



Question Q219

National Group: United States

Title: The availability of injunctions in cases of infringement of IPRs

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Date: April 18, 2011

Questions

I. Analysis of current law and case law

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

Availability:

1. *Are injunctions for infringement of an IPR available on a provisional/preliminary basis?*

Preliminary injunctions are available in patent, trademark, copyright and trade secret misappropriation cases in U.S. district courts.¹ They also are available at the International Trade Commission (“ITC”) in cases under 19 U.S.C. §1377 (“Section 337”). Provisional/preliminary injunctions are made in the form of a motion for temporary relief at the ITC.²

¹ Please note that provisional/preliminary injunctions may also be obtained from individual state courts in trademark and trade secret misappropriation cases subject to each individual state’s law. Because the focus here is on actions brought in Federal Court, this paper will not address issues of state law.

² Under section 34 of the Lanham Act [trademarks], the court has the "power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable." 15 U.S.C. § 1116(a).

Similarly, under the Copyright Act, the court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). See also, 35 U.S.C. 283 regarding patents.

2. *Are injunctions for infringement of an IPR available on a permanent basis?*

Permanent injunctions are available in district courts as outlined above for preliminary injunctions. They also are available in the form of a General Exclusion Order (“GEO”), Limited Exclusion Order (“LEO”) and/or Cease and Desist Order (“CDO”) is available at the ITC in Section 337 cases.

Criteria:

3. *If yes to question 1, what are the criteria for the grant of an injunction on a provisional/preliminary basis?*

In a number of recent cases, the U.S. Supreme Court has emphasized the need for application of general legal principles in intellectual property cases. *eBay v. MercExchange* was one such case. *eBay*, however, involved a permanent, rather than preliminary, injunction. Thus, it is important to review the Supreme Court’s most recent examination of the preliminary injunction standard.

As a preliminary matter, under U.S. law, a preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief”....In exercising their sound discretion, courts of equity should “pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 376-77 (2008). (citations omitted) In *Winter*, the district court entered a preliminary injunction, and the Court of Appeals affirmed, on the basis of its finding, among other things, that the plaintiff had established at least a “possibility” of irreparable injury if the injunction were not granted. The Supreme Court reversed. First the Court set forth the elements of proof for a preliminary injunction:

- 1) a likelihood of success on the merits;
- 2) a showing of "irreparable harm" without an injunction
- 3) the balance of equities must tip in the plaintiff’s favor
- 4) a showing that entry of the preliminary injunction is in the public interest.

The Supreme Court then held that that a showing that irreparable injury is “likely” is required to support the entry of preliminary injunctive relief, and that a showing of “possible” irreparable injury is not enough. *Winter*, 129 S. Ct. at 374-76 (citations omitted). Both the U.S. Court of Appeals for the Federal Circuit, and many district courts, have applied the rule of *Winter v. NRDC* in deciding motions for preliminary injunctions in

patent infringement cases.³ Accordingly, plaintiffs seeking preliminary injunctions in all intellectual property cases should be prepared to offer evidence of a likelihood, not merely a possibility, of irreparable injury, as well as evidence relating to the other factors required under both *eBay* and *Winter*.

In applying the preliminary injunction factors, U.S. Courts of Appeal have adopted different tests for balancing the factors discussed above.

To obtain provisional/preliminary relief at the ITC under Section 337, a motion for temporary relief will be considered if it is filed with the complaint, or if certain conditions are met, filed after the complaint is filed, but before an investigation is initiated by the ITC. 19 C.F.R. § 210.52 (a) provides that “[i]n determining whether to grant temporary relief, the Commission will apply the standards the U.S. Court of Appeals for the Federal Circuit uses in determining whether to affirm lower court decisions granting preliminary injunctions.”

In Section 337 cases, reasonable likelihood of success on the merits, includes demonstration that a valid and enforceable intellectual property right has been infringed and that a domestic industry exists, or is in the process of being established.

The motion for temporary relief filed at the ITC must also contain a detailed statement of facts as to whether the Complainant should post a bond and the amount of the bond, among other things. See 19 CFR § 210.52 (b).

