended up Law No 328-Z of 22 December 2011)

10. Actions Not Recognized as Violation of the Exclusive Right of the Patent-Holder.

[...]

conducting the scientific research or experiment on the method in which the invention, industrial model or industrial design protected by the patent are used;

[...]

BELGIUM

Article XI.34. § 1er. of the Law of 19 April 2014, inserting Book XI 'Intellectual Property' to the Code of Economic Law, and specific provisions to the Book XI in Books I, XV and XVII of the Code

XI.34. § 1er. Les droits conférés par le brevet ne s'étendent pas:

[...]

b) aux actes accomplis à des fins scientifiques sur et/ou avec l'objet de l'invention brevetée;

[...]

BELIZE

Article 33 (4) (c) of the Patents Act (Cap. 253, Revised version 2000)

33 (4): The rights under the patent shall not extend to:

[...]

(c) acts done only for experimental purposes relating to a patented invention;

[...]

BHUTAN

Section 13 (4) a) of the Industrial Property Act of the Kingdom of Bhutan 2001

13 (4) (a): The rights under the patent shall not extend:

[...]

(iii) to acts done only for experimental purposes relating to a patented invention;

[...]

BOLIVIA

Article 53 (b) of the decision № 486 of 14 September 2000 of the Commission of the Andean Community

53. The owner of the patent may not exercise the right referred to in the foregoing Article in relation to the following acts:

[...]

(b) acts performed for exclusively experimental purposes on the subject matter of the patented invention;

[...]

BOSNIA AND HERZEGOVINA

Section 73 (b) of the Law on Patents as of 28 May 2010

73. Exceptions from the Exclusive Rights.

The patent holder's exclusive right shall not apply to:

[...]

b) acts performed for research and development purposes, and for experiments relating to the subject matter of the protected invention, including the acts necessary for obtaining registration or marketing authorization for the product which is a medicine intended for humans or animals or a medicinal product;

[...]

BOTSWANA

Section 25 (1) (c) of the Industrial Property Act 2010 (Act No 8 of 2010)

25. (1) The rights conferred by a patent shall not extend to –

[...]

(c) acts done only for experimental purposes relating to the subject-matter of the patented invention;

[...]

BRAZIL

Article 43 II of the Patent Law No 9.279 of 14 May 1996 as last amended by Law No 10.196 of 14 February 2001

43: The provisions of the previous Article do not apply:

[...]

(II) to acts carried out by unauthorized third parties for experimental purposes, in connection with scientific or technological studies or researches;

[...]

BULGARIA

Article 20 (2) of the Law on Patents and Utility Models Registration of 9 November 2006 as last amended by Law of 18 May 2012

20. The effect of a patent shall not extend to:

[...]

2. use of the invention for experimental or research purposes relating to the subject matter of the patented invention;

[...]

BURKINA FASO

Article 8 (1) (c) of the Agreement Revising the Bangui Agreement of 2 March 1977 on the Creation of an African Intellectual Property Organization (Bangui (Central African Republic), 24 February 1999)

8. Limitation of the Rights Conferred by the Patent:

(1) The rights deriving from the patent shall not extend

[...]

(c) to acts in relation to a patented invention that are carried out for experimental purposes in the course of scientific and technical research;

[...]

CANADA

Section 55.2. (1), (6) of the Patent Act (R.S.C., 1985, c. P-4) (status as of 21 June 2016)

55.2 (1) Exception.

It is not an infringement of a patent for any person to make, construct, use or sell the patented invention solely for uses reasonably related to the development and submission of information required under any law of Canada, a province or a country other than Canada that regulates the manufacture, construction, use or sale of any product.

[...]

(6) For greater certainty, subsection (1) does not affect any exception to the exclusive property or privilege granted by a patent that exists at law in respect of acts done privately and on a non-commercial scale or for a non-commercial purpose or in respect of any use, manufacture,

construction or sale of the patented invention solely for the purpose of experiments that relate to the subject-matter of the patent.

CHINA

Article 69 (4) of the Patent Law of the People's Republic of China (as amended up to the Decision of 27 December 2008 regarding the Revision of the Patent Law of the People's Republic of China)

69. The following shall not be deemed to be patent right infringement:

[...]

(4) Any person uses the relevant patent specially for the purpose of scientific research and experimentation;

[...]

HONG KONG, CHINA

Article 75 (b) of the Patents Ordinance 2017 (Chapter 514)

75. Limitation of effect of patent:

The rights conferred by a patent shall not extend to-

[...]

(b) acts done for experimental purposes relating to the subject-matter of the relevant patented invention;

[...]

COLOMBIA

Article 53 (b) of the decision № 486 of 14 September 2000 of the Commission of the Andean Community

53. The owner of the patent may not exercise the right referred to in the foregoing Article in relation to the following acts:

[...]

(b) acts performed for exclusively experimental purposes on the subject matter of the patented invention;

[...]

COSTA RICA

Article 16 (2) (b) and (c) of the Law No 6867 of 25 April 1983 on Patents, Industrial Designs and Utility Models (as amended up to Law No. 8686 of 21 November 2008)

16. Rights conferred by patents. Limitations.

Provided that the following exceptions do not unjustifiably affect the normal working of the patent or result in unreasonable prejudice to the legitimate interests of the owner or his licensee, the rights conferred by the patent shall not extend to:

[...]

