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GENERAL STUDIES

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

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(Fourth and last Part) *

Only on one occasion has Austrian jurisprudence had to apply the act in question. In identical decisions taken on July 6, 1936, the Federal Ministry of Commerce and Communications declared nul and void, in accordance with paragraph 1 of the act, a provision of a patent licence agreement for manufacturing radio receiver sets concluded by the firm Philips Gloeilampenfabriken N. V., and an almost identical provision of a similar licence agreement concluded by the firms Telefunken and Dr. E. F. Huth. By virtue of the provision at issue stipulated by the defendants, the association of the Austrian radio industry was to oblige members of a trade grouping within the radio industry to sell in Austria only sets (valve radio receivers as described in the agreement) equipped with valves made by Telefunken (or alternatively Philips); sets as described in the agreement and intended for sale in Europe were to be designed in such a way as to enable the use of valves made by Telefunken (Philips), without any engineering difficulties. The Austrian purchasers (wholesalers) were to undertake to resell the radio sets obtained only if they were equipped with the valves supplied to them by these two firms. In their individual agreements the Austrian manufacturers were to sign a protective letter ("revers") of the same general content. The Federal Ministry of Commerce and Communications considered that the obligations thus assumed by licensees constituted for them a restraint of their trade activity, which referred neither to the method nor to the extent of the use of the patented invention covered by the licence granted. The effect, therefore, of the confusion created between the right to use the patents of the agreements and the economic obligations of the licence agreements to manufacture and the obligation to sign, emanating from the individual agreements, made the manufacture and sale of valves of any other make impossible. The abuse thus made of patents hindered progress in the technique of radio reception, not only at the expense of inventors and entrepreneurs authorized to use other inventions, but generally to the detriment of the community. The provisions involved were injurious to the interests of the national economy and of the public welfare.

The firms Dr. E. F. Huth and Philips Gloeilampenfabriken N. V. lodged an appeal with the Austrian Federal Supreme Court against the decisions taken by the Federal Minister. In its judgment of January 11, 1938, the Federal Supreme Court declared that the appeals were as a whole without foundation.

*) See *Industrial Property*, 1964, pp. 32, 47, 86.

It held that each of the various sub-paragraphs in the provisions of the agreements concerned with the licence to manufacture implemented the conditions established by the act. The monopoly secured of the supply of valves imposed on the licensees a restraint unrelated to the patented inventions covered by the licence. In its opinion the provisions of the agreements at issue hindered progress, they were intended specially to prevent the dissemination of new designs of valves, to arrest technical progress and thus compel the community to remain at the stage of (engineering) development fixed by the continued use of valves of Philips or Telefunken make (as far as the appellants themselves did not possess patents for improvements). These provisions had no effects which came within the scope of the Patents Act. They had been incorporated in the agreement systematically "far away from any provisions concerning the use of the licensed patents". The decisions taken in pursuance of the 1936 act did not constitute measures within the meaning of Article 5 of the Paris Convention. The abuses involved in this case consisted in restrictions on the purchase of goods being outside of the use of the patents (and not restrictions in conjunction with the exercise of the patent rights)¹⁰².

The reason why we have digressed on the subject of the special act of 1936 to combat the abuse of patent rights is that, although it was no longer valid after 1938 (when Austria was occupied), it was reintroduced on the re-establishment of Austrian legislation. Its provisions are today an integral part of the Austrian *Patents Act* of 1950.

The first Austrian *Cartels Act* was enacted in 1951¹⁰³. It does not specifically mention industrial property rights. We must therefore first consider to what extent the official definition of cartels includes associations and groupings in the field of industrial property. Paragraph 1 of the Cartels Act of 1951 defines cartels as "associations of entrepreneurs or unions of entrepreneurs which, while preserving their economic independence, purpose by means of contractual obligations (cartel arrangements) to regulate or limit competition". In the first place, the definition in paragraph 1 of the Act is confined to "associations" ("*Zusammenschlüsse*") and consequently appears to exclude individual agreements which are not associations in character, as well as all restraints on trade arising from monopolistic enterprises. A further essential feature seems to be that Austrian law defines a cartel not according to the restraints which cartel arrangements may *objectively* impose on trade, but according to the *subjective intention* of the parties to impose such restraints ("associations of entrepreneurs ... which ... *purpose* to regulate or limit competition")¹⁰⁴. Further, the Austrian Cartels Act makes provision for a Cartel Register. Registra-

¹⁰²) *Ämtliche Sammlung der Erkenntnisse des österreichischen Bundesgerichtshofes* (Official collection of judgments of the Austrian Federal Tribunal), No. 1743 (A), pp. 4 *et seq.*

¹⁰³) Federal Act to regulate cartels of July 4, 1951, text published in *BGBL*, No. 226/1951 and No. 56/1952, as amended by the supplement published in *BGBL*, No. 252/1956, by the second supplement, published in *BGBL*, No. 276/1957 and by the third supplement, published in *BGBL*, No. 136/1958.