Although provisional/preliminary injunctions are available at the ITC in the form of a motion for temporary relief, the utilization of this remedy is extremely low.

4. *If yes to question 2, what are the criteria for the grant of an injunction on a permanent basis?*

For patents, these criteria are set out in controlling U.S. Supreme Court decision in *eBay, Inc. v. Merc. Exchange, LLC.*, 547 U.S. 388 (2006), which are the four (4) well-known factors:

- Irreparable harm;
- Inadequacy of legal remedies (money damages);
- Balance of hardships;

³ The Court of Appeals for the Federal Circuit has cited *Winter v. NRDC* in appeals in at least two patent cases involving requests for preliminary injunctions. See, *AstraZeneca LP v. Apotex, Inc.*, 633 F.3d 1042 (Fed. Cir. 2010) (affirming grant of preliminary injunction, citing *Winter* but not *eBay*); *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372 (Fed. Cir. 2009) (affirming denial of preliminary injunction, citing both *Winter* and *eBay*). In addition, district courts have cited *Winter v. NRDC* in granting or denying preliminary injunctions in at least seventeen patent cases since 2008.

- Public interest favoring / disfavoring injunction.

cf. 35 USC § 283

The court rejected the notion that a patent holder was entitled to a presumption of irreparable harm. Some courts have applied *eBay* to trademark and copyright cases, but others have not.⁴ The caselaw continues to evolve throughout the U.S. Courts. Importantly, however, *eBay*'s central point was that patent cases should be subject to the same general legal principles as any other cases and, thus, *eBay* turned on the plaintiff's showing—or lack thereof—in that particular case. *eBay* involved a non-practicing entity seeking a permanent injunction and thus it was unlikely that the NPE could demonstrate an injury other than money damages. In U.S. trademark cases, this could be less of an issue. Under U.S. law, a trademark holder essentially has no rights to assert unless that trademark is actually being used in the marketplace. Thus, unlike the NPE (which, by definition is not practicing a patent) a trademark owner facing a confusing similar use in the market, has a much easier burden to establish.

Because the only relief available at the ITC under Section 337 is injunctive relief, the Complainant must prove that a violation of Section 337 has occurred in order to obtain any form of permanent relief. The elements of a Section 337 violation include (1) an unfair act, *e.g.*, patent infringement; (2) the importation of infringing articles into the United States; and (3) that the complainant has or is in the process of establishing a "domestic industry."

Assuming the elements of a Section 337 violation are met, the Complainant may obtain a General Exclusion Order ("GEO") or Limited Exclusion Order ("LEO") in order to prevent the infringing imports from entering the United States. In addition, Complainant may also obtain a Cease and Desist Order ("CDO") in order to prevent imports that have already been imported into the United States from being further distributed.

In addition, if the Complainant seeks to impose a GEO, which bars entry of all infringing goods regardless of whether the importer was a named respondent in the investigation, the Complainant must prove: (1) that such an order is necessary to prevent

⁴ In some U.S. appellate courts, prior to *eBay* a plaintiff merely had to (1) succeed on the merits, (2) show an absence of an adequate remedy at law; and (3) establish irreparable harm if the relief is not granted. *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). Yet, other appellate courts already applied a similar *eBay* type of test. For example, in the Third Circuit, in deciding whether to grant a permanent injunction, a court must consider four factors: (1) whether the moving party has shown actual success on the merits; (2) whether the moving party will be irreparably injured by the denial of injunctive relief; (3) whether the granting of the injunction will result in even greater harm to the defendant; and (4) whether the injunction would be in the public interest." *Gucci America, Inc. v. Daffy's Inc.*, 354 F.3d 228, 236 (3d Cir. 2003).

circumvention of a limited exclusion order, or (2) there is a pattern of violation of Section 337 and its difficult to identify the source of the infringing goods.

If the Complainant is unable to prove the higher standard of a GEO, but nevertheless has proved that a Section 337 violation has occurred, the ITC will order relief in the form of a LEO. A LEO prevents importation of products into the United States by the named Respondents.