(b) acts performed for experimental purposes which are related to the subject matter of the patented invention;

(c) acts done exclusively for the purpose of teaching or scientific or academic research in respect of the subject matter of the patented invention;

[...]

CROATIA

Article 63 (2) of the Patent Act and Acts on Amendments to the Patent Act No 173/2003 of 1 January 2004, as amended by Act No 76/2013 of 29 June 2013

63. Exceptions from the exclusive rights.

The patent owner's exclusive right of exploitation of the invention shall not apply to:

[...]

2. acts done for the purposes of research and development and for experiments relating to the subject-matter of the protected invention, including where such acts are necessary for obtaining registration or authorization for putting on the market a product comprising a medicine intended for people or animals, or a medicinal product;

[...]

CUBA

Article 47 (a), (c) of Decree-Law No 290 of 20 November 2011 on Inventions and Industrial Designs and Models

47. Los derechos conferidos por la patente no se extienden a:

a) los actos realizados exclusivamente con fines de enseñanza o de investigación científica o tecnológica;

[...]

c) los actos realizados con fines experimentales que se refieran al objeto de la invención patentada;

[...]

CYPRUS

Article 27 (3) (ii) and (iii) of the Patent Law of 1998 (amended in 2000,2002 and 2006)

27. Rights conferred by a patent.

[...]

(3) Notwithstanding paragraphs (1) and (2) of this section, the owner of a patent shall have no right to prevent third parties from performing, without his authorization, the acts referred to in subsections (1) and (2) of this section in the following circumstances:

[...]

(ii) Where the act is done privately and on a non-commercial scale, provided that it does not significantly prejudice the economic interests of the proprietor of the patent;

(iii) Where the act consists of making or using for purely experimental purposes or for scientific research;

[...]

CZECH REPUBLIC

Section 18 (d), (e) of the Act No 527 / 1990 Coll. on Inventions and Rationalisation Proposals, as follows from amendments implemented by Act No 519/1991 Coll., Act No 116/2000 Coll. and Act No 207/2000 Coll.

18. The rights of the proprietor of the patent shall not be infringed by use of the protected invention:

[...]

d) in acts done for non-commercial purposes;

e) in act relating to the subject-matter of the invention done for experimental purposes, including experiments and tests necessary under special legal regulations^{3a)} prior to being placed on the market.

DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

Article 33 (2) 3 (3) (iii) of the Invention Law of the Democratic People's Republic of Korea (amended by Decree No 597 of 11 March 1999 of the Presidium of the Supreme People's Assembly)

33. Use of patented science and technology without permission

A patented science and technology may be used without the consent of the patent owner if:

[...]

2. it is used for scientific research and experiment;

[...]

DENMARK

Section 3 (3) (iii) of the Consolidate Patents Act (Consolidate Act No 221 of 26 February 2017)

3. (3) The exclusive right shall not extend to:

[...]

(iii) acts done for experimental purposes relating to the subject-matter of the patented invention;

[...]

DOMINICA

Article 33 (4) c of the Patents Act No 8 of 7 October 1999

33. Rights of owner of patent.

[...]

(4) The rights under the patent shall not extend to:

[...]

c) acts done only for experimental purposes relating to a patented invention;

[...]

DOMINICAN REPUBLIC

Article 30 (b) and (c) of the Law on Industrial Property No 20-00 of 8 May 2000

30. Limitation and Extent of the Rights of the Patent.

The patent does not give the right to prevent:

[...]

b) Actions carried out exclusively for purposes of experimentation with regard to the patented invention.

c) Actions carried out exclusively for purposes of teaching or of scientific or academic research.

[...]

ECUADOR

Article 53 (b) of the decision No 486 of 14 September 2000 of the Commission of the Andean Community

53. The owner of the patent may not exercise the right referred to in the foregoing Article in relation to the following acts:

[...]

(b) acts performed for exclusively experimental purposes on the subject matter of the patented invention;

[...]

EGYPT

Article 10 of the Law No 82 of 3 June 2002 on the Protection of Intellectual Property Rights

10.

[...]

The following shall not be considered as infringements of that right when carried out by third parties:

(1) Activities carried out for scientific research purposes.

[...]

EL SALVADOR

Article 61 (c) of the Legislative Decree No 912 of 14 December 2005 on Amendments to the Law on the Promotion and Protection of Intellectual Property

61. Letters (a), (b) and (c) of the first subparagraph of Art. 116 are hereby amended and letter (e) added, as follows:

[...]

(c) To a third party that, without commercial purposes, carries out acts of manufacture or use of the invention for experimental purposes relating to the subject of the patented invention or for the

purposes of scientific, academic or teaching research, provided that this does not unjustifiably infringe upon the normal exploitation of the invention that the holder may or does carry out;

[...]

ESTONIA

Paragraph 16 (3) of the Patents Act of 1 January 2015 (consolidated text of 1 January 2015)

§ 16. Acts which do not constitute infringement of exclusive right of proprietor of patent.

The following acts do not constitute infringement of the exclusive right of the proprietor of a patent:

[...]