¹⁰⁴) Vide, in particular, R. Dittrich-F. Schönherr, *Das Kartellgesetz* (The Cartels Act), 2nd edition, Vienna, 1958, p. 9, Note 14; Ender-Landau, *Kommentar zum Kartellgesetz*, pp. 11 *et seq.*; Schinnerer, *Die Kartellvereinbarung* (The cartel arrangement), p. 581.

tion therein is authorized when a series of conditions are simultaneously fulfilled (paragraph 12 b). One of these conditions, for instance, is that the agreement in question must not envisage any obligation or provision concerning the exclusive sale of products or rendering of services covered by the agreement (paragraph 12 b, item 3 a). According to paragraph 3, definitely approved registration is a condition of the validity of cartel agreements according to Austrian law.

The legal situation created by the simultaneous validity of the Patents Act of 1950 and the Cartels Act of 1951 is that conflicts between industrial property rights and legal provisions to protect freedom of competition may be confined to the sphere of licensing agreements for such rights. In this connection Austrian doctrine, like that of most other European countries, draws a distinction between licence agreements which impose restrictions within the field of patent law (having the nature of actual law), and those which involve restrictions outside patent law (founded on the law of contract). The aim of the latter, though going beyond the terms of protection conferred by the patent, is not necessarily, in the view of Austrian authors, to impose restraints on trade¹⁰⁵). Schönherr mentions as categories of restraints outside the field of patent law and most often imposed on patent licensees the following: limitations on the number of suppliers, on price-fixing and on the scope of the patent, the obligation assumed by the licensee not to attack the patent covered by the licence, the prohibition on acquiring from third parties similar licences or on carrying on activity in a field not touched by the patent, as well as restraints for the period exceeding that of the patent. Restraints applied in connection with price-fixing and with recognition of the scope of the licensed patent are not invariably considered to lie outside the sphere of patent rights¹⁰⁶).

Dittrich-Schönherr make the following comment in regard to the position of licensing agreements in the context of the existing Cartels Act:

“Licensing agreements (covering patents, trademarks, industrial designs, copyright and non-protected inventions) may not be defined as cartel arrangements, even if they must be regarded as associations, when the restraints agreed upon in using these said rights do not exceed the limits assigned to them by law. In such cases the grant of a restricted licence represents a relaxation of the monopoly belonging to the holder of the industrial property right which, for that reason alone, cannot be considered as an arrangement to *restrain* trade. The case is different with restraints imposed on the licensee which go beyond the scope assigned by law to the said rights, such as restraints on price formation or limitations of the licensee beyond the term for which the patent is valid. In such cases the *intent* of the parties to the agreement, especially of the owner of the licence, making the restraints, is of special relevance¹⁰⁷).”

¹⁰⁵) To be mentioned as fundamental to the interpretation of Austrian law: F. Schönherr, “*Fallen Lizenzverträge unter das Kartellgesetz?*” (Is the Cartel Act applicable to licensing agreements?), published in *Oesterreichische Blätter*, Nos. 5/6 and 7/8, May-June 1952; Dittrich-Schönherr, *loc. cit.*, 1958, p. 7.

¹⁰⁶) *Loc. cit.*, Schönherr, June 1952.

¹⁰⁷) *Loc. cit.*, p. 7, comment 10.

Schönherr gives a negative reply to the question whether the provisions of the Patents Act concerning the abuse of patent rights considered as *lex specialis* exclude the application of the Cartels Act to patent licences. Not only is the Cartels Act more recent, but its provisions are much more severe. For example, according to the Cartels Act, restraints imposed on a licensee are from the start invalid unless entered in the Cartels Register, whereas such restraints can only be declared null and void in pursuance of paragraph 22 a of the Patents Act, and this only in cases where they are injurious to the public interest¹⁰⁸).