In lieu of or in addition to a GEO or LEO, the ITC may determine to also apply a CDO. A CDO is directed to named respondents in order to prevent the sale, distribution, or other use of the infringing product. In order to obtain a CDO the Complainant must demonstrated that a Respondent has “commercially significant” inventories of infringing goods in the United States.

5. *If not addressed in answering questions 3 and 4, does the criteria for the grant of an injunction differ depending on whether the injunction sought is on a provisional/preliminary or permanent basis? If so, how?*

The U.S. Supreme Court has stated, “The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success,” *Amoco Production Co. v. Village of Gambell, A.K.*, 480 U.S. 531, 546, n. 12 (1987), *cited with approval in Winter, id.* at 381.

Some U.S. courts, to date, have not uniformly applied *eBay* and its progeny to preliminary injunctions, restricting *eBay* to permanent injunctive relief. Recognize, however, that decisions from U.S. trial courts, while they may be considered persuasive, are not binding on other trial courts. Only appellate courts may establish binding precedent and such precedent is limited to the courts within its geographic territory.

It is also important to remember that under Rule 65 of the Federal Rules of Civil Procedure, a Court must require a plaintiff to post “security” (usually in the form of a bond) in granting a temporary injunction. The individual judge will have discretion as to the amount of the bond.(or Section 337, this has been discussed in questions 3 and 4 above.)

6. *Are the criteria for the grant of an injunction equally applicable to infringement of all IPRs?*

Yes, with the understanding, however, that it may be easier for owners of some kinds of IPRs to establish likelihood of irreparable injury (as to preliminary injunctions) or actual irreparable injury (as to permanent injunctions) than for other kinds of IPRs. For example, it may be easier for a trade secret owner to show likelihood of irreparable injury

in the absence of a preliminary injunction against disclosure of the trade secret than for an NPE owner of a patent to show irreparable injury absent a preliminary injunction against continued practice of the patented invention.

7. *If no to 6, are there any specific criteria or considerations for the grant of an injunction for particular IPRs? If so, what criteria apply and to which IPRs?*

8. *Are there any specific criteria or considerations for particular subject matter, for example, pharmaceutical patents? If so, what criteria or considerations apply to what subject matter?*

Not because of technical subject matter, but because of the public interest criteria. See *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401, 420 (ND Ohio 2007). There have been a handful of cases where the public interest has superceded the patent owner's otherwise right to an injunction (e.g. such as in most direct competitor situations). The Vitamin D case is a well-known example, where public health concerns and the needs of the public, superceded an otherwise appropriate permanent injunction grant; the injunction was refused but a running royalty (effectively, a compulsory (license)), was granted. *cf. Novozymes A / S v. Genencor Int'l. Inc.*, 474 F. Supp. 2d 592, 613 (D. Del. 2007).

9. *Are there any specific considerations relevant to particular IP holders, for example, NPEs? If so, what considerations are relevant and to what IPR holders?*

A number of district and appellate court decisions have cited and discussed *eBay* and/or *Winter v. NRDC* in refusing requests for both preliminary and permanent injunctions on the ground that the plaintiff's status as an NPE undermined any claim that it would suffer irreparable injury if injunctive relief were not entered.⁵ However, there is no per se rule that NPE status means that an injunction must be refused.

For the most part, permanent injunctions are granted where the patent owner and the defendant are direct competitors, through application of the four (4) *eBay* criteria. See, e.g., *Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1303 (Fed. Cir. 2007); (*cf.*) *Fresenius Med. Care Holdings Inc. v. Baxter Int'l. Inc.*, 2008 WL 928496 at 3 (N.D. Cal. 2008); see also *Patent Injunctions After eBay*, IP Law 360, 7/28/08;