3) the use of the patented invention in testing related to the invention itself, including the use of a medicinal product containing the patented invention in clinical trials of the medicinal product;

[...]

ETHIOPIA

Section 25 (1) (b) of the Industrial Property Law (Proclamation) № 123 of 10 May 1995

25. Limitations of Rights.

1. The rights of the patentee shall not extend to:

[...]

b) the use of the patented invention solely for the purposes of scientific research & experimentation;

[...]

FINLAND

Section 3 (2) of the Patents Act (Act № 1967/550 of 15 December 1967, as amended up to Act № 2013/101 of 31 January 2013)

3.

[...]

The exclusive right shall not apply to:

[...]

(3) use in experiments relating to the invention as such;

[...]

FRANCE

Article L613-5 (b) of the Intellectual Property Code (consolidated version of 7 September 2018)

Article L613-5

Les droits conférés par le brevet ne s'étendent pas:

[...]

b) Aux actes accomplis à titre expérimental qui portent sur l'objet de l'invention brevetée;

[...]

GERMANY

Section 11 (2) of the Patent Act (as amended up to Act of 8 October 2017)

11. The effect of a patent shall not extend to:

[...]

2. acts done for experimental purposes relating to the subject-matter of the patented invention;

[...]

GHANA

Section 11 (4) (c) of the Patent Act of 31 December 2003 (Act 657)

11. Rights Conferred by Patent.

[...]

(4) The rights under the patent shall not extend to:

[...]

(c) acts done only for experimental purposes relating to a patent invention; or

[...]

GREECE

Article 10 (2) a) of the Law 1733/87 of 22 September 1987 on Technology Transfer, Inventions and Technological Innovation

10. Contents of the right.

[...]

2. The owner of the patent may not forbid, in the meaning of the preceding paragraph, the following activities:

a. The use of the invention for nonprofessional or research purposes;

[...]

GUATEMALA

Article 130 (b) and (c) of the Industrial Property Law, Decree No 57-2000 of 18 September 2000

130. La patente no dará el derecho a su titular de impedir:

[...]

b) Actos realizados exclusivamente con fines de experimentación respecto al objeto de la invención patentada;

c) Actos realizados exclusivamente con fines de enseñanza o investigación científica o académica, sin propósitos comerciales, respecto al objeto de la investigación patentada;

[...]

HONDURAS

Article 18 of the Law on Industrial Property (approved by Decree Law No 12-99-E of 30 December 1999)

18. Los derechos conferidos por la patente sólo podrán hacerse valer contra actos realizados por terceros con fines industriales o comerciales. En particular, tales derechos no podrán hacerse valer contra actos realizados exclusivamente en el ámbito privado y con fines no comerciales, o con fines de experimentación, investigación científica o enseñanza relativos al objeto de la invención patentada.

HUNGARY

Article 19 (6) b) of the Act No XXXIII of 1995 on the Protection of Inventions by Patents (consolidated text of 17 June 2017)

19.

[...]

(6) The exclusive right of exploitation shall not extend to:

[...]

(b) acts done for experimental purposes relating to the subject matter of the invention, including experiments and tests necessary for the marketing authorisation of the product constituting the subject matter of the invention or the product obtained through the process constituting the subject matter of the invention;

[...]

ICELAND

Article 3 (3) of the Patents Act No 17/1991 (as amended up to Act No 126/2011)

3.

[...]

The following are excepted from the exclusive right:

[...]

(3) use of the invention for experiments which relate to the invention itself, [i.a. studies and trials and other related procedures that are necessary to make possible an application for marketing authorization for e.g. a generic medicinal product and an improved pharmaceutical form;]

[...]

INDIA

Section 47 of the Patent Act No 39 of 20 April 1970 (as last amended in 2005)

47. Grant of patents to be subject to certain conditions. - The grant of a patent under this Act shall be subject to the condition that –

[...]

(3) any machine, apparatus or other article in respect of which the patent is granted or any article made by the use of the process in respect of which the patent is granted, may be made or used, and any process in respect of which the patent is granted may be used, by any person, for the purpose merely of experiment or research including the imparting of instructions to pupils;

[...]

INDONESIA

Article 16 (3) of the Patent Law No. 14 of 1 August 2001

16.

[...]

(3) Exempted from the provisions as referred to in paragraph (1) and paragraph (2) if the use of said Patent is for the sake of education, research, experiment, or analysis, as long as it does not harm the normal interest of the Patent holder.

IRELAND

Section 42 (b) of the Patents Act No 1 of 27 February 1992 (as last amended by Intellectual Property (Miscellaneous Provisions) Act No 36 of 2014)

42. The rights conferred by a patent shall not extend to-

[...]

(b) acts done in conducting studies, tests, experiments and trials (including clinical trials and field trials) with a view to satisfying the application requirements for a marketing authorisation or similar instrument (howsoever described) that is required by the law of the State or of any other state in order to sell or supply or offer to sell or supply-

(I) a medicinal product for human use, within the meaning of subsection (2), or

(II) a - veterinary medicinal product, within the meaning of subsection (2),

or

[...]

ISRAEL

Section 1 of the Patent Law, 5727-1967 (consolidated version of 2014)

[...]

