

# Industrial Property

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## VACANCY FOR THREE POSTS IN BIRPI

### 1. Clerk in the Trademark Registration Service

*Job description:* indexing, classifying and distribution of official documents relating to trademarks.

*Qualifications required:* secondary education or commercial or administrative experience; perfect knowledge of French.

*Conditions of employment:* initial basic salary: 11,785 (G. 2) or 12,660 (G. 3) Swiss francs per year, according to experience and qualifications.

### 2. Library Assistant

*Job description:* registration, cataloguing and other usual tasks of a library assistant.

*Qualifications required:* librarian's diploma or equivalent; several years experience; perfect knowledge of French and a good knowledge of English or vice versa; a knowledge of German and Slav languages sufficient for a librarian's duties desirable.

*Conditions of employment:* initial basic salary: 15,030 (G. 5) or 16,475 (G. 6) Swiss francs per year, according to experience and qualifications.

### 3. Translator, Editorial Assistant (English)

*Job description:* translation of legal texts from French into English; correction of English texts from the point of view of language (editing); correction of printers' proofs; contacts with printers.

*Qualifications required:* English mother tongue; knowledge of legal technical terms in French and English; experience in translation.

*Conditions of employment:* initial basic salary: 26,482 (P. 2) or 32,227 (P. 3) Swiss francs per year, according to experience and qualifications.

Candidates should apply in writing to BIRPI, 32, chemin des Colombettes, Geneva, before March 31, 1964, for an application form, specifying for which of the three posts they are a candidate.

# INTERNATIONAL UNION

## GABON

### Declaration of Membership

of the International Union of Paris for the Protection of Industrial Property and of Adhesion to the Lisbon Text of the Convention

According to a communication received from the Federal Political Department, the following note was addressed by the Embassies of the Swiss Confederation in the countries of the Paris Union to the Ministries of Foreign Affairs of those countries:

*(Translation)*

"In compliance with the instructions of the Swiss Federal Political Department dated January 29, 1964, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the President of the Gabonese Republic, by letter of November 16, 1963, a copy of which is enclosed herewith<sup>1)</sup>, has confirmed to the Swiss Government the member-

<sup>1)</sup> Omitted. (Ed.)

ship of his Country to the International Union of Paris for the Protection of Industrial Property by virtue of a declaration of application previously made in accordance with Article 16<sup>bis</sup> of the International Convention for the Protection of Industrial Property.

According to the above-mentioned letter the Government of the Gabonese Republic declares its adhesion to the Convention of Paris, as revised at Lisbon on October 31, 1958. In application of Article 16 (3) of the said Convention, the adhesion of the Gabonese Republic will take effect on February 29, 1964.

With regard to its contribution to the common expenses of the International Bureau of the Union, this State is placed in the Sixth Class, for the purposes of Article 13 (8) and (9) of the Convention of Paris as revised at Lisbon."

\* \* \*

This adhesion will bring the membership of the Union to 62 with effect from February 29, 1964.

## RUMANIA

### Adhesion<sup>1)</sup>

to the Convention of Paris for the Protection of Industrial Property (Text of The Hague)

According to a communication received from the Federal Political Department, the following note was addressed by the Embassies of the Swiss Confederation in the countries of the Paris Union to the Ministries of Foreign Affairs of those countries:

*(Translation)*

"The Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Diplomatic Mission in Berne of the People's Republic of Rumania has notified the Political Department by letter of November 22, 1963, a copy of which is enclosed herewith<sup>2)</sup>, that the adhesion of its country to the Convention of Paris for the Protection of Industrial Property, a declaration which was the subject of a communication of September 30, 1963, also extends to the text as revised at The Hague on November 6, 1925."

## The Former Federation of Rhodesia and Nyasaland

We have received from the Registrar of Patents of Southern Rhodesia a copy of the following circular of the Patent Institute of Rhodesia and Nyasaland.

"Dear Sirs,

### *Dissolution of the Federation of Rhodesia and Nyasaland*

We wish to advise that upon the dissolution of the Federation on the 31<sup>st</sup> December, 1963, the Patent Office, situate

<sup>1)</sup> See *Industrial Property*, 1963, p. 215.

<sup>2)</sup> Annex omitted. (Ed.)

in Salisbury, will be taken over and operated by the Southern Rhodesian Government with effect from the 2<sup>nd</sup> January, 1964. All Federal records will be retained in that Office.

The Order in Council made under the Rhodesia & Nyasaland Act, 1963, of the United Kingdom, provides that all Federal rights existing up to 31<sup>st</sup> December, 1963, shall be of full force and effect in Southern Rhodesia, Northern Rhodesia, and Nyasaland, unless the respective legislatures of those territories provide otherwise.

The Southern Rhodesia Legislature has made the Patents (modification and adaptation) Regulations 1963 G. N. 793/1963, the Trade Marks (modification and adaptation) Regulations 1963 G. N. 806/1963, and the Registered Designs (modification and adaptation) Regulations 1963 G. N. 802/1963, which were published in the Southern Rhodesian Gazette of the 27<sup>th</sup> December, 1963. These Regulations apply the Federal Patents, Trade Marks, and Registered Designs Acts to Southern Rhodesia with the necessary adjustments, and they will henceforth be administered by the Southern Rhodesian Government through the Salisbury Patent Office.

The Southern Rhodesia Government has notified through diplomatic channels its adherence to the Paris Convention, and has forwarded a declaration of continuity with the notification<sup>1)</sup>. This procedure should ensure the preservation of all existing Convention rights until Southern Rhodesia's accession to the Convention is finalised.

The Government of Northern Rhodesia has requested the Southern Rhodesia Government to permit it to make use of the services of the Salisbury Registry on an Agency basis for a period and on terms to be negotiated. It is understood that the Northern Rhodesia Government is taking similar steps as Southern Rhodesia to adhere to the Paris Convention, and to make similar Regulations under the Order in Council modifying and adapting the three Federal industrial property Acts.

With effect from 2<sup>nd</sup> January, 1964, therefore, the Salisbury Patent Office will operate in respect of Southern Rhodesia, and on an Agency basis for Northern Rhodesia, but separate applications and separate fees will be required in respect of each territory.

With regard to all pending matters up to and including the 31<sup>st</sup> of December, 1963, these will be processed and completed in terms of the respective Federal Acts.

It is understood that Nyasaland wishes 'to go it alone', and will set up its own Registry, but it is not known what steps are being or will be taken to this end. The Salisbury Office will have no jurisdiction whatsoever in respect of Nyasaland, and no application of any description in respect of that territory can be entertained.

Yours faithfully,  
Signed: F. B. d'ENIS  
Administrative Officer"

<sup>1)</sup> We understand from the Swiss Federal Political Department that this notification and declaration has not yet been received. (*Ed.*)

## LEGISLATION

### REPUBLIC OF SOUTH AFRICA

#### Act

To consolidate and amend the law relating to trade marks

(English text signed by the State President)

(Assented to 21<sup>st</sup> June, 1963)

(Third and last Part)

#### PART IX

#### Registered Users

48. — (1) (a) Subject to the provisions of this section, a person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions.

(b) The use of a trade mark by a registered user thereof in relation to goods with which he is connected in the course of trade and in respect of which for the time being the trade mark remains registered and he is registered as a registered user, being use such as to comply with any conditions or restrictions to which his registration is subject, is in this Act referred to as the "permitted use" thereof.

(2) The permitted use of a trade mark shall be deemed to be use by the proprietor thereof, and shall not be deemed to be use by a person other than the proprietor for the purposes of section 36 or for any other purpose for which such use is material under this Act or at common law.

(3) Subject to any agreement subsisting between the parties, a registered user of a trade mark shall be entitled to call upon the proprietor thereof to institute proceedings to prevent infringement thereof, and, if the proprietor refuses or neglects to do so within two months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the proprietor, making the proprietor a defendant, but a proprietor so added as a defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

(4) Where it is proposed that a person should be registered as a registered user of a trade mark, the proprietor and the proposed registered user shall apply in writing to the registrar in the prescribed manner and the application shall be accompanied by the prescribed fee and shall furnish him with a sworn declaration made by the proprietor, or by some person authorized to act on his behalf and approved by the registrar:

(a) giving particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control by the proprietor over the permitted use which their

<sup>1)</sup> See *Industrial Property*, 1963, p. 260; 1964, p. 15.

relationship will confer and whether it is a term of their relationship that the proposed registered user shall be the sole registered user or that there shall be any other restriction as to persons for whose registration as registered users application may be made;

- (b) stating the goods in respect of which registration is proposed;
- (c) stating any conditions or restrictions proposed with respect to the characteristics of the goods, to the mode or place of permitted use, or to any other matter; and
- (d) stating whether the permitted use is to be for a period or without limit of period, and, if for a period, the duration thereof,

and with such further documents, information or evidence as may be required under the regulations or by the registrar.

(5) When the requirements of sub-section (4) have been complied with, and if the registrar after considering the information furnished to him under that sub-section, is satisfied that in the circumstances the use of the trade mark in relation to the proposed goods or any of them by the proposed registered user, subject to any conditions or restrictions which the registrar thinks proper, would not be contrary to the public interest, the registrar may register the proposed registered user as a registered user in respect of the goods as to which he is so satisfied.

(6) The registrar shall refuse an application under the provisions of this section if it appears to him that the grant thereof would tend to facilitate trafficking in a trade mark.

(7) The registrar shall, if so required by an applicant, take steps to ensure that information furnished for the purposes of an application under the provisions of this section (other than matters entered in the register), is not disclosed to rivals in trade.

(8) Without prejudice to the provisions of section 33, the registration of a person as a registered user:

- (a) may be varied by the registrar as regards the goods in respect of which it has effect or any conditions or restrictions relating to it, on application in writing in the prescribed manner and on payment of the fee prescribed by the registered proprietor of the trade mark to which the registration relates;
- (b) may be cancelled by the registrar on application in writing in the prescribed manner and on payment of the fee prescribed by the registered proprietor or by such registered user or by any other registered user of the trade mark;
- (c) may be cancelled by the registrar on application in writing in the prescribed manner and on payment of the prescribed fee by any person on any of the following grounds, that is to say:
  - (i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause, or to be likely to cause, deception or confusion;
  - (ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for registration, or that the circum-

stances have materially changed since the date of the registration;

- (iii) that the registration ought not to have been effected, having regard to rights vested in the applicant by virtue of a contract in the performance of which he is interested;
- (d) may be cancelled where the trade mark in respect of which such person has been registered has been assigned and application has in terms of sub-section (1) of section 51 been made for registration of the assignment.

(9) Provision shall be made by regulation for the notification of the registration of a person as a registered user to any other registered user of the trade mark, and for the notification of an application under sub-section (8) to the registered proprietor and each registered user (not being the applicant) of the trade mark, and for giving to the applicant in such an application, and to all persons to whom such an application is notified and who intervene in the proceedings in accordance with such regulations, an opportunity of being heard.

(10) The registrar may at any time cancel the registration of a person as a registered user of a trade mark, in respect of any goods in respect of which the trade mark is no longer registered.

(11) Any decision of the registrar under the provisions of this section shall be subject to appeal to the court.

(12) Nothing in this section shall confer on a registered user of a trade mark any assignable or transmissible right to the use thereof.

## PART X

### Assignment

#### *Powers of, and restrictions on, assignment and transmission*

49. — (1) Notwithstanding any rule of law to the contrary, a registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible either in connection with or without the goodwill of the business concerned in the goods for which it has been registered.

(2) A registered trade mark shall be, and shall be deemed always to have been, assignable and transmissible in respect either of all the goods in respect of which it is registered, or was registered, as the case may be, or of some (but not all) of those goods.