Austrian jurisprudence has only once so far had occasion to pronounce on the question whether a licensing agreement covering a (registered) trademark was contrary to the Cartels Act¹⁰⁹). The facts underlying the decision were as follows:

The plaintiff had introduced on the market a new lemonade under the trade name “Almdudler-Limonade”. It had granted a licence for the manufacture and sale of this drink to a large number of mineral water manufacturers throughout the territory of Austria. The licensees were specifically required to draw supplies of the necessary raw material to make the lemonade exclusively from a particular firm, which had obtained from the manufacturer of the raw material the exclusive agency for the whole of Austria. The defendant claimed that this provision of the license agreement constituted an invalid cartel arrangement, since it had not been registered as such. The Federal Supreme Court rejected this plea on the following grounds:

“When a licensing agreement stipulates that the licensee may obtain supplies of the necessary material, equipment or raw materials necessary to manufacture the product covered by the licence only from the licensor or from a third party nominated by him, this does not (automatically) mean that the object of such clauses is to restrain trade. In order to protect his trade reputation, a licensor is frequently obliged to impose on the licensee certain obligations regarding suppliers, as a means of ensuring that the quality of his product is uniform (Schönherr in *ÖBl.* 1952, pp. 19 and 26 *et seq.*). In his appeal against the decision of the lower court the plaintiff had rightly pointed out (quoting Schönherr-Dittrich, *Kartellgesetz*, 2, p. 7) that licensing agreements covering patents and trademarks, even if they have to be regarded as associations, must not be described as cartel arrangements if the restraints agreed upon concerning the exercise of the right of industrial property do not exceed its legal scope. The possibility of placing on the market branded goods of inferior quality cannot be left to the judgment of the licensee.

The object of the obligation assumed by the licensee to obtain supplies of raw material only from the undertaking mentioned by name may very well be to maintain an uniform quality of the lemonade which makes it a brand product. The agreement concluded between the plaintiff and the licensees, stipulating that the raw material was to be supplied by the firm Anton K., need not therefore necessarily be in the nature of a cartel arrangement. Although the prohibition on pur-

¹⁰⁸) *Loc. cit.*, 1952.

¹⁰⁹) Judgment of the Federal Supreme Court of June 16, 1959, in re “Almdudler-Limonade”, *OeBl.*, 1959, pp. 84 *et seq.*

chasing raw material from a firm other than the one specified in the agreement had been arranged with the sole object of guaranteeing the quality of the brand drink, its purpose was not to prevent price-cutting. The appeal is well-founded to the extent that the state of the dossier does not enable the nullity of the obligations assumed, by virtue of the Cartels Act, to be established. Accordingly, there need be no hesitation in regarding as legally valid, within the terms of the court procedure for a preliminary injunction the obligation imposed by the plaintiff on licensees to obtain supplies of the raw material needed to manufacture Almdudler lemonade exclusively from the firm Anton K."

In view of the co-existence of two so similar legal regulations as that of paragraphs 22a to 22e of the Patents Act and that of the Cartels Act, it is hardly possible to reach clear-cut legal decisions concerning the legal use of industrial property rights in Austria.

F. Switzerland

The Swiss Confederation has always tended strongly towards independent development in the field of patent law and cartel law. Some reference must therefore be made to historical antecedents in this country. Switzerland also played a part in the violent discussions which took place about a century ago among European, especially German, British and Dutch politicians and engineers on the question whether protection of inventions by patents was justified or not. In 1861, for instance, the Government of Prussia asked the Swiss Government for its opinion concerning the effects on the development of Swiss industry of the lack of any patent legislation. Professors Bolley and Kronauer of the Federal Polytechnic in Zurich thought the absence of protection in Switzerland was in no way detrimental to industrial development. Later, it was referred to the fact that at the Paris World Exhibition of 1867 a large number of important Swiss inventions had been exhibited, although unprotected by patents, and that Switzerland on that occasion secured 35% of all industrial awards. It was said that school education was the most important factor in industrial prosperity and that real improvements were rewarded by a larger volume of trade. The best known opponent of the inventors' patent was Professor V. Böhmert of Zurich. It was he who in 1869, in the course of one of his extensive works on the economic aspects of patent protection, penned the famous words: "Patents are ripe for their fall and are increasingly recognized as being a rotten fruit on the tree of human culture"¹¹⁰). Böhmert's attitude accorded with that of the Swiss Government which, from decade to decade (in 1849, 1851, 1854, 1863, 1882 and 1887) had rejected all petitions in Parliament to introduce a system of patent protection. In its refusal in 1863, the Swiss Government pointed out that some of the most perceptive economists considered the principle of protection of inventions by patents