"exploitation of an invention" –

(1) In respect of an invention that is a product – any act that is one of the following: production, use, offer for sale, sale, or import for purposes of one of the enumerated acts;

[...]

but excluding any of the following:

[...]

(2) any experimental act in connection with the invention, the objective of which is to improve the invention or to develop another invention;

[...]

ITALY

Article 68 (1) of the Industrial Property Code (Legislative Decree № 30 of 10 February 2005, as amended up to Legislative Decree № 63 of 11 May, 2018)

68. Limitations on patent rights.

1. Whatever the object of the invention may be, the exclusive authority attributed by patent rights does not extend to the following:

a) actions carried out in the private sphere and for non-commercial purposes, or as experimentation;

[...]

JAPAN

Article 69 (1) of the Patent Act № 121 of 13 April 1959, as amended up to Act № 55 of 10 July 2015)

69. Limitations of patent right.

(1) A patent right shall not be effective against the working of the patented invention for experimental or research purposes.

[...]

JORDAN

Article 21 C of the Patent Act 1999 № 32 of 1 December 1999

21. Rights of the Patentee.

C. Notwithstanding the provisions of this Law or any other legislation, carrying out research and development, and submitting applications for obtaining approvals to market a product prior to the expiry date of the patent protection shall not be considered an act of civil or criminal infringement.

KAZAKHSTAN

Article 12 (2) of the Law on Patents of the Republic of Kazakhstan № 427-I of 16 July 1999 (as amended up to Law of the Republic of Kazakhstan № 378-V of 31 October 2015)

12. Acts which are not Recognised as Violation of Exclusive Right of Patentee.

The following shall not be recognised as violation of the exclusive right of the patentee:

[...]

2) carrying out scientific research or experiment on means which contain the protected object of industrial property when such research or experiment does not have a commercial purpose;

[...]

KENYA

Section 58 (1) of the Industrial Property Act № 3 of 27 July 2001 (as amended up to Act № 11 of 2017)

58. Limitation of rights.

(1): The rights under the patent shall extend only to acts done for industrial or commercial purposes and in particular not to acts done for scientific research.

[...]

KYRGYZSTAN

Article 13 (2) of the Law of the Kyrgyz Republic №. 8 of 14 January 1998 on Patents (as amended up to Law № 76 of 10 April 2015)

13. Actions Not Considered as an Infringement of the Exclusive Right of the Patent Owner.

The following is not recognized as an infringement of the exclusive right of the patent owner:

[...]

2) conducting scientific research or an experiment with an article containing an object of industrial property;

[...]

LATVIA

Section 20 (2) of the Patent Law of 1 March 2007 (as amended up to 1 January 2012)

20. Limitations of Exclusive Rights Resulting from a Patent.

The exclusive rights resulting from the patent shall not extend to:

[...]

2) experimental or investigative activities;

[...]

LEBANON

Article 42 of the Law No 240 of 14 August 2000

42. - A person infringing the rights of a basically published patent while being aware of such action, shall be penalized by a fine ranging from five to fifty million Lebanese Liras and imprisonment from three months up to three years or by either of the penalties hereinbefore mentioned.

- Exploiting the invention on non-commercial, nonindustrial personal aims or for scientific research reasons shall not be considered counterfeit according to the provisions of the Article herein.

LIBERIA

Paragraph 13.11 (b) (ii) of the Act to Repeal an Act Adopting a New Copyright Law of the Republic of Liberia approved on 23 July 1997; and the Industrial Property Act of Liberia approved on 20 March 2003, constituting Title 24 of the Liberian Code of Laws Revised, and to enact in their stead a New Title 24 to be known as the "Liberia Intellectual Property Act, 2016"

§13.11. Rights Conferred by the Patent; Limitations and Exceptions.

[...]

b) The rights under a patent may not be used to prevent:

[...]

ii. acts done for purposes of scientific research in academic, educational or research institutions;

iii. acts done for experimental purposes relating to the subject matter of the patented invention;

[...]

LITHUANIA

Article 26 of the Patent Law No I-372 of 18 January 1994 (as last amended by Act – No. X-1119 of 10 May 2007)

26. Rights of the Owner of a Patent.

[...]

The owner of the patent shall have no right to prevent third parties from performing acts referred to in paragraphs 1 and 2, provided that:

[...]

2) the act is done for experimental purposes or for scientific research, and this does not conflict with a normal exploitation of the patent and does not unreasonably prejudice the legitimate interests of the patent owner;

[...]

LUXEMBOURG

Article 47 (b) of the Law of 20 July 1992 on the Changes in the System for Patents for Invention (as amended by the Law of 24 May 1998)

47. Limitation of the Effects of the Patent.

The rights afforded by the patent shall not extend to:

[...]

(b) acts done for experimental purposes relating to the subject matter of the patented invention;

[...]

MALAYSIA

Section 37 (1) of the Patents Act of 1983 (as amended up to Act A1264)

37. Limitation of rights.

(1) The rights under the patent shall extend only to acts done for industrial or commercial purposes and in particular not to acts done only for scientific research.

[...]

MALTA

Article 27 (6) (b) of the Patents and Designs Act (chapter 417) of 01 June 2002

27.