(3) The provisions of sub-sections (1) and (2) shall have effect in the case of an unregistered trade mark used in relation to any goods as they have effect in the case of a registered trade mark registered in respect of any goods, if at the effective date of the assignment or transmission of the unregistered trade mark it is or was used in the same business in which a registered trade mark is or was used and if it is or was assigned or transmitted at the same date and to the same person as that registered trade mark is or was assigned or transmitted and in respect of goods all of which are goods in relation to which the unregistered trade mark is or was used in that business and in respect of which that registered trade mark is or was assigned or transmitted.

(4) Notwithstanding anything in sub-sections (1), (2) and (3) contained, a trade mark shall not be, or be deemed to have been, assignable or transmissible in a case in which as a result of an assignment or transmission there would in the circumstances subsist, or have subsisted, whether under the common law or by registration, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in the exercise of those rights would be, or have been, likely to deceive or cause confusion: Provided that where a trade mark is, or has been, assigned or transmitted in such a case as aforesaid, the assignment or transmission shall not be deemed to be, or to have been, invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, or were, having regard to the limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within the Republic (otherwise than for export therefrom) or in relation to goods to be exported to the same market outside the Republic.

(5) The proprietor of a registered trade mark who intends to assign it in respect of any goods in respect of which it is registered may submit to the registrar in the prescribed manner a statement of case setting out the circumstances, and the registrar may on payment of the fee prescribed issue to him a certificate stating whether, having regard to the similarity of the goods and of the trade marks referred to in the statement of case, the proposed assignment of the first-mentioned trade mark would or would not be invalid under sub-section (4), and a certificate so issued shall, subject to the provisions of this section as to appeal and unless it is shown that the certificate was obtained by fraud or misrepresentation, be conclusive as to the validity or invalidity under the said sub-section of the assignment in so far as such validity or invalidity depends upon the facts set out in the statement of case, but, as regards a certificate in favour of validity, only if application for registration of the title of the person becoming entitled is made under section 51 within six months from the date on which the certificate is issued.

(6) Notwithstanding anything in sub-sections (1), (2) and (3) contained, a trade mark shall not be assignable or transmissible in a case in which as a result of an assignment or transmission thereof would in the circumstances subsist, whether under the common law or by registration, an exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in in a place or places in the Republic, and an exclusive right in another of those persons to the use of a trade mark nearly resembling the first-mentioned trade mark or of an identical trade mark, in relation to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in another place or other places in the Republic. Provided that on application in the prescribed manner by the proprietor of a trade mark who intends to assign it, or of a person who claims that a trade

mark has been transmitted to him or to a predecessor in title of his after the commencement of this Act, the registrar, if he is satisfied that in all the circumstances the use of the trade marks in exercise of the said rights would not be contrary to the public interest, may, on payment of the fee prescribed, approve the assignment or transmission, and an assignment or transmission so approved shall not be deemed to be, or to have been, invalid under this sub-section or under sub-section (4) of this section, provided that in the case of a registered trade mark application under section 51 for the registration of the title of the person becoming entitled is made within six months from the date on which the approval is given or, in the case of a transmission, was made before that date.

(7) Notwithstanding anything contained in sub-sections (1) and (2) and subject to the provisions of sub-sections (4) and (6), where a trade mark which is the subject of a pending application for registration, has subsequent to the date of the application been assigned or transmitted, the registrar may, on application in the prescribed manner, and subject to such conditions as he may deem necessary, allow, on payment of the fee prescribed, the person or persons entitled to such trade mark by reason of such assignment or transmission, to be substituted as applicant or applicants for registration of the trade mark.

(8) Any decision of the registrar under this section shall be subject to appeal to the court.

#### *Power of registered proprietor to assign and give receipts*

50. — Subject to the provisions of this Act, the person for the time being entered in the register as proprietor of a trade mark shall, subject to any rights appearing from the register to be vested in any other person, have power to assign the trade mark and to give effectual receipts for any consideration for an assignment thereof.

#### *Registration of assignments and transmissions*

51. — (1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall make application on the form prescribed to the registrar to register his title, and the registrar shall on receipt of the application together with the fee prescribed and of proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect and shall cause particulars of the assignment or transmission to be entered in the register.

(2) Every application to register an assignment or transmission in terms of sub-section (1) shall recite the effective date of such assignment or transmission and if application is made more than twelve months after such date, the applicant shall be liable to pay such penalty as may be prescribed.

(3) Any decision of the registrar under this section shall be subject to appeal to the court.

(4) Except for the purposes of an appeal under this section or of an application under section 33, a document or instrument in respect of which no entry has been made in the reg-

ister in accordance with the provisions of sub-section (1) of this section, shall not be admitted in evidence in any court in proof of the title to a trade mark unless the court otherwise directs.

#### PART XI

##### Certification Marks

52. — (1) Where any Government or provincial authority, or any association or person undertakes the examination of any goods in respect of origin, material, mode or conditions of manufacture, quality, accuracy, or other characteristic, and certifies the result of such examination by a mark used upon or in connection with such goods, the Minister may, if he judges it to be to the public advantage, permit the authority, association or person to register the mark as a trade mark in respect of such goods, whether the authority, association or person is or is not a trader, or is or is not possessed of goodwill in connection with such examination and certifying.

(2) When registered, the certification mark shall be deemed in all respects to be a registered trade mark and the authority, association or person to be the registered proprietor thereof, save that such a trade mark shall not be transmissible or assignable except with the permission of the Minister.

(3) This section shall as to conditions of manufacture apply to Government and provincial authorities only.

#### PART XII

##### Defensive Trade Marks

###### *Defensive registration of well-known trade marks*

53. — (1) Where the registrar is of opinion that, by reason of the extent of use or of any other circumstances, a trade mark registered in part A of the register would, if used in relation to goods other than the goods in respect of which it is registered, be likely to be taken as indicating a connection in the course of trade between the first-mentioned goods and the proprietor of the registered trade mark, then, notwithstanding that the proprietor does not use or propose to use the trade mark in relation to the first-mentioned goods and notwithstanding anything in section 36 contained, the trade mark may, on application by the proprietor in the prescribed manner, and on payment of the fee prescribed, be registered in his name in respect of the first-mentioned goods as a defensive trade mark, and such a trade mark, while so registered, shall not be liable to be taken off the register under section 36 in respect of those goods.

(2) The registered proprietor of a trade mark may apply in the prescribed manner for the registration thereof in respect of any goods as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods otherwise than as a defensive trade mark, or may apply for the registration thereof in respect of any goods otherwise than as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods as a defensive trade mark, in each case in lieu of the existing registration.

(3) A trade mark registered as a defensive trade mark and that trade mark as otherwise registered in the name of

the same proprietor shall, notwithstanding that the respective registrations are in respect of different goods, be deemed to be, and shall be registered as, associated trade marks.

(4) On application to the court or, at the option of the applicant and subject to the provisions of section 69, to the registrar by any person aggrieved, the registration of a trade mark as a defensive trade mark may be cancelled on the ground that the requirements of sub-section (1) of this section are no longer satisfied in respect of any goods in respect of which the trade mark is registered in the name of the same proprietor otherwise than as a defensive trade mark, or may be cancelled with regard to any goods in respect of which it is registered as a defensive trade mark on the ground that there is no longer any likelihood that the use of the trade mark in relation to those goods would be taken as indicating a connection such as is mentioned in sub-section (1) of this section.

(5) The registrar may at any time cancel the registration as a defensive trade mark of a trade mark of which there is no longer any registration in the name of the same proprietor otherwise than as a defensive trade mark.

(6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply *mutatis mutandis* in respect of the registration or cancellation of the registration of trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

#### PART XIII

##### Powers and Duties of Registrar

###### *Venue of proceedings*

54. — Any proceedings before the registrar under this Act shall be heard and determined by him at the trade marks office: Provided that if it be made to appear to him by any party that the proceedings may more conveniently or fitly be heard and determined in another place, he may hear and determine the proceedings in such other place.

###### *General powers of registrar*

55. — (1) The registrar may, for the purposes of this Act:

- (a) receive evidence and determine whether and to what extent it shall be given by affidavit or *viva voce* upon oath;
- (b) summon witnesses and issue commissions *de bene esse*;
- (c) order discovery or inspection, and require the due production of documents;
- (d) consider any interlocutory or other matters as may seem expedient;
- (e) award costs against any party to any proceedings before him,

and generally the registrar shall in connection with any proceedings before him have all such powers and jurisdiction as are possessed by a single judge in a civil action before a provincial division of the Supreme Court having jurisdiction at the place where the proceedings before the registrar are held.

(2) Where express provision is not contained in this Act on any matter of procedure, the registrar shall have recourse to the rules governing procedure in the Transvaal Provincial Division of the Supreme Court.

(3) Whenever by this Act any time is specified within which any act or thing is to be done, the registrar may, unless otherwise expressly provided, extend the time either before or after its expiration.

*Power of registrar to allow amendment of any document*

56. — (1) The registrar may at any time before registration of a trade mark permit the amendment of any document relating to any application or proceedings before him on such terms as to costs or otherwise as he thinks just.

(2) If rights in a trade mark which is the subject of a pending application, have been acquired by a body corporate subsequent to the date of application, the registrar may, on good cause shown, and on payment of the fee prescribed permit amendment of the application by the substitution of the name of the body corporate as applicant for registration notwithstanding that such body corporate was not in existence as at the date of the application.

*Duty of registrar in exercising discretionary power to give opportunity to applicant of being heard*

57. — Whenever any discretionary power is by this Act given to the registrar, he shall not exercise that power adversely to an applicant without giving that applicant an opportunity of being heard personally or by his agent.

*Taxation of costs awarded by the registrar*

58. — Any costs awarded by the registrar shall be taxed by a taxing officer of the provincial or local division of the Supreme Court having jurisdiction in the area wherein the award was made, and payment thereof may be enforced in the same manner as if they were costs allowed by a judge of that division.

PART XIV

Evidence

*Register to be prima facie evidence*

59. — Any register kept under this Act shall be *prima facie* evidence of any matters directed or authorized by this Act to be inserted in that register.

*Certificates of registrar to be prima facie evidence*

60. — (1) A certificate purporting to be under the hand of the registrar as to any entry, matter or thing which he is authorized by this Act to make or do, shall be *prima facie* evidence of the entry having been made and of the contents thereof and of the matter or thing having been done or left undone.

(2) Printed or written copies or extracts purporting to be copies of or extracts from any register or book or document relating to trade marks and kept in the trade marks office and certified by the registrar and sealed with the seal of that office, shall be admitted in evidence in all courts and

proceedings without further proof or production of the originals.

*Registration to be prima facie evidence of validity*

61. — In all legal proceedings relating to a registered trade mark (including applications under section 33 of this Act) the fact that a person is registered as proprietor of the trade mark shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

*Certification of validity*

62. — In any legal proceeding in which the validity of the registration of a registered trade mark is in issue and is decided in favour of the proprietor of the trade mark, the court may certify to that effect, and if it so certifies, then in any subsequent legal proceeding in which the validity of the registration of that trade mark is in issue, the proprietor of the trade mark, on obtaining a final order or judgment in his favour, shall have his full costs, charges and expenses as between attorney and client, unless in the subsequent proceeding the court certifies otherwise.

PART XV

Appeals to and Powers of the Court

*Appeal against decisions of the registrar to the court and powers of the court*

63. — (1) In addition to any right of appeal specifically conferred in respect of proceedings under this Act, any party to any proceedings before the registrar other than proceedings under section 28, may appeal to the court against any decision or order pursuant to such proceedings.

(2) Subject to the provisions of sub-section (5), an appeal shall lie to the division of the Supreme Court having jurisdiction to hear appeals in the area wherein the decision or order was given and thereafter to the appellate division of the Supreme Court.