⁵ See, e.g., *Acoustic Processing Technology, Inc. v. KDH Electronic Systems, Inc.*, 697 F.Supp.2d 146 (D. Me. 2010) (plaintiff failed to establish likelihood of irreparable injury and was not entitled to a preliminary injunction where it had licensed, but not practiced, the patented technology itself and where plaintiff's stated willingness to enter into licensing agreements with defendant indicated that its potential injury would be compensable by money damages);

http://ip.law360.com/print_article/63878. Prior to *eBay*, the win rate on contested motions for permanent injunctions in patent cases was about 80%; since *eBay*, the new rate is roughly 70%. See, e.g., Streur, *The eBay Effect: Tougher Standards but Courts Return to the Prior Practice of Granting Injunctions for Patent Infringement*, 8 Nw. J. Tech & Intell. Prop. 67 (Fall 2009); Lim et al., *Injunctions Enjoined: Remedies Restructured*, 25 Santa Clara Computer and High Tech L.J., 787, 798-803 (2009); Grumbles et al., *The Three Year Anniversary of eBay v. Merc Exchange: A Statistical Analysis of Permanent Injunctions*, Intellectual Property Today, November 2009, p. 25; Stiefel, *Two Years Since eBay: The Impact on Permanent Injunctive Relief in Patent Cases*, 76 PTCJ 62, May 2008; Ellis et al., *The Economic Implications (and Uncertainties) of Obtaining Permanent Injunctive Relief After eBay v. Merc Exchange*, 17 Fed Cir B.J. 437, 441-59 (2008) (extensive discussion of competition between patent owner and infringer as affecting availability of permanent injunctive relief); Manzo, *Injunctions in Patent Cases Alter eBay*, 7 J. Marshall Rev. Intell. Prop. L. 44 (Fall 2007).

Direct competition is not always an effective prerequisite, however, especially in university or research group licensing situations: see *CSIRO v. Buffalo Technology, Inc.*, 492 F. Supp. 2d 600, 604 (E.D. Tex. 2007); *Post -eBay: Injunction Practice in Patent Litigation*, IP Law 360, 8/21/07; <http://ip.law360.com/Secure/printview.aspx?id=32960>.

If the patented technology is used as only a small component of the infringing technology, a permanent injunction may not result. See *Z4 Technologies Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 440 (E.D. Tex. 2006).

One specific consideration for IP holders at the ITC is that the IP holder must satisfy the Domestic Industry Requirement in order to obtain relief. The Domestic Industry Requirement has both an “economic prong” and a “technical prong.” The economic prong is satisfied by proving that the Complainant has in the United States, with respect to the products protected by the intellectual property right being asserted, significant investment in plant and equipment; significant employment of labor or capital; or substantial investment in the IP’s exploitation, including engineering, research and development, or licensing. The technical prong is satisfied by proving that the Complainant is practicing the asserted intellectual property right in one its products or that its licensee is practicing the IP.

Discretion:

10. *Is there any element of judicial discretion in relation to the grant of an injunction for infringement of IPRs? If so, how does the discretion apply?*

See discussion and citation from *Winter* in Section 3. This discretion is true for both preliminary and permanent injunctions.

In Section 337 cases at the ITC, the Administrative Law Judge (“ALJ”) first makes a recommended determination on the appropriate remedy, for example a GEO, LEO, and/or CDO. The remedy, however, is ultimately applied by the Commissioners at the ITC, who are political appointees. Furthermore, Section 337 mandates that the ITC must take into account the “public interest” when determining whether and what type of remedy is appropriate at the ITC. Therefore, there is a fair amount of discretion by the Commissioners at the ITC as to whether and what type of remedy is appropriate in a particular Section 337 case. This discretion can hinge on considerations of the public interest or even on purely political considerations by the Commissioners.

In addition, Section 337 also mandates that the President of the United States review all exclusion orders that the ITC issues. By Executive Order (July 21, 2005), this authority has been delegated to the United States Trade Representative (“USTR”). Therefore, there is also a fair amount of political discretion that is accorded to USTR when determining whether and the type of exclusion order that should be applied even if there is a violation of Section 337.

11. *Are there any circumstances in which a court must grant an injunction for infringement of an IPR? If so, in what circumstances?*

Not in district courts., Because money damages are not an available remedy at the ITC under Section 337, the only remedy available is an injunctive remedy. If a violation of Section 337 is found by the ITC, the ITC will almost always grant some form of injunctive remedy, subject to the discretion of the Commissioners and USTR noted in Question 10 above.