[...]

(6) Notwithstanding subarticles (1) and (2), the proprietor of a patent shall have no right to prevent third parties from performing the acts referred to in subarticles (1) and (2)(b) in the following circumstances:

[...]

(b) where the act consists of making or using such product for purely experimental purposes or for scientific research;

[...]

MAURITIUS

Section 21(4)(d) of the Patents, Industrial Designs and Trademarks Act of 8 August 2002

21. Rights conferred by patent.

[...]

(4). Any right under the patent shall not extend –

[...]

d) to acts done only for research and experimental purposes relating to a patented invention;

[...]

MEXICO

Article 22 (I) of the Law on Industrial Property (consolidated text published in the Official Journal of the Federation on 18 May 2018)

22. El derecho que confiere una patente no producirá efecto alguno contra:

I.- Un tercero que, en el ámbito privado o académico y con fines no comerciales, realice actividades de investigación científica o tecnológica puramente experimentales, de ensayo o de enseñanza, y para ello fabrique o utilice un producto o use un proceso igual al patentado;

[...]

MONGOLIA

Article 18.2.2. of the Patents Act of 25 June 1993 (as amended up to 1 September 2016)

18. Exploitation of Inventions, Industrial Designs and Utility Models.

[...]

2. The following exploitation of the invention or industrial design protected by the patent or utility model protected by the certificate shall not be regarded as an infringement of the exclusive rights of the patent or certificate owner:

[...]

18.2.2. the use for scientific research, education or experimental purposes;

[...]

MOROCCO

Article 55 (b) of the Law No 17-97 on the Protection of Industrial Property (as amended by Laws No 31-05 and No 23-13)

55. Les droits conférés par le brevet ne s'étendent pas:

[...]

b) aux actes accomplis à titre expérimental qui portent sur l'objet de l'invention brevetée;

[...]

MOZAMBIQUE

Article 75 (a) of the Industrial Property Code (approved by Decree No 47/2015 of 31 December 2015)

75. Limitation of the rights derived from a patent.

The rights of the patent holder shall not extend to the following:

a) Acts relating to a patented invention for the purposes of scientific research;

[...]

NAMIBIA

Section 108 (c) of the Industrial Property Act 2012 (Act No 1 of 2012)

108. Limitations of rights.

The rights of the owner of a registered design do not extend to

[...]

(c) acts related to experimental use of the design or acts done on a noncommercial scale for scientific research;

[...]

NETHERLANDS

Section 53 (3) of the Patent Act 1995 (Act of 15 December 1994 containing Rules Relating to Patents)

53.

[...]

3. The exclusive right shall not extend to acts solely serving for research on the patented subject matter, including the product obtained directly as a result of using the patented process.

[...]

NEW ZEALAND

Section 143 of the Patent Act 2013 as at 16 December 2017

143 No infringement for experimental use.

(1) It is not an infringement of a patent for a person to do an act for experimental purposes relating to the subject matter of an invention.

(2) In this section, act for experimental purposes relating to the subject matter of an invention includes an act for the purpose of-

(a) determining how the invention works:

(b) determining the scope of the invention:

(c) determining the validity of the claims:

(d) seeking an improvement of the invention (for example, determining new properties, or new uses, of the invention).

[...]

NICARAGUA

Article 46 (a) and (b) of the Law on Patents, Utility Models and Industrial Design No 354 of 21 November 2000

46. Limitation of Patent Rights.

A patent shall not confer the right to prohibit the following acts:

a) those conducted in a private circle and for noncommercial purposes, and also those conducted solely for the purposes of experimentation in relation to the subject matter of the patented invention;

b) those performed exclusively for teaching or scientific or academic research purposes in relation to the subject matter of the patented invention, and those referred to in Article 5ter of the Paris Convention for the Protection of Industrial Property;

[...]

NORWAY

Section 3 (3) no. 3 of the Patents Act (Act No 9 of 15 December 1967) (consolidated version of 2018)

3. The exclusive right shall not include:

[...]

3) Exploitation by experiment relating to the subject matter of the invention

[...]

OMAN

Section 11 (4) (C) of the Industrial Property Rights Law (promulgated by the Royal Decree No. 67/2008)

11.

[...]

4 - The rights under the patent shall not extend:

[...]

C) to acts done only for experimental purposes relating to a patented invention;

[...]

PAKISTAN

Section 30 (5) of the Patents Ordinance No LXI of 2 December 2000

30. Rights conferred by patent.

[...]

(5) The rights under the patent shall not extend to:

[...]

c) Acts done only for experimental purposes relating to a patented invention;

[...]

f) Acts done for teaching purposes in educational or research institutions.

[...]

PANAMA

Article 19 (1) of the Law No 61 of 5 October 2012, amending Law No 35 of 10 May 1996 on Industrial Property

19. El derecho que confiere una patente no producirá efecto alguno contra:

1. Un tercero que, en el ámbito privado, realice actos relacionados con la invención patentada a escala no comercial, con fines experimentales, de investigación científica o de enseñanza y con una finalidad no comercial;

[...]

PAPUA NEW GUINEA

Section 29 (4) (c) of the Patent and Industrial Act No 30 of 19 July 2000

29. Rights conferred by a patent.

[...]