¹¹⁰) "Die Erfindungspatente nach volkswirtschaftlichen Grundsätzen und industriellen Erfahrungen, mit besonderer Rücksicht auf England und die Schweiz" (Inventors' patents according to economic principles, and industrial experience, with special reference to Great Britain and Switzerland), published in the review *Vierteljahresschrift für Volkswirtschaft und Kulturgeschichte*, Vol. 25, VIIth year, Berlin, 1869, pp. 28 et seq.

to be "pernicious and reprehensible". Only in 1907 was an Inventors' Patent Act passed in Switzerland. This act made provision for the possibility of granting a compulsory licence when it was warranted by the public interest. The discussions which took place in the Swiss Parliament in 1906 on the statutory establishment of expropriation and withdrawal of patents illustrate the importance attached by Swiss politicians to the existence of a public interest in connection with these legal interferences with private property¹¹¹). At that time it was intended to protect the Swiss textile, metal and watch industries officially against competition from the large industrial countries. In 1928, the patent act provisions on compulsory licences and expropriation were adapted to the text of the Convention of the Paris Union, as revised at The Hague. The new Patents Act of 1954 maintained the principle of the grant of a compulsory licence when the public interest so required (Art. 40). In this context the official statement of reasons says that "the public interest may be threatened when, for instance, products essential to the public welfare are marketed at prices beyond the means of wide sections of the population"¹¹²). The provision in question is also aimed to provide means of safeguarding the public interest in cases where an action of law neither for a licence nor for the forfeiture of a patent can be started on account of the removal of a local obligation to exploit the invention¹¹³). In a supplementary message, dated December 28, 1951, on the draft revision of the Patents Act, the Commission of the National Council (*Nationalrat*) for the first time approached the question we are considering in this paper. In connection with Article 40 mentioned above, it issued a statement with the characteristic title: "Patents as weapons used by cartels in the struggle of competition"¹¹⁴). The Commission of the National Council thought the question to be one which could not be answered without a long and difficult enquiry, and that, in addition, such an enquiry would go beyond the framework of a revision of the Patents Act. In its opinion, patents undoubtedly play a prominent part in the economic policy of cartels, but do not by any means constitute the only weapon at the disposal of the latter. The Commission also recalled that the Federal Department of National Economy was already studying the question of cartel legislation and that, in the extensive enquiries it was to undertake on the organization of the Swiss economy, it would also have to "consider the part played by patents in the hands of cartels". For this reason it did not feel that it was advisable to take up the question within the framework of revision of the Patents Act¹¹⁵). These comments made by the Commission were pertinent in themselves, since in April 1936 the Price Study Commission set up by the Department of National Economy had been assigned the task of undertaking a study of cartels

¹¹¹) *Bulletin sténographique du Conseil des Etats*, Vol. 16 and 17, Berne, 1906 and 1907.

¹¹²) Message from the Federal Council to the Federal Assembly on the revision of the Inventors' Patents Act, of April 25, 1950, Berne, 1950, p. 56.

¹¹³) *Loc. cit.*, p. 56.

¹¹⁴) Supplementary message from the Federal Council to the Federal Assembly on the draft revision of the Inventors' Patents Act, Berne, 1951, pp. 19 et seq.

¹¹⁵) *Loc. cit.*, p. 20.

in Switzerland in order to obtain an overall view of the position. After 15 years of work and after carrying out an enquiry into more than nine of the most important branches of Swiss commerce and industry, and publishing the results, in the spring of 1951 the Price Study Commission was directed to draw its conclusions from the enquiry, submit a report thereon and give its opinion on the advisability of cartel legislation¹¹⁶). The results of this assignment were submitted in 1957 in the form of a voluminous report entitled: "Cartels and Competition in Switzerland", prepared under the direction of the chairman of the Price Study Commission, Professor F. Marbach. Owing to the careful manner in which the available material was systematically evaluated (it represents, however, merely *voluntary* information given by the persons interrogated), the enquiry is rather unique in the literature existing in the cartel field. Industrial property rights are considered under the title: "Customary horizontal relationships created to achieve the purpose of a cartel", and the subtitle: "Agreements about patents and licences". The report expresses the opinion that patents acquire the features of cartels only when the licensing agreement is accompanied by specific subsidiary provisions, covering, for instance, prices or conditions of production, territorial division of markets and exchange of know-how and (engineering) advice¹¹⁷). As regards the various forms of exploitation of patents liable to impose restraint of trade, the Commission concurred with the distinction made by Neumeyer in 1932 between cooperation by indirect ("*unechte*") patent communities, "real" ("*echte*") patent communities by so-called patent pools¹¹⁸). The first mentioned form arises from the conclusion of an agreement or several parallel or subordinated agreements for purposes of exchange of industrial property rights, in most cases in the legal form of a common, legally independent agency; in the second case, there is a community agency proper which, in addition to its main function of administering patents, has other duties to fulfil; lastly, the pool represents a special form of collective patent exploitation¹¹⁹). The report presented in 1957 by the Price Study Commission, in enumerating measures liable to restrain trade and to lower costs of production, refers in its summary to "the common exploitation, at fixed prices, of patents and licences, as well as of the organizational and technical know-how"¹²⁰). This statement, however, is not explained or supported by examples from the Swiss economy. The report then turns to patents, in the summary called "cartel rationalization", which is a subheading in the section devoted to the organization of Swiss cartels covered by the enquiry¹²¹), whose agreements sometimes include contractual exchange of know-how (i. e. technical know-how).