12. *Are there any circumstances where infringement of an IPR is proved and no permanent injunction is available? If so, in what circumstances?*

A plaintiff is always entitled to seek a preliminary injunction, but trial courts are not required to provide such relief, whether through application of the *eBay* standards or other factors considered by the court. Commissioners at the ITC and USTR have the discretion to not impose an exclusion order, even if a Section 337 violation is found; however, this is rare. The circumstances surrounding those few occasions where the Commissioners at the ITC or USTR have not imposed an exclusion order even though a violation of Section 337 was found vary, but generally relate to protecting the public interest or protecting politically sensitive industries.

Scope:

13. *Is an injunction granted only against named parties to the infringement proceeding, or is an injunction available more broadly against potential infringers such as customers or manufacturers who are not parties to the proceeding?*

In usual US (permanent) injunction practice in patent cases, the actual order is drafted and entered to include named parties, related corporate entities, related individuals, and those who act in concert with the named parties or the related entities / individuals, within its effect.

In Section 337 cases, injunctive relief is available in two forms, an LEO and a GEO. An LEO is limited to parties who are Respondents but a GEO may bar all infringing goods regardless of whether the importer is named as Respondents to the investigation. A GEO is available if the Complainant proves the additional elements of the remedy including (1) that such an order is necessary to prevent circumvention of a limited exclusion order, or (2) there is a pattern of violation of Section 337 and its difficult to identify the source of the infringing goods. A GEO extends to infringers who are not named as Respondents to the investigation including unnamed manufacturers, distributors, and customers. See answer to question no. 4 above for more information.

14. *Is there a specific form of words used by your courts to describe the scope of the grant of an injunction? If so, what is the 'formula'?*

A typical form of permanent injunction in a patent case will state:

Each Defendant, its officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them who receive actual notice hereof, are hereby restrained and enjoined, pursuant to 35 U.S.C. § 283 and Fed. R. Civ. P. 65(d), from making, using, offering to sell or selling in the United States, the Infringing Products, either alone or in combination with any other product and all other products that are only colorably different therefrom in the context of the Infringed Claims, whether individually or in combination with other products or as a part of another product, and from otherwise infringing or inducing others to infringe the Infringed Claims of the '___ patent.

Similar forms are employed in trademark and copyright infringement cases.

In Section 337 cases, there is not a specific form of words used by the ITC to grant an exclusion order (whether it be a GEO, LEO, or CDO), but these orders are often fashioned in a similar manner based on previous orders.

15. *Is the grant of an injunction referable to the item(s) alleged to infringe the relevant IPR, or may the grant of an injunction be broader in scope? If it may be broader, what is the permissible scope of the injunction?*

In usual US (permanent) injunction practice in patent cases, the form of permanent injunction(s) will relate to the claims found to be infringed, the products / processes found to be infringing those claims, and combinations of those products with other products, and “all other products that are only colorably different [from the infringing products] in the context of the infringed claims,” although U.S. judges have broad discretionary powers to provide a broader order.

An exclusion order at the ITC may include the specific infringing goods which were before the ITC in the action as well as downstream products containing the infringing goods. It may also include all infringing goods not specifically involved in the action where those goods were not available to be in the action. With respect to downstream products containing the infringing good, only named Respondents’ goods will be included in an exclusion order, unless the Complainant has proved the additional elements of a GEO.

Judicial trends and practice:

16. *Is there any discernible trend in your country as to the willingness or otherwise of courts to grant or refuse injunctions for particular IPRs or in relation to particular subject matter?*

Regarding permanent injunctions, there are no discernible trends towards refusing permanent injunctive relief, either for particular IPRs or in relation to particular subject matter.

There is not necessarily a discernable trend in granting, or refusing to grant injunctions related to claims of trademark and/or copyright infringement.

In Section 337 cases, there is not necessarily a discernable trend in granting, or refusing to grant exclusion orders on particular products. Due to the public interest test (See Question No. 10 above), however, the Commissioners and USTR are more likely to refuse to enter an exclusion order on politically sensitive industries, or on industries where the government relies on the goods for safety and/or defence of the country.