(4) The rights of an owner of a patent shall not extend to:

[...]

c) acts done only for experimental purposes relating to a patented invention;

[...]

PARAGUAY

Article 34 (a) and (b) of the Law No 1.630/2000 on Patents (as last amended by Law No 2.593/2005)

34. De las limitaciones al derecho de patente y agotamiento del derecho.

La patente no dará el derecho de impedir:

[...]

a) los actos realizados exclusivamente con fines de experimentación y sin fines comerciales respecto al objeto de la invención patentada;

b) los actos realizados exclusivamente con fines de enseñanza o de investigación científica o académica;

[...]

PERU

Article 53 (b) of the decision No 486 of 14 September 2000 of the Commission of the Andean Community

53. The owner of the patent may not exercise the right referred to in the foregoing Article in relation to the following acts:

[...]

(b) acts performed for exclusively experimental purposes on the subject matter of the patented invention;

[...]

PHILIPPINES

Section 72.3. of the Intellectual Property Rights Code, Act No 8293 of 1 January 1998

72. Limitations of Patent Rights.

The owner of a patent has no right to prevent third parties from performing, without his authorization, the acts referred to in Section 71 hereof in the following circumstances:

[...]

(3) Where the act consists of making or using exclusively for the purpose of experiments that relate to the subject matter of the patented invention;

[...]

POLAND

Article 69 (1), (iii) of the Act of 30 June 2000 on Industrial Property (as amended up to Act of 24 July 2015)

69.

1. The following shall not be considered acts of infringement of a patent:

[...]

(iii) employing of an invention for search and experimental purposes, for the evaluation thereof, analysis or teaching;

[...]

PORTUGAL

Article 102 (c) of the Industrial Property Code (as amended up to Law № 46/2011 of 24 June 2011)

102. Limitation of rights conferred by a patent.

The rights conferred by a patent do not extend to:

[...]

c) Acts performed exclusively for trial or experimental purposes, including experiments for the preparation of the administrative processes required for the approval of products by the competent official bodies, though industrial or commercial exploitation of these products may not commence before expiry of the patent protecting them;

[...]

REPUBLIC OF KOREA

Article 96 (1) of the Patent Act № 950 of 31 December 1961 (as amended up to Act № 14112 of 29 March 2016)

96. Limitations on Effects of Patents.

(1) The effects of a patent shall not extend to the following:

1. Execution of a patented invention for the purpose of research or testing (including research and testing for obtaining permission for items of medicines or reporting items of medicines by under the Pharmaceutical Affairs Act or for registering pesticides under the Pesticide Control Act);

[...]

REPUBLIC OF MOLDOVA

Article 22 (1) (b) of the Law № 50-XVI of 7 March 2008 on the protection of Inventions (as amended up to Law № 101 of 26 May 2016)

22. Limitation of Effects of a Patent.

(1) The rights conferred by a patent shall not extend to:

[...]

b) acts done for experimental purposes relating to the subject-matter of the patented invention;

[...]

ROMANIA

Article 34 (e) of the Patent Law No 64/1991 (as amended up to Law No 28/2007)

34. The following acts shall not constitute infringements of the rights provided in Art. 32 and Art. 33:

[...]

e) use of the subject-matter of the patented invention for exclusively noncommercial experimental purposes;

[...]

RUSSIAN FEDERATION

Article 1359 (2) of the Civil Code of the Russian Federation (Part IV).

1359. Acts which Shall Not an Infringement of the Exclusive Right to an Invention, Utility Model, or Industrial Design.

The performance of the following acts shall not constitute an infringement of the exclusive right to an invention, utility model, or industrial design:

[...]

2) scientific research of a product or process incorporating an invention or utility model, or scientific research of a device incorporating an industrial design or the conduct of an experiment with such a product, process, or device;

[...]

SAINT LUCIA

Section 62 (2) (b) of the Patents Act No 16 of 27 August 2001

62. Meaning of infringement.

[...]

(2) An act, which apart from this subsection would constitute an infringement of a patent for an invention shall not do so if:

b) it is done for experimental purposes relating to the subject matter of the invention;

[...]

SAO TOME AND PRINCIPE

Article 8.4 (c) of the Law № 4/2001 of 31 December 2001 on Industrial Property

8. Duration and annual fees.

[...]

4. The rights deriving from the patent do not include:

[...]

c) Acts regarding an Invention patented for scientific research purposes;

[...]

SAUDI ARABIA

Article 47 of the Law of Patents, Layout-Designs of Integrated Circuits, Plant Varieties, and Industrial Designs (promulgated by Royal Decree № M/27 of 29/5/1425H (17 July 2004))

47.

[...]

However, the owner of the protection document's right shall not preclude others from exploiting his invention in non-commercial activities relating to scientific research.

SERBIA

Article 21 (2) of the Law on Patents of 4 January 2012 (Official Gazette of the Republic of Serbia № 99/2011)

21. Exceptions to Exclusive Rights.

The exclusive rights of a right holder referred to in Articles 14 and 15 of this Law shall not apply to:

[...]