¹¹⁶) The so-called Cartels Enquiry covers the following industries: stone and earth, wood and glass, paper and cardboard, foodstuffs, clothing and ready to wear, floor coverings (leather and rubber), ferrous and other common metals, dairying, textile industry and textile commerce.

¹¹⁷) *Kartelle und Wettbewerb in der Schweiz*, pp. 85 *et seq.*

¹¹⁸) *Patentgemeinschaften und deren Aufbau bei amerikanischen Industrieverbänden* (Patent communities and their structure in American industrial associations), Marburg, 1932.

¹¹⁹) The question of so-called patent cartels was surveyed in detail by F. Neumeyer in *Patentkarteller* (in Swedish), Stockholm, 1947.

¹²⁰) *Loc. cit.*, p. 200.

¹²¹) *Loc. cit.*, p. 243.

In its final summary the report of the Study Commission makes the general remark that "Switzerland is cartellized on a wide scale and, considering its limited area, contains an extremely large number of cartels"¹²²). In the author's view, cartels which use patents as a means of cooperation or exchange, in order to strengthen their collaboration, are no exception. In Switzerland contractual arrangements covering patents and imposing restraint of trade are probably to be found primarily in the machine, metal and chemical industries. This form of restraint of trade has, however, not so far been the subject of enquiry by Swiss authorities or analysis by experts in the field.

In Switzerland the problem of analysing cartels of various types is all the more difficult because the country has for long been the seat of a large number of *international* cartels, whose members reside and whose effects are felt mainly abroad, i. e. outside Switzerland itself. In the patent field international cartels are sometimes found whose object is to centralize the benefits and risks attaching to patent rights and which take the legal form of a "dual company" (*Doppelgesellschaft*), whereby a separate corporate body, in the form of a holding company, administers the common interests arising from the patents concerned. For instance, there was the Phoebus S. A., Geneva, which centrally administered the patent rights in respect of electric lamps belonging to shareholding undertakings domiciled in 18 different member countries; is also administered centrally the exchange of know-how and patents in the field as well as fixed sales quotas for electric lamps¹²³).

The first drafts for a Swiss Cartels Act did not specifically refer to industrial property rights, nor to agreements covering such rights. In the preliminary work of the Panel of Experts emphasis was placed on civil law provisions and it was proposed to set up a Cartels Commission, to which any information asked for was compulsory. Boycott measures, prohibitions on the supply of goods and price undercutting should, if liable to harm third parties, be regarded unlawful in principle. The preliminary work of the Panel of Experts set up by the Department of National Economy was analysed in 1959-60 for the first time by representatives of Swiss large-scale industry and patent specialists in respect of the contents and the scope of industrial property rights in relation to the future Cartels Act¹²⁴). A favourable reception was given to the idea incorporated in the draft law, in accordance with the proposal of Professor Marbach's report, not to make prohibitions with automatic effect but to be satisfied with provisions of a civil law character. Some concern was expressed concerning the general law concepts which judges might

¹²²) *Loc. cit.*, p. 203.

¹²³) For details see F. Neumeyer, "*Die Rolle von Patenten in internationalen Kartellen*" (The role of patents in international cartels), *Wirtschaft und Recht*, Zürich, H. 3, pp. 220 *et seq.*, in particular p. 230.