(3) In addition to any other powers conferred upon it by this Act, the court may in relation to such appeal:

- (a) confirm, vary or reverse the order or decision appealed against, as justice may require;
- (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the registrar with instructions in regard to the taking of further evidence or the setting out of further information;
- (c) order the parties or either of them to produce at some convenient time in the court of appeal such further proof as shall to it seem necessary or desirable; or
- (d) take any other course which may lead to the just, speedy and as far as may be possible inexpensive settlement of the case; and
- (e) make such order as to costs as justice may require.

(4) (a) Every appeal to a provincial or local division of the Supreme Court shall be noted and prosecuted in the manner prescribed by law for appeals to the provincial division against a civil order or decision of a single judge



of such division, save that the period within which such appeal shall be noted shall be three months after the date of the order or decision and that the appeal shall be prosecuted within six weeks of the date upon which it was noted: Provided that the provincial or local division concerned may, on application and on good cause shown, allow such extension of time for noting or prosecuting the appeal as may be necessary.

(b) Every appeal to the appellate division of the Supreme Court shall be noted and prosecuted in the manner prescribed by law for appeals to such division in civil proceedings save that no special leave to appeal to such division shall be necessary.

(5) The parties to proceedings before the registrar shall be deemed to be parties to a civil proceeding for the purposes of sub-section (3) of section 20 of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the appellate division of the Supreme Court shall have jurisdiction to hear and determine an appeal against an order or decision of the registrar without any intermediate appeal having been first heard and determined by a provincial division of the said court, if the said parties lodge with the registrar notice in writing of their consent thereto on the form prescribed and pay the prescribed fee.

#### *Power to order production of certificate of registration*

64. — In addition to any other powers conferred upon it by this Act, the court may in relation to any application or appeal under this Act order any party to deliver to the court or to the registrar the certificate of registration of any trade mark.

#### *Notice to registrar of application to court*

65. — Before any application is made to the court for an order involving the performance of any act by the registrar or affecting any entry in the register, the applicant shall in the manner prescribed give the registrar at least fourteen days notice before the hearing of such application: Provided that the registrar may, in his discretion, waive such notice or accept such shorter notice as he may in the circumstances deem sufficient.

#### *Registrar's appearance in proceedings involving rectification of the register*

66. — (1) In any legal proceeding in which the relief sought includes alteration or rectification of the register, the registrar shall have the right to appear and be heard, and shall appear if so directed by the court.

(2) Unless otherwise directed by the court, the registrar, in lieu of appearing and being heard, may submit to the court a statement in writing signed by him, giving particulars of the proceedings before him in relation to the matter in issue or of the grounds of any decision given by him affecting such matter or of the practice of the trade marks office in like cases or of such other matters relevant to the issues and within his knowledge as registrar, as he thinks fit, and the statement shall be deemed to form part of the evidence in the proceedings.

#### *Court's power to review registrar's decision*

67. — The court, in dealing with any question of the rectification of the register (including all applications under the provisions of section 33), shall have power to review any decision of the registrar relating to the entry in question or the correction sought to be made.

#### *Discretion of court in appeals*

68. — In any appeal against a decision of the registrar to the court under this Act, the court shall have power to exercise the same discretionary powers as under this Act are conferred upon the registrar.

#### *Procedure in cases of option to apply to court or registrar*

69. — Where under any provision of this Act an applicant has an option to make an application either to the court or to the registrar:

- (a) if proceedings concerning the trade mark in question are pending before the court, the application must be made to the court;
- (b) if in any other case the application is made to the registrar, he may, at any stage of the proceedings, refer the application to the court, or he may, after hearing the parties, determine the question between them subject to an appeal to the court.

## PART XVI

### Offences

#### *Penalties for making false entries in registers, etc., for producing or tendering false entries*

70. — Any person who:

- (a) makes or causes to be made a false entry in any register kept under this Act; or
- (b) makes or causes to be made a writing falsely purporting to be a copy of an entry in any such register; or
- (c) produces or tenders or causes to be produced or tendered as evidence any such entry or copy thereof knowing the same to be false,

shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

#### *Penalty for making false statements for the purpose of deceiving or influencing registrar or other officer*

71. — Any person who:

- (a) for the purpose of deceiving the registrar or any officer in the execution of the provisions of this Act; or
- (b) for the purpose of procuring or influencing the doing or omission of anything in relation to this Act or any matter thereunder,

makes a false statement or representation knowing the same to be false, shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.

*Penalty for falsely representing a trade mark as registered*

72. — (1) Any person who makes a representation:

- (a) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark; or
- (b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is so registered; or
- (c) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not registered; or
- (d) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered in the register, the registration does not give that right,

shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand.

(2) For purposes of this section, the use in the Republic in relation to a trade mark of the word "registered" or of any abbreviation thereof or of any other word or letter which might reasonably be construed as referring to registration, shall be deemed to import a reference to registration in the register except:

- (a) where that word, abbreviation or letter is used in physical association with other words delineated in characters at least as large as those in which that word, abbreviation or letter is delineated and indicating that the reference is to registration as a trade mark under the law of a country outside the Republic being a country under the law of which the registration referred to is in fact in force;
- (b) where that word (being a word other than the word "registered"), abbreviation or letter is of itself such as to indicate that the reference is to such registration as is referred to in paragraph (a); or
- (c) where that word, abbreviation or letter is used in relation to a mark registered as a trade mark under the law of a country outside the Republic and in relation to goods to be exported to that country.

## PART XVII

*International Arrangements*

73. — (1) Any person who has made application for registration of a trade mark in a convention country or his legal representation or assignee, shall, in priority to other applicants, be entitled to registration of the trade mark under this Act and the registration shall have the same date as the date of the first application in the convention country: Provided that:

- (a) application is made within six months after the date on which the application was made in the convention country; and
- (b) nothing in this section contained shall entitle the proprietor of the trade mark to recover damages for infringements happening prior to the actual date on which the application was first advertised in the prescribed manner.

(2) Where applications have been made for the registration of a trade mark in two or more convention countries, the period of six months referred to in sub-section (1) shall be reckoned from the date on which the earlier or earliest of those applications was made.

(3) Where a person has applied for protection for a trade mark by an application which:

- (a) in accordance with the terms of a treaty subsisting between any two or more convention countries, is equivalent to an application duly made in any one of those convention countries; or
- (b) in accordance with the law of any convention country, is equivalent to an application duly made in that convention country,

he shall be deemed for the purposes of this section to have applied in that convention country.

(4) The registration of a trade mark shall not be invalidated by reason only of the use of the trade mark in the Republic during the period specified in this section as that within which application may be made.

(5) The application for the registration of a trade mark under this section must be made in the same manner as an ordinary application under this Act, except that proof of application in a convention country shall be established in the manner prescribed.

## PART XVIII

*Miscellaneous**Trade mark not to be deemed to be deceptive or confusing in certain cases*

74. — The use of a registered trade mark in relation to goods between which and the person using the trade mark a form of connection in the course of trade subsists, shall not be deemed to be likely to cause deception or confusion on the ground only that the trade mark has been, or is, used in relation to goods between which and that person or a predecessor in title of that person a different form of connection in the course of trade subsisted or subsists.

*Use of trade mark for export trade*

75. — (1) The application of a trade mark in the Republic to goods to be exported from the Republic and any other act done in the Republic in relation to goods to be so exported which, if done in relation to goods to be sold or otherwise traded in within the Republic, would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or at common law.

(2) Sub-section (1) shall be deemed to have had effect in relation to an act done before the date of the commencement of this Act as it has effect in relation to an act done after that date, but does not affect a determination of a court which has been made before that date or the determination of an appeal against a determination so made.

*Payment of prescribed fees to be made before acts done or documents issued*

76. — Whenever under this Act any prescribed fee is payable in respect of any application, registration, matter or document, the registrar may refuse to perform the act or to receive or to issue the document (as the case may be) until the fee payable in respect thereof is paid.

*Address for service*

77. — (1) Any address for service stated in any application or notice of opposition under this Act shall, for all purposes of the application or the notice of opposition, be deemed to be the address of the applicant or of the objector (as the case may be) and all documents in relation to the application or notice of opposition may be served by leaving them at or sending them to the address for service of the applicant or of the objector, as the case may be.

(2) Any address for service may be changed by notice to the registrar on the form prescribed.

(3) A post office box number shall not be deemed to be an address for service.

*Calculation of periods of time*

78. — Any period of time specified by this Act as running from the doing of any act shall be reckoned as commencing on the day next following the doing of that act.

*Persons under disability*

79. — If any person is, by reason of minority, lunacy, or other disability, incapable of making any declaration or doing any act required or permitted by this Act, then the guardian, curator or other legal representative (if any) of such person or if there be none, any person appointed by the court upon petition on behalf of the person under disability or on behalf of any other person interested in the making of such declaration or doing such act may make the declaration or a declaration as nearly corresponding thereto as circumstances permit, and do the act in the name and on behalf of the person under disability, and all acts done by such substitute shall, for the purposes of this Act, be as effectual as if done by the person for whom he is substituted.

*Fees, regulations, forms and classification of goods*

80. — (1) The State President may prescribe a tariff, not inconsistent with this Act, of the fees which shall be payable, to the registrar in respect of any application, registration, matter or document and the fees shall be payable as so prescribed.

(2) The State President may also make regulations, not inconsistent with this Act, as to all matters including forms and a schedule of classification of goods, which by this Act are required or permitted to be prescribed by regulation or which are necessary or convenient for giving effect to the provisions of this Act or for the conduct of any business relating to the trade marks office established by this Act.

(3) If either the Senate or the House of Assembly resolve within thirty days after any such tariff or regulation has been

laid on the Table thereof in accordance with law that any item of the tariff or that the regulation be disallowed, such item or regulation shall thereupon become of no effect, without prejudice to the validity of anything done in the meanwhile thereunder or to the power to make a new tariff or regulation.

*Transitional provisions*

81. — Subject to the provisions of section 3, the validity of any entry relating to a trade mark on the register of trade marks existing at the commencement of this Act or on any of the registers of trade marks kept under any provincial Trade Marks Act that were deemed to be part of the same record as the last-mentioned register, shall be determined in accordance with the laws in force at the date of such entry: Provided that any such trade mark registered prior to the first day of January, 1917, shall be deemed to have been validly registered.

*Repeal and amendment of laws*

82. — (1) Sections 96 to 140<sup>bis</sup>, inclusive, of the Designs, Trade Marks and Copyright Act, 1916 (Act No. 9 of 1916), and so much of the rest of that Act and of the Patents, Designs and Trade Marks Amendment Act, 1947 (Act No. 19 of 1947), as relates to trade marks are hereby repealed: Provided that any proclamation issued under any law hereby repealed and in force at the commencement of this Act shall continue in force until repealed by regulation made under this Act.

(2) The Designs, Trade Marks and Copyright Act, 1916, is hereby amended:

- (a) by the deletion in section 195 of the words "Trade Marks"; and
- (b) by the deletion in the long title of the words "Trade Marks".

*Short title and date of commencement*

83. — This Act shall be called the Trade Marks Act, 1963, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*.

## GENERAL STUDIES

### The Regulation of Restraint of Trade in the Industrial Property Laws of EFTA States

By Dr. Fredrik NEUMEYER, Stockholm  
(First Part)

Introduction. — A. Sweden. — B. Norway. — C. Denmark. — D. Great Britain. — E. Austria. — F. Switzerland.

#### Introduction

To the possibility of a clash between the commercial exploitation of industrial property rights and laws to safeguard the exercise of free competition against restraint of trade some industrial countries, especially the United States and Germany have paid early attention. Already sixty years ago the United States Supreme Court had for the first time given judgment in the patents field on whether a holding company exploiting patents and representing a group of six manufacturers of harrows was not, by imposing restrictive licence conditions for their patents to outsiders, acting contrary to the Sherman Act of 1890<sup>1</sup>). In Germany, H. Isay had already pointed out in 1923<sup>2</sup>) and 1927<sup>3</sup>) the economic role played by patents in the field of competition, which he described as being "the principal weapon used in the economic struggle"<sup>4</sup>). In 1926 the *Reichsgericht* had to consider for the first time what disposition an undertaking which had left a cartel organisation created to exploit patents in common (a patent pool) could legally make of the patents which it owned<sup>5</sup>).