2) research and development activities relating to the subject matter of a protected invention, including activities that are necessary for obtaining an authorization from the competent authority for placing on the market a product which is a drug intended for use on humans or animals, or a medicinal product or plant protection products defined by the law regulating plant protection products;

[...]

SINGAPORE

Section 66 (2) b) of the Patent Act (Chapter 221) Revised Edition 2005, as amended up to the Statutes (Miscellaneous Amendments) Act 2014)

Meaning of infringement.

66.

[...]

(2) An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not be so if —

(b) it is done for experimental purposes relating to the subject-matter of the invention;

[...]

SLOVAKIA

Article 18 (1) (f) of the Act No 435/2001 Coll. on Patents, Supplementary Protection Certificates and on Amendment of Some Acts [Patent Act (as amended up to Act No 125/2016 Coll.)]

18.

(1) Rights of a patent owner shall not be infringed if an invention is exploited:

[...]

f) in activity conducted for experimental purposes which shall also be studies, exams necessary for registration proceedings pursuant to a special regulation.

[...]

SLOVENIA

Article 19 b) of the Industrial Property Act (ZIL-1-UPB3) (as amended up to 6 December 2013)

19. Limitation of rights conferred by a patent.

The rights conferred by a patent within the meaning of Article 18 shall not extend to:

(b) acts done for research and experimental purposes of any kind relating to the subject matter of the patent irrespective of their final purpose;

[...]

SPAIN

Article 61 (1) (b) of the Law No 24/2015 of 24 July 2015 on Patents

61. Límites generales y agotamiento del derecho de patente.

1. Los derechos conferidos por la patente no se extienden:

[...]

b) A los actos realizados con fines experimentales que se refieran al objeto de la invención patentada.

[...]

SRI LANKA

Section 86 (1) (i) of the Intellectual Property Act No 36 of 2003

86. (1) The provisions of section 84 shall:

(i) extend only to acts done for industrial or commercial purposes and in particular shall not extend to acts done only for the purpose of scientific research;

[...]

SWEDEN

Section 3 (3) no. 3 of the Patent Act No 837 of 12 January 1967

3.

The following are excepted from the exclusive right:

[...]

(3) use of the invention for experiments which relate to the invention itself;

[...]

SWITZERLAND

Article 9 (1) (b) of the Federal Act of 25 June 1954 on Patents for Inventions (status as of 1 January 2017)

9. Exceptions aux effets du brevet.

(1) Les effets du brevet ne s'étendent pas:

[...]

b. aux actes accomplis à des fins expérimentales et de recherche servant à obtenir des connaissances sur l'objet de l'invention, y compris sur ses utilisations possibles; est permise notamment toute recherche scientifique portant sur l'objet de l'invention;

[...]

TAJKISTAN

Section 30 of the Law of the Republic of Tajikistan № 17 of 28 February 2004 on Inventions (as amended up to Law № 956 of 19 March 2013)

30. Acts which shall not an Infringement of the Exclusive Right.

The following actions shall not be deemed infringements of a patent owners' exclusive right:

[...]

- scientific research or experiments in academic, educational and research institutions involving devices incorporating inventions;

[...]

THAILAND

Section 36 (2) no. 1 of the Patent Act B.E. 2522 of 11 March 1979

36.

[...]

(2)

[...]

The preceding paragraph shall not apply to:

(1) any act for the purpose of study, research, experimentation or analysis, provided that it does not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner;

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Section 91 (2) of the Law on Industrial Property adopted on 12 January 2009

91. Free use.

The right of the patent holder laid down in Article 89 of this Law regarding the exclusive utilisation of the invention shall not relate to:

[...]

2) undertaking activities for research and development of the subject of the protected invention, in particular: manufacture, use, offer for sale, export or import of the protected invention, including also activities for obtaining approval for placing medications for human and veterinary medicine and products for protection of plants on the market;

[...]

TONGA

Section 13 (4) (c) of the Industrial Property Act No 19 of 09 November 1994

13. Rights conferred by patent; exploitation by Government or person thereby authorized.

[...]

(4) The rights under the patent shall not extend:

[...]

(c) to acts done only for experimental purposes relating to a patented invention;

[...]

TRINIDAD AND TOBAGO

Section 42 (b) of the Patent Act No 21 of 1996 (as last amended by the Act No 18 of 2000)

42. Limitation of effect of patent.

The rights conferred by a patent shall not extend to:

[...]

b) acts done for experimental purposes relating to the subject matter of the relevant patented invention;

[...]

TUNISIA

Article 47 (b) of the Patents Law No 2000-84 of 24 August 2000

47. The rights conferred by the patent shall not extend to the following:

[...]

(b) acts performed experimentally that relate to the subject matter of the patented invention;

[...]

TURKEY

Article 75 (b) of the Law No 6769 of 22 December 2016 on Industrial Property

75. Limits of the Scope of Rights Conferred by a Patent.

The following acts shall remain outside the scope of rights conferred by a patent:

[...]

b/ Acts involving, for experimental purposes, the invention, subject matter of a patent;

[...]

UGANDA

Section 44 (a) of the Industrial Property Act of 6 January 2014

44. Exception to exclusive rights.

It is not an infringement of a patent to use the patented invention without the authorization of the patent holder in any of the following circumstances:

[...]