¹²⁴) H. P. Zschokke: (1) "*Der Entwurf der Expertenkommission für ein Kartellgesetz und der gewerbliche Rechtsschutz*" (Draft of the panels of experts on a cartel law and the protection of industrial property); (2) "*Stellungnahme zum Entwurf zu einem Bundesgesetz über Kartelle und ähnliche Organisationen*" (Recommendation for a draft federal law on cartels and similar organizations) by the Swiss group of AIPPI. The two documents were published in the *Revue suisse de la propriété industrielle et du droit d'auteur*, Part 1, May 1960, pp. 9 *et seq.* and pp. 28 *et seq.* See also M. Pedrazzini, *Brevetti industriali e limitazioni alla concorrenza*, Basle, 1959.

be called upon to interpret. The proposal to set up a Cartels Commission with representatives of science and economy independent of the administration, was also welcomed. This Commission, apart from being responsible for general supervision, would be authorized to institute *ad hoc* enquiries on the harmful effect of certain cartels and seek to suppress these effects by way of negotiations between the parties concerned. For reasons of legal security, there was scepticism regarding the setting up of a special administrative tribunal to decide in the last instance. Further, it was noted with concern that the revision of the Swiss Constitution in 1947 modifying the so-called economic articles (31-32) made it possible to institute a statutory supervision of cartels "or similar groupings". In this there was seen a "partial reception of American law"¹²⁵). While acknowledging that such groupings might exert an impact on the market similar to that of cartels, the critics of the draft law are probably right, that industrial property rights do not in themselves constitute "similar groupings", any more than does the "mere exploitation and use of industrial property rights as such"¹²⁶). Further, criticism was made of Article 5 of the draft, declaring unlawful all "measures" such as "prohibiting the supply of goods, lock-out of working people, discriminations concerning price or terms of purchase, price undercutting directed against specified competitors", without however indicating that such might be "measures" aimed to influence the market. Thus, measures adopted by a group of patent-holders might become unlawful restraints of trade, which are perfectly lawful in everyday business". Zschokke also held that it would be "real nonsense" to apply the term "cartel" to a community of patents whose object was to conduct common research work¹²⁷).

It may be noted that Article 4, sub-paragraph 2, of the new "European" cartel ordinance of 1962 exempts agreements, decisions and rules for concerted action (concluded after the coming into force of the ordinance) and having as their sole object research in common with a view to technical improvements, from the obligation to notify the European Cartel authority in Brussels, if the results of the activity are available to all parties and may be used by each of them.

The Swiss critics of the cartel law draft further expressed the opinion that the existence of restraint of trade should be assessed not in terms of extension of rights of industrial property, but according to the conditions they create on the market in relation to the products or services which they encounter¹²⁸). The possible creation of a "general compulsory licence of American type" in Switzerland was feared¹²⁹).

¹²⁵) Zschokke, *loc. cit.*, p. 15.

¹²⁶) *Loc. cit.*, p. 17.

¹²⁷) *Loc. cit.*, p. 23.

¹²⁸) In the author's opinion the correct solution would be to take account of both factors at the same time.

¹²⁹) The opinion of the Swiss group of AIPPI as to these matters was expressed in a letter of February 19, 1960, to the Federal Department of National Economy; in substance it largely follows the opinion expressed by Zschokke, see note 124. It states that legislation for the protection of industrial property in Switzerland already contains "all the safeguards which parliament has thought necessary to provide against possible abuses which may possibly lead to an improper exercise of exclusive rights". In particular, account had already finally been taken of the public interest in the Patents Act, and there would be no scope for an additional public interest, which it would be the task of a Cartels

In its official message of September 18, 1961, supporting a draft law on cartels and similar organizations, the Federal Council (*Bundesrat*) commented as follows on the scope of the future act. The act would not apply to monopolies based purely on legal protection of intellectual property (patents, trademarks, industrial designs and copyright). If it was the wish of Parliament to protect industrial property, such protection must not be counter-acted by some other act. Legislation to protect industrial property itself provides the necessary measures to combat abuses in that field, as for instance by provisions for compulsory licences found in Articles 36-40 of the Patents Act of June 25, 1954. These regulations exclude any additional measure adopted by virtue of the Cartels Act. It may, however, happen that, in order to limit competition, a right thus protected may be used in a way which goes beyond the legitimate scope of protection. A cartel of patent-holders could fix a certain price on the basis of a large number of patents it disposes of. In such a case the Cartels Act will apply. A clear demarcation cannot be made between these two fields of law. Accordingly, the last paragraph of the draft Cartels Act (Art. 22, sub-para. 2) made exception in favour of federal legislation in respect of unfair competition, protection of industrial property and copyright, and in favour of the provisions of public law, if these depart from those of the Cartels Act¹³⁰).