Most national patent laws recognize the granting of compulsory licences for patents and have considered their effects on competition<sup>6</sup>).

Between the two world wars, trade marks as means of unreasonably restraining competition became for the first time the subject of court decisions based on the American Anti-trust Laws. The following were in particular deemed to be violations of law: price-fixing agreements, division of markets and restrictions on assortment, in all cases in conjunction with trade marks<sup>7</sup>). On several occasions restrictions on competition imposed by agreements on design patents<sup>8</sup>)

<sup>1</sup>) Case: *Bement and Sons v. National Harrow Co.*, 186 U.S. 70, 22 S.C. 747 (1902).

<sup>2</sup>) *Die Patentgemeinschaft im Dienste des Kartellgedankens* (Patent pools in the service of cartels).

<sup>3</sup>) *Die Funktion der Patente im Wirtschaftskampf* (The role of patents in the struggle for economic competition).

<sup>4</sup>) *Patentgesetz, Kommentar, 6. Auflage* (Commentary on Patent Law, 6th Edition), Berlin 1932, p. 24.

<sup>5</sup>) Judgment by the *Reichsgericht* of July 2, 1926, *RGZ*, 114, p. 213, published also in *GRUR*, 1931, p. 589; vide also judgment by the German Cartel Court (*Kartellgericht*) of December 21, 1929, *GRUR*, 1935, p. 431.

<sup>6</sup>) Vide F. Neumeyer, *Zwangslizenz für Patente, eine rechtsvergleichende Skizze* (Compulsory licence for patents, a study in comparative law), *GRUR Auslandsteil*, 1958, pp. 1 *et seq.*

<sup>7</sup>) Vide F. Neumeyer, *Antitrustgesetze und Warenzeichen* (Anti-trust laws and trade marks), Chapter 5, *Monopolkontrolle in USA* (Supervision of monopolies in the USA), Berlin, 1952, pp. 134 *et seq.*

<sup>8</sup>) Judgment of the U.S. Supreme Court in the case of *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 451, 668, 615 S.C. 703, 85 L. Ed. 949 (1941).

or on copyright (covering motion pictures)<sup>9</sup>) were the subject of court proceedings in America.

In several countries, such as Great Britain, France and Norway, and indirectly in Sweden, the law on cartels and monopolies emphasizes the protection the community should be given against the charging of excessive prices for products or services. In principle, agreements on industrial property rights which regulate the prices for patented products or which fix the licence fees payable for patents or trade marks come within the scope of the law<sup>10</sup>). On the other hand, according to section 20, sub-section 2, item 2 of the German law to combat restrictions on competition, conditions imposed by purchasers or licensees, in so far as they concern the fixing of the price, are specifically exempted from being invalid. Among the Scandinavian cartel laws, the Swedish act of 1953 "to combat certain cases of restrictions on competition", and the 1956 act on "the obligation to report conditions governing prices and competitive relations", and the Danish Monopoly Act of 1955 specifically provide that the assignment, for industrial or commercial purposes, of property rights of an immaterial nature comes within the scope of the cartel laws. This will apply when these rights exercise or may exercise an influence, within the country, on prices, on production conditions or on the sale or transport of products.

All the Scandinavian countries, together with Great Britain and Austria have, by setting up a public register of cartels, established the legal basis enabling them to be informed of any groupings or agreements in restraint of competition (sec. 8 of the Swedish Act, sec. 9 of the Danish Act and sec. 33 of the Norwegian Act). An analysis of the Scandinavian cartel registers shows that, since the introduction of the respective cartel laws and despite the explicit provisions of the Swedish and Danish Acts concerning the obligation, in principle, to register agreements on property rights of an immaterial nature, no patent agreement was registered in Denmark, only one patent licensing agreement was registered in Norway and only a few agreements of this kind were registered in Sweden (out of a total of some 2,000 agreements). It is characteristic that most patent agreements registered are substantially international in scope, in the sense that at least one of the contracting parties represents one or more foreign undertakings, the other party being a national of the country itself. Only Sweden and Denmark registered agreements on trade marks and these are few in number. Some "mixed" agreements, covering both patents and trade marks and regulating the use of these two industrial property rights, were registered in Sweden.

The following survey, made according to countries, shows that so far Norway has been the only country where disputes have arisen concerning the interpretation, from the point of view of cartel legislation, of some agreements on the exploitation of patents. In Denmark, there are the *collective or service trade marks* ("faellesmærken"), as instruments of the policy of complete branches of industry or commerce and

<sup>9</sup>) Judgment of the U.S. Supreme Court in the case of *Interstate Circuit Inc. v. U.S.*, 306 U.S. 208 (1939), 59 S.C. 467, 83 L. Ed. 610.

<sup>10</sup>) In Great Britain licences granted in respect of patents or trade marks are, in certain conditions, exempted from registration in the Cartel Register [Restrictive Trade Practices Act 1956 (Act of 1956 on restrictive trade practices), section 8 (4) and 8 (7)].

of collective price-fixing, which have come into conflict with the Cartels Act. In Sweden there are primarily the *trade marks*, as possible compulsory means to limit the range of sale of branded goods and to divide the market, which have attracted the attention of the authorities responsible for the supervision of monopolies.

## A. Sweden

### I. Earlier cartel legislation

In its earliest form Swedish cartel legislation goes back to 1925. In that year an act was passed to examine monopolistic undertakings and groupings. The act gave the authorities power to enquire into restrictions on competition from case to case only. In 1946 Parliament set up a permanent body to supervise restrictions on competition in the economy, irrespective of whether such restriction took the form of monopolies or cartels. A public register of cartels was introduced. Any person who in the course of trade sold goods or provided services to third parties was, under section 2 of the act, required to register any agreement which placed restrictions on competition. Registration was to be made on the request of the authority. The general obligation to register extended to any agreement restricting competition which affected conditions of prices and production, as well as sale or transport conditions within the country. In this connection the act carries an express obligation to register, in addition, agreements concluded by undertakings which transfer, in the course of business, property rights of an immaterial character, i. e. patents, trade marks, industrial designs or copyrights, or grant licences to exploit such property rights (sec. 2).

### II. Law in force

In May 1953 the Swedish Cartels Act was revised and supplemented. The obligation to register publicly agreements restricting competition was maintained. The new section 26 carries a specific obligation to register agreements on industrial property rights or copyright. It also specifies as undertakings subject to the revised act those which are professionally "granting rights of immaterial property"<sup>11</sup>). The 1946 act to supervise cartels and monopolies was revised in 1956 and the provisions on cartel registration embodied in section 8 of the present act entitled "Act concerning the obligation to disclose facts affecting conditions of prices and competition"<sup>12</sup>). Registration in the cartel register does not, *per se*, signify that the agreement is harmful. A summary of the agreements registered appears regularly in the form of a printed review. The public is free at all times to visit the competent authority and consult the original documents concerning the agreements registered.

The bodies responsible under existing Swedish law for supervising conditions of competition in the country are three in number. They are: the National Price and Cartel Office,

whose particular duty it is to keep the Cartel Register; the Office of the Commissioner for Freedom of Commerce and Industry, who performs the role of "public prosecutor" and may, independently, raise any questions and examine any cases of restrictions harmful to competition in the Swedish economy; lastly, the Freedom of commerce Board, whose role is similar to that of a judicial tribunal and is responsible for enquiring whether restrictions on competition have harmful effects, which, if need be, it will seek to settle amicably by means of negotiations between the parties concerned<sup>13</sup>).

The question whether an agreement which restricts competition, whether registered or not, may or may not have harmful effects may be submitted by any interested party to the Commissioner for Freedom of Commerce and Industry. The Commissioner may also act of his own accord. The decision rests with the Freedom of Commerce Board, which gives its opinion on cases submitted by the Commissioner.

### III. Effects on industrial property rights

The Official Committee work preparing the Swedish Cartels Act affords only a rather superficial indication of the attitude of the Swedish parliament to industrial property rights and their order in view of the law to combat the harmful effects of restrictions on competition. In this work the Committee of Experts on the right of settlement (*nyetableringssakkuniga*) wrote, in their official report given in 1951, that the intent of the proposed cartel act was not to restrict the rights conferred by patents. More particularly, the Committee said: "The inventor should have the opportunity, in agreement with the patent laws, himself to exploit the rights conferred by the patent, or to transfer them to a third party with exclusive right of ownership. If, however, the patent right is used as a pretext to impose other restrictions on competition, e. g. if the patent-holder imposes on the seller the price he must charge for the patented article, if he makes the availability of his patent conditional on the other party to the agreement taking appropriate steps to impose restrictions on competition when such steps have no direct connection with the rights conferred by the patent, the legality of any such steps may be examined in the light of the provisions of the draft Cartels Act." The Committee proposed that, should patents be used, on a larger scale than hitherto, as a means of imposing restrictions on competition, the question should later be reconsidered (by Parliament) and that, for example, an extension of the provisions on the granting of compulsory licences should be considered<sup>14</sup>). The Minister of Commerce approved this attitude of principle when, in 1953, he tabled his draft law. He underlined that patents constituted to some extent a special case. At the same time he gave a warning that, should patents be used, on a larger scale than hitherto, to impose restrictions on competition, it

<sup>11</sup> "Law to combat certain cases of restriction on competition" of May 21, 1953; a German translation appeared in *Wirtschaft und Wettbewerb (WuW)*, 1953, pp. 568 *et seq.*

<sup>12</sup> "Law on the compulsory disclosure of facts concerning price formation and conditions of competition" of June 1, 1956; published in *Svensk Författningsamling*, 1956, p. 245.

<sup>13</sup> For further details, vide Neumeyer, *Neuere schwedische Kartellpolitik* (Recent Swedish cartel policy), published in *WuW*, 1957, pp. 48 *et seq.*; by the same author, *Kartellpolitik in Schweden* (Cartel policy in Sweden), published in Jahn-Junckersdorff, *Internationales Handbuch der Kartellpolitik* (International Handbook of cartel policy), Berlin, 1958, pp. 421 *et seq.*

<sup>14</sup> *Statens Offentliga Utredningar* 1951 : 27, *Handelsdepartementet, Konkurrensbegränsning*, Part I, pp. 560 *et seq.*

might become necessary to adopt "special rules"<sup>15)</sup>. So far, the Government has not implemented this threat.

What actually has been the situation created by the general obligation to register restrictive agreements concerned with the exploitation or licensing of patents? Out of some 1900 agreements registered (up to the end of 1961), 906, or about 49%, were no longer in force by the end of 1960; 42 new agreements were registered in 1960. Registration of agreements directly concerned with the grant of licences for patents have been few in number. Some agreements, especially those for an international division of markets, including the Swedish market as part of the European market, contain special provisions and certain restrictions on the method and extent to which certain patents (or trade marks) may be used. An interesting example is the agreement for a licence registered for the first time in 1947 (under No. 344) entered into between the Dutch firm *Algemeene Kunstvezel MNV* and the Swedish concern *Billesholms Glasulls AB* in respect of the manufacture of fibre glass invented in the USA and patented in various countries. On the Swedish licensee severe restrictions of different kinds have been imposed, especially as regards the manufacture, finishing and sale of fibre glass textiles. Further, it had been stipulated that licence fees should be paid even after the expiring of the Swedish patents. Lastly, the licensee was forbidden to bring an action for nullity of the patents covered by the licence, or to import or export pure glass wool or machinery for its production. The agreement was modified by the parties in 1952, without however undergoing any substantial changes as to restrictions on competition<sup>16)</sup>.