(a) to carry out any acts related to experimental use or research on the patented invention, whether for scientific or commercial purposes;

[...]

UKRAINE

Article 31 (2) of the Law of Ukraine No 3687-XII of 15 December 1993 on Protection of Rights to Inventions and Utility Models (as amended up to 5 December 2012)

31. Acts which Shall Not an Infringement of the Exclusive Right.

[...]

2. The use of the patented invention (utility model) shall not be considered to be the infringement of rights deriving from a patent provided that it is used:

[...]

for scientific or experimental purposes;

[...]

UNITED KINGDOM

Section 60 (5) (b) of the Patents Act of 2004

60. Meaning of infringement.

[...]

(5) An act which, apart from this subsection, would constitute an infringement of a patent for an invention shall not do so if –

[...]

(b) it is done for experimental purposes relating to the subject-matter of the invention;

[...]

UNITED REPUBLIC OF TANZANIA

Section 12 (4)(a) (iii) of the Zanzibar Industrial Property Act 2008 (Act No 4 of 2008)

12. Rights conferred by a patent.

[...]

(4) (a) The rights under the patent shall extend:

[...]

(iii) to acts done relating to experimental use on or relating to the patented invention, whether for scientific or commercial purposes;

[...]

URUGUAY

Article 39 (c) and (d) of the Law № 17.164 of 2 September 1999 regulating Rights and Obligations relating to Patents, Utility Models and Industrial Designs

39. The rights conferred by patents shall not cover the following acts:

[...]

(c) acts carried out solely for experimental purposes, including acts anticipating future commercial exploitation, carried out during the year prior to expiry of the patent;

(d) acts carried out for teaching, scientific or academic research purposes;

[...]

UZBEKISTAN

Section 12 of the Law of the Republic of Uzbekistan № 1062-XII of 6 May 1994 on Inventions, Utility Models and Industrial Designs (as amended up to Law of the Republic of Uzbekistan № ZRU-446 of 14 September 2017)

12. Acts not recognized as an infringement of a patent owner's exclusive right.

The following shall not be recognized as an infringement of a patent owner's exclusive right:

[...]

the conduct of scientific research or an experiment on means containing industrial property subject matter protected by patents;

[...]

VIET NAM

Article 125 (2) a) of the Intellectual Property Law № 50/2005/QH11 of 29 November 2005

125. Right to prevent others from using industrial property objects.

[...]

2. Owners of industrial property objects as well as organizations and individuals granted the right to use or the right to manage geographical indications shall not have the right to prevent others from performing the following acts:

a/ Using inventions, industrial designs or layout-designs in service of their personal needs or for noncommercial purposes, or for purpose of evaluation, analysis, research, teaching, testing, trial

production or information collection for carrying out procedures of application for licenses for production, importation or circulation of products;

[...]

ZAMBIA

Section 75 (1) of the Patents Act 2016 (Act No 40 of 2016)

75. Limitations of patent rights.

(1) Despite any other provision of this Act, rights under a patent shall be limited to industrial or commercial activities and shall not extend to the following:

(a) acts done by any person, involving a patented invention, for scientific research;

[...]

(d) acts related to experimental use of the patented invention;

[...]

(2) Where test batches of a patented product have been produced in terms of subsection (1), the term of the patent of the original product shall not be extended.

ANDEAN COMMUNITY

Article 53 (b) of the decision No 486 of 14 September 2000 of the Commission of the Andean Community

53. The owner of the patent may not exercise the right referred to in the foregoing Article in relation to the following acts:

[...]

(b) acts performed for exclusively experimental purposes on the subject matter of the patented invention;

[...]

EURASIAN PATENT ORGANIZATION

Rule 19 of the Patent Regulations under the Eurasian Patent Convention (adopted by the Administrative Council of the Eurasian Patent Organization (EAPO) at its second (1st ordinary) session on 1 December 1995, with the amendments and additions adopted by the Administrative Council of the EAPO at its thirty second (22st ordinary) EAPO AC session on 1-3 November 2016.

19. Acts not Infringing the Eurasian Patent.

The following cases of the use of the patented invention shall not constitute an infringement of the Eurasian patent:

[...]

use for scientific research and experimental purposes;

[...]

GULF COOPERATION COUNCIL (GCC)

Section 14 (1) of the Patent Regulation for the GCC States was approved by the GCC Supreme Council during its 13th summit held in Abu Dhabi 21-22 September 1992

14: The rights under the patent shall not extend to:

1) Acts done particularly for scientific research purposes.

[...]

ORGANISATION AFRICAINE DE LA PROPRIÉTÉ INTELLECTUELLE (OAPI)

Article 8 (1) c) of the Bangui Agreement of 2 March 1977 on the Creation of an African Intellectual Property Organization (1999)

8 (1): The rights deriving from the patent shall not extend:

(c) to acts in relation to a patented invention that are carried out for experimental purposes in the course of scientific and technical research;

[...]

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

Article 1709 (6) of the North American Free Trade Agreement of 1 January 1994

1709: Patents.

[...]

6. A Party may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking into account the legitimate interests of other persons.

[...]

[End of Appendix and of document]