17. *What, if any, has been the impact of the eBay v Merc-Exchange decision or any tendency of the courts in your jurisdiction to treat final injunctions as discretionary? Please explain whether the eBay v Merc-Exchange decision has been relied on or cited by your courts, and in what circumstances. Alternatively, or in addition, has there been*

any legal commentary on any potential implications of the eBay v Merc-Exchange decision in your jurisdiction?

See materials cited and comments *supra*.

Where permanent injunctive relief has been denied, the adjudged - infringer has been subjected to a post-adjudication royalty, akin to a reasonable (running) royalty determined under 35 USC § 284 but adjusted for the realities that the infringement is now *de jure* willful in nature. See, for the analysis and determination of such a post-verdict royalty, *Affinity Labs of Texas, LLC v. BMW North America LLC*, Civil Action No. 9:08 cv 164 (E.D. Tex) [Clark, J], *Memorandum Opinion and Order Re: Damages for Post Judgment Sales of Infringing Products*, (March 28, 2011); see also Ullmer, "Paice Yourself: A Basic Framework For Ongoing Royalty Determinations in Patent Law", 24 Berkeley Technology L.J. 75 (2009); Stover, "When Courts Deny Injunctive Relief Post-eBay : Winning the Injunction Battle but Losing the Ongoing Royalty War," 79 PTCJ 18 (11/6/2009); Herrington, "Assessing Damages when An Injunction Is Denied", IP Law 360 (4/1/08); <http://IP.law360.com/Secure/printview.aspx?id=51491>

In Section 337 cases, there has not been a shift in treating exclusion orders as discretionary, because exclusion orders are the only form of remedy at the ITC. *eBay v. Merc-Exchange* has, however, had the effect of increasing the number of cases filed at the ITC. Those looking to enforce their IP rights with an injunctive remedy are now looking to the ITC first because the cases proceed with speed (concluding in 12-18 months) and because the only remedy is an injunctive remedy in the form of a exclusion order.

II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to injunctions for infringement of IPRs. More specifically, the Groups are invited to answer the following questions:

Availability of provisional/preliminary injunctions:

18. *Should there be a test or criteria for the grant of a provisional/preliminary injunction for the infringement of an IPR? If yes, what should that test or those criteria be?*

Yes, the standard articulated in Sections 2 and 3 above.

19. *If no, what principles should be considered in determining whether to grant an provisional/preliminary injunction?*

N/A

Availability of permanent injunctions:

20. *Should there be a test for the grant of a permanent injunction for the infringement of an IPR? If yes, what should that test be?*

Yes, the standards articulated above.

21. *If no, what principles should be considered in determining whether to grant a permanent injunction?*

N/A

Discretion:

22. *In what circumstances, if any, should the grant of an injunction automatically follow a finding of infringement of an IPR?*

None

23. *In what circumstances, if any, should the grant of an injunction be denied notwithstanding a finding of infringement of an IPR?*

There are no circumstances in which the grant of an injunction should *automatically* be denied notwithstanding a finding of IPR infringement. If, however, an IPR owner fails to satisfy the standards articulated above no injunction should be granted.

Differences between IPRs:

24. *Should the above test/principles apply equally to all IPRs?*

Yes

25. *If no, what should any differences be and why?*

N/A

Scope:

26. *Should an injunction be granted only against named parties to infringement proceeding, or should an injunction be available more broadly against potential infringers such as customers or manufacturers who are not parties to the proceeding?*

No, but to no extent greater than the usual US permanent injunctive relief language set out *supra*, in response to Question 14.

27. *What is the appropriate scope of an injunction prohibiting an infringer from committing further infringing acts? For example, should the injunction relate simply to the IP the subject of the allegation of infringement, or should the injunction be broader in scope? If broader, what is the permissible or desirable scope?*

It should track the language of usual permanent injunctive relief set out *supra* in response to Question 14.

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Note: It will be helpful and appreciated if the Groups follow the order of the questions in their Reports and use the questions and numbers for each answer. If possible type your answers in a different colour. Thank you for your assistance.