In regard to some agreements registered, the official summary published refers to exclusive licences for the manufacture and sale of some new products, without expressly using the term "patent". It is almost certain, however, that these agreements relate to licensing of patents. Thus, in 1953 agreements were registered for division of markets and price-fixing entered into between the holder of a licence in respect of a patent for the manufacture of light building materials (*Ytong*) and several building concerns established in Sweden<sup>17)</sup>. The agreement stipulated that the parties should collaborate in price-fixing and in the sale of products. It included provisions fixing quotas and the division of markets. In 1954, despite protests by the Swedish licensee, the authority registered another licensing agreement providing for price-fixing in respect of the manufacture of patented raw materials used in medical products (*Sulfamedicine*) and the use of a particular trade mark; the agreement had been concluded between a Danish firm (holder of the patent) and its branch in Sweden on the one hand, and a Swedish pharmaceutical products factory (licensee) on the other<sup>18)</sup>.

A typical arrangement in Sweden, found frequently in agreements registered in the cartel register, relates to what has been called protection of the home market; the parties

(one of whom is nearly always a large foreign industrial undertaking) mutually undertake not to export the products concerned to the country of the other party and not to carry on any activity in this territory in the field covered by the agreement. The "activity" in question may obviously refer to both the manufacture and the sale of patented products or products manufactured according to a patented process. In many cases the parties agree at the same time to exchange their technical "know how" and any improvements they may have introduced. Such agreements were concluded, for instance, between large Swiss producers of synthetic resins (*Lonza S. A.* and *Ciba S. A.*) and a Swedish manufacturer of plastics (*Stockholms Superfosfat Fabriks AB*)<sup>19)</sup>. An agreement similar in principle, including a clause to protect the home market, was concluded between the Swedish holder of an industrial property right (*AB Kabi*) and a Danish licensee (*A/S Kongens Bryghus*) on the manufacture and sale of a new binder for substances to make the cores used in foundries<sup>20)</sup>.

In 1954 the Swedish representative of a Dutch company making optical goods sent to the Commissioner for Freedom of Commerce a request to remove an unwarranted restriction on competition. Briefly, the facts were as follows: The representative mentioned had granted the Swedish Philips company a sales concession for the system known as *Delrama*, used to project films on a wide screen. The firm *Fox Film Aktiebolag*, the Swedish branch of the American *Fox Film Company*, had some *Fox Cinemascope* films projected by a lens system protected by a patent owned by the *20th Century Fox Film Company*. In response to a request by Philips, the Swedish *Fox Film AB* opposed the exhibition in cinemas of *Cinemascope* films using the *Delrama* lens system. The Commissioner held that the *Fox Company's* refusal to lease *Cinemascope* films to cinemas using the *Delrama* system debarred the Swedish representative of the Dutch firm, in conditions contrary to the provisions of the *Cartels Act*, from exercising his trade, that it constituted an obstacle to the efficiency of the economy and caused a rise in prices in the industry concerned. *Fox Film AB* had not claimed that the system using *Delrama* lenses was unsatisfactory from a technical standpoint, a fact which could, in certain circumstances, have injured its film leasing business. Further, the Commissioner considered that the refusal on the part of the *Fox Film Company* constituted an obstacle or hindrance, not permissible from the standpoint of public interest, to the exercise of his trade by a third party; it therefore had harmful effects within the meaning of section 1, sub-section 2 of the 1953 act. The Commissioner summoned the *Fox Film AB* to appear before the Freedom of commerce Board. The "defendant" forthwith declared his readiness to withdraw his refusal and the matter was thus settled in December 1954<sup>21)</sup>.

Also in 1958 a Swedish firm approached the Commissioner, a competitor in the same trade having warned it of infringing a patent and having asked it to cease manufacture of the products concerned and to declare the profits it had secured.

15) Kungl. Maj:ts proposition No. 103, 1953, p. 221.

16) Agreement registered on February 3, 1954, under No. 1135.

17) Registrations Nos. 832 and 834 of March 13, 1953. After annulment of these agreements a new registration was made on April 2, 1958, under No. 1727.

18) Registration No. 1223, of August 3, 1954.

19) Registrations Nos. 1815 and 1816, of October 4, 1960.

20) Registration No. 1867, of May 31, 1961.

21) No. 11, Ombudsmannaämbetet for Näringsfrihetsfrågor against *Fox Film AB*, published in *Näringsfrihetsfrågor*, No. 2, 1955, pp. 31 *et seq.*

Another firm thus cautioned in turn requested that the undertaking which had approached the Commissioner should provide security for any damages which might be awarded for patent infringement. The undertaking concerned, alleging that illegal restrictions on the exercise of competition existed, asked the Board to put an end to the difficulties it was meeting in carrying on its trade. The Commissioner rejected the request on the ground that the Cartels Act of 1953 did not apply to legally constituted monopolies — including patents — for the simple reason that their holders are merely exercising a monopoly right conferred by law. Intervention is possible only if the limits fixed by law are exceeded and if the legal monopoly is exploited as a means of imposing or favouring other restrictions on competition<sup>22</sup>).

In contrast to the situation concerning patent rights, the Board and the Commissioner have in recent years had occasion to state their views at length on the relations existing between protection afforded by trade marks and legal provisions to guard against the harmful effects of restrictions on competition. Two cases discussed below concern registered trade marks for non-alcoholic fruit drinks ("Pommac" and "Coca Cola"). In the first case the situation was as follows: the firm Fructus, of Stockholm, manufactures fruit extracts, particularly for the preparation of "Pommac" apple juice; it sells essences for making this drink and also labels with the "Pommac" trade name. A manufacturing licence was granted to some 200 Swedish manufacturers, who undertook to observe certain rules as to the manufacture of the drink and to submit themselves to inspection of manufacture, packing and handling of the product. At his request a small manufacturer received a delivery of essence for making Pommac, without however obtaining the right to sell his product under the registered "Pommac" trade name. The manufacturer considered that, in refusing him authority to use the trade name, the holder of the mark was preventing him from keeping Pommac juice in stock. The drink being a well-known branded trade product and one much in demand, the refusal to use the trade mark constituted a serious obstacle to the development of a fruit drinks business with a choice of different products able to meet competition. The chances of competing on equal terms with competitors were thereby diminished. On the other hand, according to Swedish law, the holder of a trade mark possesses an exclusive right to it, including the right to grant licences, even though this right is not specifically mentioned in the act. The firm Fructus, holder of the trade mark, pointed out that, when granting manufacturing licences and the right to use the mark, it must, for reasons of efficiency, make a strict selective choice. Moreover, the 1953 Cartels Act does apply, in principle, to all firms which, for business reasons, license industrial property rights. However, the Committee work (which resulted in the adoption of the act) shows that the exclusive rights conferred under the (Patent) act shall not be subject to restrictions. In any case, the Cartels Act contains no explicit provision which would enable restrictions restraining competi-

tion permitted by other acts to be opposed. Products manufactured by a licensee for a trade mark must be capable of inspection by the holder of the trade mark. The latter has an absolute right to grant licences on whatever terms and to whatever person he chooses. This is particularly true when the granting of a licence is connected with conditions concerning manufacture and inspection of the product. On June 18, 1959, the Board held that refusal to grant a licence to use the trade mark "Pommac" could not, in this case, be deemed "improper" from the standpoint of public interest. The Board refused to follow the Commissioner, who was asking for termination of restriction on the free exercise of competition by amicable agreement<sup>23</sup>).

The second case, which will perhaps be submitted by the Commissioner to the Board for Freedom of Commerce and Industry, concerns the well-known trade mark "Coca Cola", which designates both the juice concentrate and the drink ready for consumption. Manufacture is directed centrally from a head office abroad and the product, bearing the registered trade mark, is sold in Sweden under licence. As a first step, in September 1958 registration was effected in the Cartel Register of the agreements entered into by the American Coca Cola Export Corporation and the Coca Cola Company with six Swedish fruit drink manufacturers, i. e. with the firms carrying out the bottling, and with some sixty distributors. Registration was made public at the end of 1959<sup>24</sup>). The agreements relate, first, to the exclusive right to manufacture and bottle the drink and, secondly, to the exclusive right to keep stocks of Coca Cola and to sell it. The agreement with the manufacturers contains amongst others provisions as follows: The licensees recognize the validity of the trade mark and the property right in it held by the American company. The manufacturers secure an exclusive right to manufacture, bottle, distribute and sell the drink, each for a part of the Swedish territory clearly defined in the agreement. They undertake to purchase all concentrates necessary to meet orders in their territory exclusively from the American company and not to resell those concentrates. Further, the drink is to be distributed and sold in special bottles, with a special seal, both imposed by the American company; these articles are to be supplied only by the manufacturers specified by the American company. Moreover, for the transport of the drink only cars approved by the American company may be used. Except with special permission, the drink may not be distributed to undertakings which would resell it outside the territory specified in the agreement. Concentrates, juices or drinks capable of being used as substitutes or imitations may not be manufactured or bottled or sold or used in any way, nor may any other products which by their appearance or packing constitute an imitation of the products of the American company. The provisions relating to the right to use the word "Coca" must be valid even after expiry of the term of the contract; those relating to the word "Cola" are valid for the duration of the agreement. All publicity for the product must be approved by the American company. The

<sup>22</sup>) "Konkurrensbegränsande verkan av ifrågasatt patentinfrång", No. 19, Meddelanden från ombudsmannen för näringsfrihetsfrågor, in *Pris- och Kartellfrågor*, No. 1, 1959, pp. 59 *et seq.*, in particular p. 60.

<sup>23</sup>) *Pris- och Kartellfrågor*, No. 6, 1959, pp. 407 *et seq.*

<sup>24</sup>) Registration No. 1776 of September 30, 1958, published in *Pris- och Kartellfrågor*, No. 9/10, 1959, pp. 546 *et seq.*

before mentioned secondary agreements entered into with about sixty distributors, mainly breweries, accord the latter the sole right to distribute and resell Coca Cola in the parts of the territory outside the areas reserved to the six manufacturers. These distributors may restock only from certain manufacturers specifically named.

The competitive circumstances mentioned above have faced the Swedish cartel authorities with difficult problems, as regards both the investigation to be made and the decisions to be taken. The fundamental question was whether the refusal to supply Coca Cola, based on a system of selective sales, involving a geographical division of the market between the various Swedish undertakings to which the American owner of the trade mark had granted a licence, should or should not be held to be a restriction on competition liable to involve harmful effects within the meaning of Swedish cartel legislation. Some breweries in the south and centre of Sweden found it impossible to obtain supplies of Coca Cola owing to the existing agreements. The breweries so affected represented to the Board that the absence of Coca Cola from their stocks not only eliminated them as competitors in the sale of this drink, but also caused them to lose the custom of the retail businesses and of the consumers for their other malted drinks or other fruit drinks. Coca Cola, they said, played the role of an essential general element of competition in the non-alcoholic fruit drinks trade. The breweries affected had no other means of meeting the current situation than to obtain Coca Cola by roundabout ways and at excessive prices from certain retailers or itinerant truck drivers. The Board analyzed, in particular, what additional costs the breweries discriminated against thus incurred as a result of the higher prices and the increase in costs of transport. At the same time, it also enquired whether the list and maximum prices charged for Coca Cola by wholesalers and authorized manufacturers were fair. Swedish law prohibits generally the fixing of the retail prices.

The fixed uniform prices charged under the agreements by both manufacturers and distributors of Coca Cola were not found to extend on the other sectors of the malted and fruit drinks market. The enquiry on the fairness of the prices charged by the manufacturers of Coca Cola, also showed that the selling prices charged by the firms responsible for bottling were not excessive in relation to costs of production<sup>25</sup>). The Board has not yet been asked by the Commissioner to decide whether the agreements concerned can be regarded as having harmful effects within the meaning of the Cartels Act, and whether there should be negotiations to modify them. It is probable, however, that grounds for intervention in this sense are insufficient, since the agreements concluded with Swedish manufacturers and wholesalers regarding manufacture and sale of the drink bearing the registered trade mark must be regarded as unassailable from the point of view of the Cartels Acts.