The late creation of a Swiss Cartels Act (as compared with other European countries) must not, however, lead to the belief that no judicial account has been taken in Switzerland of restraint of trade arising from industrial property rights. A solution has been sought in the provisions of private law in respect of freedom of contract and of the effects of collective arrangements and measures on third parties. Cartel arrangements are judged either from the standpoint of the *Civil Code* (Art. 2 on the prohibition of general abuse of a right; Arts. 27 and 28 on the protection of personality from unjustified contractual arrangements and from unlawful interferences by third parties), or alternatively from the standpoint of the so-called *Code des Obligations* (Art. 19 on freedom of contract; Art. 20 on nullity of agreements which are unlawful or contrary to good custom; Art. 41 on the obligation to repair damage caused unlawfully; Art. 160 on penal clauses and Art. 839 on the admission of members of a co-operative society).

Act to correct. Abuses directed against the public interest can be suppressed under Article 35 of the Patents Act. In view of the general independence and completeness of all Swiss laws to protect industrial property, it would be wrong to subordinate the Patents Act, in an American way, to a Cartels Act. Moreover, it was requested that agreements whose sole object was to accommodate private interests, i. e. patent licensing agreements, which are bilateral in nature, should not come within the scope of the Cartels Act. An incidental effect of research communities, with subsidiary pooling of patents, may be some restraint on trade. Since, however, their aim is to rationalize in common, they should escape application of a cartels act. Restraint of trade in the form of a refusal to grant a licence or to supply goods to third parties who do not share property or license of an industrial property right, as also the obligation imposed on a licensee not to resell goods, should not be regarded as unlawful restraints, since there was no intent to apply discriminatory measures. The opinions given above clearly reveal a tendency to wish to remove industrial property as a whole from supervision and action based on cartel legislation.

¹³⁰) Message from the Federal Council to the Federal Assembly in support of a draft law on cartels and similar organizations, of September 18, 1961 (with the text of the draft law).

One example is given here to show the way in which Swiss courts have applied the provisions of the Civil Code and the *Code des Obligations*. In 1901 a stock corporation engaged in the manufacture, sale and leasing of patented shoe-making machinery had concluded a number of machinery leasing agreements with a Swiss factory making shoe machinery. After 1926 the latter refused to honour the agreements, whereupon the company holding the patents protecting the machinery concerned brought an action to prove the validity of the agreement. We cannot here go into all the details of the leasing agreements drawn up by the plaintiff, the United Shoe Machinery Company, of which the defendant signed several dozen at a time. Their substance is well known from American and European literature treating American anti-trust policy¹³¹). In a judgment rendered on January 11, 1932, the Zurich Commercial Court ordered the annulment of all the shoe machinery leasing agreements. The plaintiff's plea for reversal of this decision before the Federal Tribunal was withdrawn. The considerations underlying the decision may be summarized thus: The leasing agreements at issue had all been concluded for a fixed period of 20 years, apart from four, the duration of which depended on that of other leasing agreements. The expiry dates of the various agreements were spread over different periods, thus ensuring that when one agreement expired there were always others which continued to run and could not be cancelled, owing to their technical content, without seriously interrupting the various stages in the chain of manufacture of the foot-wear made by the machinery. Further, the plaintiff did not permit the cancellation of individual agreements as long as others would continue to run. The result was a continuous sequence of agreements by means of which the plaintiff was able to tie down the defendant indefinitely, the latter having no means of gradually shedding his contractual commitments. Thus, the defendant was involved for an indefinite period of time in a network of agreements which, as regards the beginning and the end of each new one, overlapped to such an extent that the livelihood of the licensee, and that of his employees and workmen, became increasingly menaced. The court held that the danger to which, from the outset, the livelihood of the firm taking the machinery on lease was exposed was sufficient proof that the agreements were contrary to good custom. In the Commercial Court's opinion, these agreements restricted economic freedom in a way contrary to good custom. Article 27 of the Civil Code, with a view to protecting the contracting parties, declares such agreements contrary to good custom and they become null and void. In addition, in this case the commitments assumed by the defendant were also null and void from the fact that the plaintiff could, because of them, compel the firm leasing the machinery to hire and use that machinery exclusively, even after expiry of the patents he owned. In this way he was able to extend indefinitely, as regards the time factor, the monopoly vested in a patent-holder, a monopoly which, according to the Patents

Act, was limited to 15 years (former Art. 10). At the same time, the terms imposed on the defendant tended, in the court's opinion, to extend the effects of the Patents Act. For that reason they were unlawful and accordingly became null and void. The statutory basis for pronouncing such agreement null and void is provided by Article 20 of the *Code des Obligations*. The court also pointed out that, as soon as better and cheaper machinery would be offered by third parties, as threatened to be the case especially after the expiry of the patents held by the plaintiff, the defendant would be exposed to inherent dangers capable of ruining his livelihood¹³²). Thus, more than, 30 years ago, Swiss courts had already made a clear pronouncement on unreasonable restraint of trade arising from the use of patents.