The disputes in the trade mark field mentioned here caused Swedish legal authors to increase their attention to these problems. The conflicts were subjected to an examina-

tion of their antecedents and of the legal questions they raised, by Eberstein<sup>26</sup>), Hermansson<sup>27</sup>) and Uggla<sup>28</sup>).

A problem somewhat analogous to the problems here dealt with is that of opposition by a Swedish exclusive sales agent for a branded product manufactured abroad, to the importation of that same article into Sweden. This matter was dealt with by the Swedish Supreme Court in a decree of October 21, 1960 (the so called "Prestige" case)<sup>29</sup>). Suffice it to say that the opposition on the part of the exclusive representative to the importation of the original product (gramophone records) is founded, as a rule, on reasons which concern not only sales organization, but also price policy. Primarily, the aim is to prevent the sale of a product at lower prices on a certain market than those quoted by the exclusive representative of the foreign manufacture in this market. This was the background to the Prestige case. It was judged, however, by the courts from the sole standpoint of trade mark law, to the disregard of cartel law. The latter, however, could also have been considered, in view of the object underlying the legal action started by the claimant and in view of sect. 2 of the Cartels Act, which prohibits fixing the retail price of goods.

Swedish case law on compulsory licences for patents on the basis of the patent act is sporadic. It plays hardly any role in the restriction on competition imposed by the patent-holder. The cases decided between 1935 and 1947 are explained by the inability at that time of Swedish industry to obtain from abroad (during the second world war) certain goods or intermediate products needed by manufacturers wishing to use certain inventions patented in Sweden<sup>30</sup>). In the Külzer case, the Supreme Court in its judgment of December 22, 1947, refused to grant a compulsory patent licence. In an expert's report requested by the Appeal Tribunal the Swedish Patent Office had to establish whether the patent-holder, in demanding an over-price for patented raw materials used to make dental protheses had not reduced the demand for the final product (i. e. dental protheses) and whether, as a result, the invention "had not been used to an extent inappropriate to the conditions prevailing in the country" (sec. 15 Swedish Patent Act). In the opinion of the Patent Office, normally the patent-holder has the right freely to fix the price he intends to charge third parties wishing to use his invention. However, it is possible to take action against the patent-holder under sect. 15 of the Patents Act (which concerns compulsory licensing) when "by fixing a prohibitive price he prevents the exploitation of the invention in the country". When the public interest so requires, expropriation

<sup>26</sup>) "Det Industriella Rättsskyddet, Några aktuella synpunkter", *Nordiskt Industriellt Rättsskydd (NIR)*, 1959, pp. 73 et seq., in particular pp. 74 et seq. (regarding patents and trade marks).

<sup>27</sup>) "Ett par rättsfall rör varumärkes betydelse vid tillämpning av konkurrenshegränsningslagstiftningen", *NIR*, 1959, pp. 250 et seq.

<sup>28</sup>) "Varumärken och Konkurrenshegränsningar", *NIR*, 1960, p. 248.

<sup>29</sup>) Vide *Nytt Juridiskt Arkiv*, 1960, pp. 457 et seq. = *NIR*, 1961, pp. 88 et seq., and Brann in *GRUR Ausl.*, 1961, p. 404.

<sup>30</sup>) Four patents out of the five covered by a compulsory licence were owned by German firms, i. e.: Siemens & Halske (radio transmitter); I. G. Farbenindustrie (corrosion process); I. G. Farbenindustrie (contrast product used for X-rays); Külzer GmH. (dental prothesis); the last patent, covering an intermediate product for making vitamins C, was owned by Hoffmann-La Roche S. A., Basle. Vide Neumeyer, in *GRUR Ausl.*, 1958, pp. 1 et seq.

<sup>25</sup>) "Selektiv försäljning av Coca Cola, vissa konkurrensproblem", published in *Pris- och Kartellfrågor*, No. 4, 1961, pp. 272 et seq.



proceedings against the patent-holder may be taken under section 17 of the Patents Act<sup>31</sup>).

## B. Norway

### I. Earlier cartel legislation

The system of regulation adopted in Norway to deal with cartels differs markedly from the law both in the other Scandinavian states and in other countries of Western Europe. It is this system also which has the oldest history. As long ago as December 1913 a proposal was made to set up a committee responsible for examining the question of official supervision of trusts and cartels. At the end of the first world war this committee submitted an interim draft law making it obligatory to notify and register any grouping or agreement restricting competition, as well as any undertaking which dominated the market. Supervision was to be entrusted to a Supervisory Council composed of five members. Certain forms adopted to conduct restraint of trade, such as by formation of trusts, the conclusion of exclusive agreements, commercial boycotting, discriminatory price-fixing and sales at prices below cost in order to crush competition were to be prohibited. The State was to take steps to counter abuses by trusts and cartels by encouraging the creation of cooperative undertakings and of public and commercial enterprises, and by the adoption of appropriate customs measures. The registration of groupings, agreements and undertakings restraining trade was provided for in the interim act of August 6, 1920 (respectively November 10, 1920), on price regulation. The act gave the Prices Office general power to fix maximum prices and profit margins, or to forbid the refusal to sell certain goods. This act, adopted at a time of crisis, was later abrogated as regards the provisions on price formation; the general prohibition on charging unreasonable prices was, however, retained. In May 1924 the Government proposed replacing the interim act by a final act on the supervision of restrictions on competition and on price-fixing abuses. The draft abandoned the system of compulsory registration and most of the earlier prohibitions: the supervisory power of the authority was greatly reduced. The draft law was not submitted to the *Stortinget* for discussion. In 1925 a new Government (Mowinckel) introduced a new draft law representing a compromise between the radical proposals of 1920 and the adulterated draft submitted by the Government in 1924. The new draft did not provide for power to expropriate undertakings or confiscate goods subject to price supervision; on the other hand, it contained a prohibition, subject to withdrawal, on fixing of vertical minimum prices, an obligation on retailers to indicate prices at clearance sales, and an obligation on all stock corporations whose share capital exceeded one million Norwegian Crowns to submit their balance sheets when such corporations participated in groupings or were a party to agreements in restraint of trade, or when they themselves enjoyed a dominant position in the market.

In 1926 was issued an extensive "Act relating to the supervision of regulations on competition and to combat abuses in

price formation" (*trustloven*). In general, this act was intended to apply only, in the matter of cartels, to combat abuses arising from restrictions on competition; in return, it gave the authorities extensive powers to intervene directly to regulate prices for all products and services. It also made it obligatory to notify and register groupings and agreements restricting competition, as well as large undertakings and trade associations. Owing primarily to constant intervention by the authority in the formation of prices charged on the market by private undertakings, it had similar effects as a state economic planning instrument. It also provided severe penalties.

### II. The existing Law

In June 1953 the act of 1926 was replaced by the "Act to supervise and regulate prices, profits and conditions governing competition", which came into force on January 1, 1954<sup>32</sup>). As regards supervision of cartels, the 1953 act to supervise prices embodied the main provisions of the 1926 act. Moreover, it widened the power of the commission of generally regulating prices and company profits. Under Article 2, it applies to "all categories of economic activity, regular or occasional, conducted in exchange of payment", that is to say all kinds of production and distribution of products, all activities by transport undertakings, commercial agents, banks, insurance companies, members of independent professions and of state enterprises. Para. 2 of Article 2 also specifically states that the King (in Council of State) may, should an activity come simultaneously within the scope of the present act and of other acts which also provide for regulation or supervision of commercial activity, issue *ad hoc* regulations to define the respective competence of the various relevant authorities. In this connection, Parliament had in mind primarily the numerous other Norwegian acts containing provisions on price regulation.

Nowadays Norwegian legal authors believe that the powers conferred by two different acts, whose purpose overlaps in whole or in part, should be placed on the same footing, unless it is specifically stated or provided that the competence conferred by one of the acts concerned is to have precedence over that deriving from the other act<sup>33</sup>). In the preparatory work leading to the adoption of the 1953 act on price supervision it was pointed out that it is of little consequence whether the other act concerned is special or subsequent in relation to the Prices Supervision Act<sup>34</sup>). No similar principle was stated concerning the provisions of the Patents Act and the Trade Marks Act.

### III. Effects on industrial property rights

The question whether the statutory rules governing cartels apply also to exclusive rights possessed by the holder of a patent, trade mark, industrial design or the holder of a copyright was examined in Norway in 1936, in the light of the Act of 1926 then in force, by an eminent and authoritative

<sup>32</sup>) Published in part, in a German translation, in *WuW*, 1955, p. 271.

<sup>33</sup>) Torstein Eckhoff-Øystein Gjelsvik, *Prisloven av 26 Juni 1953 med Kommentarer*, Oslo, 1955, p. 23.

<sup>34</sup>) Innstilling O. II, 1953, p. 97.

<sup>31</sup>) *NIR*, 1947, pp. 211 *et seq.*, in particular pp. 212 *et seq.*

expert, Professor Ragnar Knoph<sup>35</sup>). He considered that the supervision provided for in the Cartels Act should extend not merely to groupings and agreements to regulate competition, but that even individuals doing business could take boycott action, illegal under section 21 of the Act, conclude exclusive agreements, prohibited by section 22 or impose other unreasonable conditions in their business relations<sup>36</sup>). In his opinion, inventors and authors of literary or artistic works also engage in economic activity in order to make a profit and find themselves in a relationship of mutual competition, which comes within the scope of Article 1 of the Cartels Act. This is equally, and even more, the case with all (?) groupings formed to exploit patent rights or copyrights (*ophavsrettighetene*), and with those whose sole purpose is to exploit jointly these same patents or copyrights<sup>37</sup>). Knoph was, however, mistaken in claiming that if "legally distinctive marks (i. e. trade marks) are bought or sold, this is only by way of exception" and that in these cases there can be no question of "groupings formed to exploit them"<sup>38</sup>). Lastly, he stated that copyright and inventors' rights, by reason of their special nature, on a hasty glance seem to impose restrictions on freedom of commerce and industry and confer on creators of tangible intellectual values an exclusive and unconditional right, which would place them above and beyond the system of regulation laid down in the Cartels Act. That, however, would be an erroneous opinion; rights of intellectual property can only exclude third parties, the exercise of such rights is not, however, removed from the supervision of the State, which control, society has always considered necessary<sup>39</sup>). An author or inventor asks only that his right be placed on the same footing as any other subjective rights; he claims no privileged treatment by desiring to remove his rights from the supervision provided by the Cartels Act, to which all other citizens must conform.

Ten years after the adoption of the 1926 Cartels Act, in the same year as Knoph published in Norway his fundamental work on intellectual property rights under the title *Åndsretten*, in which he dealt particularly with the distinction to be drawn between intellectual property and the Cartels Act, there occurred the first direct conflict between Norwegian patent law and cartel law. The Norwegian radio valve company Radionette Norsk Radiofabrik A/S sued the Norwegian Philips Company and the Norwegian Telefunkenradio S. A. at the then existing Trust Supervisory Council because these companies refused to sell to the plaintiff radio valves of their manufacture as long as it equipped the same radio receiver sets with valves from the two companies mentioned and at the same time with valves supplied from other sources (that is to say, of American origin). The arguments advanced by the plaintiff were as follows: The obligation imposed by the valve suppliers — who in Norway were organized in a

pool to exploit their patents — to purchase complete sets of valves prevented the plaintiff from equipping his radio receivers, in part, with American valves, which in Norway were considerably cheaper than "European" valves. The total costs incurred by the plaintiff to pay the licence fees on the receiver sets, and the fact of the unreasonably high prices charged for "European" valves protected by patent increased the cost of production to such an extent that it was impossible for the licensees in Norway to compete with e. g. the Philips and Telefunken company. The plaintiff requested the Trust Supervisory Council to take action under section 14 of the Cartels Act. Under the terms of this provision, the authority responsible for supervision of cartels may intervene when it considers that a grouping or agreement of the type specified in section 6, para. 1 and 2, of the Act leads to "unreasonable" (*urimelige*) prices or profit margins, or if a manufacturer or merchant as referred to in section 6, para. 3 and 4, charges unreasonable prices or makes unreasonable profits. The same applies when an undertaking charges unreasonable prices or makes unreasonable profits and when, in addition, competition by other undertakings is not sufficiently effective. According to Norwegian doctrine, the cause of the lack of competition by other undertakings is immaterial; it matters little whether a *de facto* monopoly is due, for instance, to customs duty measures or to a ban on imports. The protection afforded by patent rights and exclusive sales agreements may also, according to Knoph, result in the elimination of competition or in making it less effective, which may justify intervention by the Council in order to regulate the market<sup>40</sup>).

In the present case, the plaintiff contended also that the terms of delivery imposed by the suppliers of radio valves were at least unfair (*utilborlige*) within the meaning of section 13 of the Act<sup>41</sup>). In turn, the Norwegian Philips Company claimed that the use of valves of different origin in the same receiver was liable to cast discredit on Philips valves and that the American valves which the plaintiff intended to use were made in violation of a Norwegian patent possessed by Philips on radio valves. Telefunken advanced similar arguments and also stated, as regards the price charged in Norway for valves, that in a country where products were still patented, prices were necessarily higher than in the USA, where the patents in question had lapsed a long time ago. Moreover, the plaintiff would, owing to the grant of a compulsory licence, have obtained the right himself to manufacture in Norway grid valves patented in favour of Telefunken. The director of the Supervisory Council observed that, in his opinion, the obligation imposed on a purchaser by a manufacturer or merchant to buy also other products in order to obtain a particular product as a rule, should be regarded as an unreasonable condition. It was for the buyer himself to decide what products he intended to purchase. In this case, it should be left to the manufacturers of radio sets to determine to what extent they proposed to use, for equipping their sets, valves from several different manufacturers. The question whether

<sup>35</sup>) Ragnar Knoph, *Åndsretten*, Oslo, 1936, paragraph 58 (*Åndsrettighetene og Trustloven*), pp. 566 *et seq.* Vide also Kristen Andersen, *Rettens stilling till konkurranseregulerende sammenslutninger og avtaler*, 1937; Arnold Raestad, *Bernkonventionen*, 1929.

<sup>36</sup>) *Loc. cit.*, Knoph, pp. 566 *et seq.* (569).

<sup>37</sup>) *Loc. cit.*, Knoph, p. 566.

<sup>38</sup>) *Loc. cit.*, Knoph, p. 566.

<sup>39</sup>) *Loc. cit.*, Knoph, p. 567.

<sup>40</sup>) R. Knoph, *Trustloven av 1926 med kommentarer*, Oslo (undated), p. 100.

<sup>41</sup>) For the distinction to be made between the terms "urimelig" and "utilbørlig", see R. Knoph, *loc. cit.*, pp. 83 *et seq.* and 92 *et seq.*

the sets gave satisfaction technically was one which the maker of the set and the purchaser would be able to judge for themselves. The risk incurred by reason of the fact that the sets might not give satisfactory effect devolved on the maker of those sets and not on the supplier of the valves. In the opinion of the director of the Council, the terms of sale in question were unreasonable and no effective competition existed between different suppliers. This opinion, however, should in no wise prejudice to what extent a supplier might refuse to make delivery to a firm guilty of infringement of a patent.

On March 13, 1936, the Trust Supervisory Council forbade, by four votes to one, and with reliance on section 14 of the Cartels Act, the offering for sale of radio valves on condition that complete sets of valves only be purchased, or the refusal to sell valves unless the purchaser bought complete sets. Failure to observe this ruling was punishable by the penalties specified under sections 27 and 28 of the Act, i. e. a fine of up to 100,000 Norwegian Crowns or up to 3 months imprisonment, or both at once (sect. 27) and, as regards manufacturers or merchants, by a ban on the continuance of their business activity for an indefinite period, or up to five years<sup>42</sup>).

*(To be continued)*

## REPORTS OF INTERNATIONAL ORGANISATIONS

### Fifteenth Ordinary Session of the Consultative Assembly of the Council of Europe

(Strasbourg, January 13 to 17, 1964)

#### Report on a European Patent Law

Under the Chairmanship of M. Pflimlin (France), the Consultative Assembly of the Council of Europe held the 3<sup>rd</sup> part of its 15<sup>th</sup> Ordinary Session from January 13 to 17, 1964, at the House of Europe, Strasbourg.

In view of the fact that some questions relating to intellectual property were on the Agenda and that they were of great interest to BIRPI, the latter was invited to send an observer to the Meeting. The Director of BIRPI, Professor G. H. C. Bodenhausen, nominated for this purpose M. C. Masouyé, Counsellor, Head of the Copyright Division.

The appointment of M. Lodovico Benvenuti (Italy) having expired, the Consultative Assembly had, during this session, to elect his successor in the post of Secretary-General of the Council of Europe. Mr. Peter Smithers (United Kingdom), Parliamentary Secretary to the Foreign Office, was elected by a large majority.

The Director of BIRPI communicated his warm congratulations to the new Secretary-General of the Council of Europe and expressed the hope that the fruitful collaboration

within the working agreement which exists between the two organisations would continue.

Among the items on the Agenda, those relating to the European patent law and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) should be noted.

On these two subjects the Consultative Assembly, having heard the reports of its Legal Commission, presented by the Rapporteur, M. Borel (Switzerland), discussed the draft recommendations which were submitted to it.

After M. Lannung (Denmark), President of the said Commission, had supported the drafts presented, the Consultative Assembly unanimously adopted the following Recommendation relating to the European Patent Law:

#### I

#### Recommendation N° 384 (1964)

The Assembly,

Having regard to Recommendation 23 of 8<sup>th</sup> September, 1949, in which it proposed the drafting of a Convention on the creation of a European Patent Office, responsible for the issuing of a European inventors' certificate, which would be recognised in the Contracting States;

Considering that the policy advocated by the Committee of Governmental Experts, created following Recommendation 23, was that the immediate task of the Council of Europe in the field of patents was to work out such measures as could be put into effect in the immediate future, and that these measures constituted the preparatory stage leading towards the ultimate establishment of a European patent system; and that this policy was followed by the Committee of Ministers;

Having regard to the fact that two European Conventions in the field of patents are at present in force, namely the European Convention on the formalities required for patent applications and the European Convention on the establishment of a uniform system of classification of patents for invention, that the European Convention on the unification of certain parts of substantive law of patent for invention is open for signature, and that a European Convention to facilitate the filing and examination of applications in patents in several States is in preparation;

Considering that a preliminary draft Convention for a European Patent Law has been prepared within the framework of the European Economic Community;

Noting with satisfaction that the work undertaken in the field of patents within the framework of the European Economic Community generally corresponds to the wishes expressed by the Assembly in its above-mentioned Recommendation 23 of 1949;

Considering that there are two aspects of the preliminary draft Convention for a European Patent Law which deserve the attention of the Assembly and that these concern:

- (i) the question of who is entitled to apply for a European patent, and
- (ii) the question of the possibility of third States acceding to the Convention for a European Patent Law, and under which conditions;

<sup>42</sup>) The case was published in *Trustskontrollen*, No. 2, Oslo, 1936, pp. 85 et seq.

*As regards the question of who is entitled to apply for a European patent:*

Considering that the preliminary draft Convention sets forth two alternatives, one of which makes the European patent available to any person wishing to obtain protection for his invention for the whole of the territory of the Contracting States, the other restricting the category of persons entitled to apply for a European Patent to those individuals or corporate bodies who possess the nationality of one of the Contracting States;

Considering that the establishment of a truly international patent system requires that there should be no distinction as to the nationality of the applicant for a European patent;

*As regards the question of the possibility of third States to accede to the Convention for a European Patent, and under which conditions:*

Considering that Article 211 of the preliminary draft Convention provides that third countries may accede to the Convention if they are members of the Paris Union, but that such accession would require the unanimous consent of the Contracting Parties to the Convention;

Considering that the possibility of third States acceding to the Convention will be seriously diminished if the principle of the unanimous consent of the original Contracting Parties is maintained;

Considering that it is desirable that a less rigid rule should be found and that one of the following solutions should be taken into consideration:

- (i) Any State should be allowed to accede to the Convention if it is a member of the Paris Union, without the unanimous consent of the countries already party to the Convention being required;
- (ii) Any European State member of the Paris Union should be allowed to accede, without the unanimous consent of the countries already party to the Convention being required;
- (iii) Any State member of the Paris Union which has ratified the European Convention on the unification of certain points of substantive law on patents for invention, prepared within the framework of the Council of Europe, and signed on October 25<sup>th</sup>, 1963, should be allowed to accede, without the unanimous consent of the countries already party to the Convention being required;

Having regard to the report of the Legal Committee (Doc. 1708),

*Recommends* that the Committee of Ministers should recommend that member Governments which have participated in the preparation of the preliminary draft Convention for a European patent should submit that Draft and the present report to the Committee of Experts of the Council of Europe for examination, and take into consideration for the final drafting the comments made within the framework of this Committee of Experts by the representatives of the countries which have not taken part in the preparatory work of the preliminary draft Convention.

## II

### Explanatory Memorandum

(Rapporteur: M. A. Borel)

#### Introduction

1. — Ever since its inception the Assembly has shown a great interest in questions of patent law. Suffice it to recall Recommendation No. 23, which the Assembly adopted at its first ordinary session in September 1949. This Recommendation contained a "study for a draft proposal of a convention on the creation of a European Patent Office" which would be responsible for the issuing of a "European inventors' certificate" to be recognised in the Contracting States<sup>1</sup>).

2. — As a result of this Recommendation, the Committee of Ministers created in January 1950 a Committee of Experts on Patents and instructed it to study the Assembly's proposal. The Experts considered that the immediate task of the Council of Europe in the field of patents was to work out such measures as could be put into effect in the immediate future and that uniformity in procedure and the formalities required in member States should be achieved prior to the establishment of a European Patent Office. The policy advocated by the Committee of Experts was followed and the work of the Council of Europe in the field of patents must therefore be considered as a preparatory stage leading towards the ultimate establishment of a European patent system.

3. — On December 11<sup>th</sup>, 1953, the member States of the Council of Europe signed the European Convention on the formalities required for patent applications, which is at present in force in thirteen countries<sup>2</sup>). The Experts also considered that a European Patent Office could not be set up until member States, whose legal system did not provide for the examination of inventions for novelty, had decided to make such examinations part of the procedure required by their national legislation with respect to the granting of patents. Accordingly, the Committee of Ministers adopted in 1952 a resolution concerning the examination of inventions for novelty.

4. — A further step was taken when the European Convention on the establishment of a uniform system of classification of patents for invention was signed in 1954. This has, to date, been ratified by eleven countries<sup>3</sup>).

5. — During their session of October 1963 the Ministers' Deputies have approved the European Convention on the unification of certain parts of substantive law on patents for invention and have decided to open it for signature. The Convention has been signed on October 25<sup>th</sup>, 1963, by the following States: Federal Republic of Germany, Denmark,

<sup>1</sup> See Doc. 110 of 8<sup>th</sup> September, 1949 (Recommendation to the Committee of Ministers); see also Doc. 75 (Report presented by Mr. Longchambon on behalf of the Committee on Economic Questions and containing the Opinion of the Committee on Legal and Administrative Questions).

<sup>2</sup> Denmark, France, Fed. Rep. of Germany, Greece, Ireland, Italy, Luxemburg, Netherlands, Norway, Sweden, Switzerland (adhesion: 28<sup>th</sup> December, 1959), Turkey and the United Kingdom.

<sup>3</sup> Belgium, Denmark, France, Fed. Rep. of Germany, Ireland, Italy, Netherlands, Norway, Sweden, Turkey and the United Kingdom.

France, Italy, Sweden and Switzerland and afterwards by Netherlands and Belgium. The Convention deals in particular with the requirements which an invention must satisfy in order to be patentable, and with the conditions governing the description of an invention as well as with the claims contained in the patent.

6. — The Committee of Experts is at present engaged in the preparation of a European Convention whose main object will be to facilitate the filing and examination of applications for patents in several States. The practical result of such a Convention would be that it would ease the burden placed on examining officers, thus making the results of searches for novelty carried out by one office available to another.

#### *The Work of the European Economic Community*

7. — As the Assembly is aware, the European Economic Community has also shown its interest in matters relating to patent law. A preliminary draft Convention for a European patent law, recently released for comments to interested circles in the six member countries of EEC, sets out to establish a European patent. The common patent law created by the Convention would, however, not supersede the existing national laws and the national patent would therefore continue to exist alongside the projected European patent. It is not necessary, for the purposes of this report, to deal in detail with the various provisions of the preliminary draft Convention and the following general analysis may therefore suffice. In short, a European patent would confer on its owner exclusive rights in the whole of the territories of the member States of the European Community and, apart from licensing, it would only be negotiable in respect of the whole of those territories. It is intended to set up an administratively and financially independent European Patent Office to which an application for a European patent may be filed directly. However, the member States retain the possibility of requiring that the application be filed at their own national patent office which, subject to national regulations regarding secret inventions, will transmit applications to the European Office. The European Patent Office will also be competent to hear proceedings for revocation. Appeals from decisions of the Office may be made to a European Patent Court.

8. — Work is also in progress on a so-called general Convention which will establish the legal basis for the activity of the future administrative council and for the European Patent Court. It will contain all institutional provisions relating to patents, trade marks and design protection. It may be mentioned, in passing, that draft conventions are also being prepared on “designs and models” and on “trade marks”. Work on these conventions has not yet, however, passed the preliminary stage.

#### *European Patent*

9. — In view of the above observations it will be readily understood that the work undertaken in the field of patents by the European Economic Community generally corresponds to the wishes which the Assembly expressed in its aforementioned Recommendation 23 of 1949. This in itself is a suffi-

cient reason for the Assembly to welcome the work of the EEC. As has been said on many occasions by the Assembly, the establishment of a truly European patent law should be the ultimate aim of the work undertaken within the framework of the Council of Europe and the Assembly is happy to note that the Committee of Ministers has also expressed the same opinion. This being so, it is only natural that the Assembly should follow closely the progress made towards the establishment of a European patent, and although it has, of course, no wish to interfere with the preparatory work of the EEC, express its opinion as to what it considers to be in the interest of the Greater Europe.

10. — In connexion with the preliminary work for a European patent law, there are two aspects which deserve the attention of the Assembly. They concern the problem of “availability” (the question of who is entitled to apply for a European patent) and that of the possibility of other States acceding to the Convention. It is relevant to note that these two problems have already given rise to a certain amount of controversy both amongst the authors of the draft and the interested circles to which the draft was released for comments. It is intended to deal with these two particular aspects separately and in turn.

#### *Availability*

11. — The provision of the preliminary draft Convention dealing with availability (Art. 5) contains two alternative solutions. Under the first alternative *any person* wishing to obtain protection for his invention for the whole of the territories of the Contracting States may apply for a European patent. Under the second alternative the category of persons entitled to apply is however restricted to those individuals or corporate bodies who possess the nationality of one of the Contracting States (nationals). It may be thought that these two alternatives represent extreme solutions and that it is not to be excluded that intermediate solutions may eventually be found. The general question is, however, whether the right to apply for a European patent should be confined to nationals of the Contracting Parties only or whether it should also be available to nationals of other States. Various legal and economic arguments have been put forward in favour of one alternative or the other. However, the Legal Committee considers that, at least at this juncture, it is not desirable to advance arguments of a legal nature. It is submitted that what is at stake supersedes the merely legal aspects of the matter and that what is involved is rather of an economic and political nature.

#### *Accession and Association*

12. — The second aspect is that of the open or closed character of the Convention, i. e. the possibility for other States to accede to it. The relevant provision here is Article 211 which provides that other countries may accede to the Convention if they are members of the Paris Union. Such a condition is not unusual; a similar provision is, for instance, found in the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations which lays down that a country may accede to it

provided it is a Party to the Universal Copyright Convention or the revised Berne Copyright Convention. Yet, a footnote to Article 211 indicates a difference of opinion among the authors of the Convention. Indeed, according to one view, accessibility should be restricted only to the *European* members of the Paris Union. In addition, accession would require the unanimous consent of the countries already Party to the Convention. Consequently, any member country could, in fact, veto any application for accession.

13. — In addition to accession, the preliminary draft Convention provides for “association” (Art. 212). As in the case of accession, only member States of the Paris Union could apply for association and the terms of association would have to be approved by the Contracting Parties. The Draft contains no indications as to the conditions and form of association.

14. — The original Contracting Parties to the Convention will probably be the six EEC countries. Although the draft Convention does not contain an explicit provision to this effect, this may be assumed from the history of the Draft and from its Article 217 (original languages of the Convention). In principle it is recalled Article 211 envisages that any State which is party to the Paris Convention may accede to the Convention. But even if a third-party State were willing to accept those of the economic provisions of the Draft which are closely linked with the Rome Treaty [e.g. Art. 29 (2), Art. 43 (3) first variant, Art. 136, Art. 142 (1), Art. 144 (1), Art. 199 (2) and the free circulation of goods] such a State would only be allowed to accede to the Convention after a unanimous decision to that effect has been reached by the Contracting States.

#### Conclusions

15. — As was stated above, the Committee does not wish, at this stage, to advance the various legal arguments which could be made in favour of one or the other solution. Nor does it seem necessary here to examine the perhaps important question of whether “non-accessibility” is in conformity with the provision of Article 2 of the Paris Convention of 1883<sup>4)</sup> which equates the alien with the national or whether the projected Convention on a European Patent can be seen as a special arrangement within the meaning of Article 15 of the Paris Convention<sup>5)</sup>.

<sup>4)</sup> Paragraph (1) of Article 2 of the Paris Convention, as revised in Lisbon in 1958, reads as follows: “Nationals of each of the countries of the Union shall, as regards the protection of industrial property, enjoy in all other countries of the Union the advantages that their respective laws now grant, or may hereafter grant to their own nationals, without prejudice to the rights specially provided by the present Convention. Consequently they shall have the same protection as the latter and the same legal remedy against any infringements of their rights, provided they observe the conditions and formalities imposed upon nationals.”

<sup>5)</sup> Article 15 of the Paris Convention reads as follows: “It is understood that the countries of the Union reserve the right to make between themselves special arrangements for the protection of industrial property, insofar as these arrangements do not contravene the provisions of the present Convention.” — Three multilateral special arrangements have been entered into by countries party to the International Convention under its Article 15: (a) Madrid Arrangement for the International Registration of Trade Marks; (b) Arrangement of The Hague for the International Deposit of Industrial Designs or Models; (c) Madrid Arrangement for the Prevention of False or Misleading Indications of Origin on Goods.

The question is, at this juncture, rather one of policy and moreover one which must be considered against the background of existing economic and political realities, the most important of which is undoubtedly the existence of the European Economic Community.

16. — Having said this, and stressing the fundamental value and advantage of a Convention establishing for the first time a truly international patent system, the Committee cannot but come out in favour of the first alternative of Article 5 which, it will be remembered, makes no distinction as to the nationality of the applicant for a European patent. Indeed, a closed arrangement in the EEC could well provoke the conclusion of similar closed arrangements by other groups and this would obviously be most undesirable and would contradict the tendency to ameliorate the coordination of efforts in an international framework.

17. — Closely connected with the problem of “availability” is that of accession. Indeed, if States that are not original Contracting Parties have the opportunity of acceding, the problem of availability would to some extent become less acute. As regards the unanimity rule, that is to say that accession can take place only with the unanimous consent of the original Contracting Parties, generally speaking, it is admitted that to a large extent in law third States have no right to accession unless the provisions of the treaty itself provide that it shall be open to the accession of third States, or of certain States. Article 211 of the draft Convention provides that other countries may accede to the Convention if they are members of the Paris Union. It will however readily be understood that the possibility of other States acceding to the Convention will be seriously diminished if the principle of the unanimous consent of the original Contracting Parties is maintained. The Legal Committee considers that it would be possible to find a less rigid rule and suggests that one of the following solutions should be studied and subsequently adopted:

- (i) All countries should be allowed to accede to the Convention if they are members of the Paris Union without the unanimous consent of the countries already party to the Convention being required.
- (ii) All the European member countries of the Paris Union should be allowed to accede without the unanimous consent of the countries already party to the Convention being required.
- (iii) All member countries of the Paris Union which have ratified the European Convention on the unification of certain points of substantive law on patents for invention, prepared within the framework of the Council of Europe, and signed on October 25<sup>th</sup>, 1963, should be allowed to accede without the unanimous consent of the countries already party to the Convention being required.

18. — The Assembly suggests that the Committee of Ministers should recommend that member Governments which have participated in the preparation of the draft Convention submit the preliminary draft Convention and the present

report to the Committee of Experts of the Council of Europe for examination, and take into consideration for the final drafting the comments made within the framework of this Committee of Experts by the representatives of the countries

which have not taken part in the preparatory work of the preliminary Draft.

This is the purpose of the draft Recommendation set out at the beginning of this Report.

## NEWS ITEMS

### CANADIAN INVENTORS

We are informed by the Patent and Trademark Institute of Canada that Dr. J. J. Brown, Director of Entrepreneurial History in Montreal, is preparing a history of Canadian invention and technology. He would appreciate the help of Patent Attorneys in making the book an exhaustive

history of Canada's inventive activities and would be glad to hear of inventors whose work has led to increased employment or new industry in Canada or elsewhere. Any notes, brief histories or photographs may be sent to him at P. O. Box 621, Montreal, Canada.

### Calendar of BIRPI Meetings

Place	Date	Title	Object	Invitations to participate	Observers
Geneva	May 20 to 26, 1964	Administrative Agreement, Working Party	Preparation of the Diplomatic Conference of Stockholm	Czechoslovakia, France, Germany (Fed. Rep.), Hungary, Italy, Japan, Mexico, Sweden, Switzerland, Tunisia, United Kingdom, United States of America	—
Bogotá	July 6 to 11, 1964	Latin American Industrial Property Congress	Discussion of industrial property questions of interest to Latin American Countries	All the States of Latin America	All Member States of the Paris Union outside Latin America
Geneva	September 28 to October 2, 1964	Interunion Coordination Committee	Program and budget of BIRPI	Belgium, Brazil, Czechoslovakia, Denmark, France, Germany (Fed. Rep.), Hungary, India, Italy, Japan, Morocco, Netherlands, Portugal, Rumania, Spain, Sweden, Switzerland, United Kingdom, United States of America, Yugoslavia	All other Member States of the Paris Union or of the Berne Union
Geneva	September 30 and October 1, 1964	Consultative Committee and Conference of Representatives (Paris Union)	Triennial budget of the Paris Union	All Member States of the Paris Union	—
Geneva	October 12 to 16, 1964	Committee of Experts concerning the international classification of industrial designs	Study of an international classification of industrial designs	All countries members of the Paris Union	—