A somewhat different law case was decided at a later date, on September 5, 1955, by the Federal Tribunal. Two British concerns making electrical house-hold equipment in 1950 concluded an agreement with a similar undertaking established in Switzerland, the main provisions of which were: The Swiss firm obtained the right to manufacture in Switzerland electric floor-polishers on the basis of a system developed by the British firm and with the help of information supplied by the British firm. It had the right to sell them only in Switzerland, Belgium and Luxemburg. The British company undertook not to sell its products in these three States. The Swiss company authorized the British firm to use the processes and inventions developed by the former for rubbing and polishing floors, and placed at its disposal corresponding manufacturing plans. The contracting parties undertook to interchange their know-how and improvements in the manufacture of floor polishers. The British firm brought an action alleging that the agreement did not oblige the British firm, to whom the defendant had, in 1952, transferred the manufacture of its floor polishers, not to sell in Switzerland equipment for cleaning floors and that the firm was not obliged, under the penal clauses, nor required to pay damages. The lower court found that the agreement was valid and that the fact that no term had been fixed for the restraint on competing did not justify the conclusion that there was a lack of understanding "on one of the essential points of the agreement". Any necessary additional interpretation in this respect may be provided by the law or by the judge. In the latter's opinion, it was not the task of the Swiss court to examine the question, probably raised by the British plaintiff, whether the agreement at issue should not be regarded as null and void, according to British law, because it represented a so-called "restraint of trade"; the parties had tacitly agreed, in effect, that Swiss law should apply and the common wish of the parties is primarily decisive in matters concerning the law of contract. Moreover, the defendant could not be expected to know the secret formulae of the various parts of the accessories. The fact that the text of the agreement was mentioning patents did not warrant the conclusion that this was intended to mean secret processes for manufacturing the raw material used for the accessories. As regards the possibility of giving notice to terminate the agreement, the court held

¹³¹) See, for example, F. Neumeyer, *Monopolkontrolle in U. S. A.* (Control of Monopolies in the U. S. A.), Berlin, 1953, p. 103; or F. Neumeyer, *Patentkarteller*, Stockholm, 1947, chapter on "Patenttrusts", pp. 238 et seq.

¹³²) Judgment of January 11, 1932, published in the review *Blätter für zürcherische Rechtsprechung*, 1933, pp. 130 et seq.

that neither the restraint on competing nor the interchange of commercial know-how and improvements should be of indefinite duration, not to mention the fact that, according to the Swiss law of contracts hardly any obligations valid "for ever" exist. The possibility of giving notice to end the agreement depended in turn on the legal nature of the agreement at issue. It might be asked whether in Swiss law this was a case of a *lease*, or a *licensing agreement* or a *cartel-type agreement*. In the opinion of the lower court it was not a lease, since there was no payment of a periodical rental, nor a licensing agreement, as there had been no transfer of patent rights; rather was it a case of a cartel-type agreement, in the form of a so-called loose arrangement, in this instance a territorial cartel agreement with a division of markets, accompanied by a prohibition on competition and an exchange of know-how. The minimum term and the period of notice of such an agreement, which was similar to a partner relation in a company agreement, must be assessed freely by the judge; in the present case the minimum fixed term should be five years, with the possibility of giving notice of termination at the end of the last year of that period. The appeal court and the Federal Tribunal (Supreme Court) confirmed the judgment of the lower court. On one or two points the Federal Tribunal amplified the considerations. It stated that in the absence of a time limit the restraint on competition did not become directly null and void, but should be limited by the judge (in accordance with Art. 357 of the *Code des Obligations*). Neither was the agreement null and void because it had not been respected. As regards the nature of the agreement, the Federal Tribunal held that it was a case of "an agreement similar to a licensing agreement, accompanied secondarily by a territorial division"; it therefore presented features of both a licensing agreement and a cartel agreement. In view of the obligation to interchange new processes invented, the inability, which was unlimited in time, to give notice of termination constituted a close reciprocal obligation and one incompatible with Article 27 of the Civil Code, owing to the excessive restraints it placed on the economic freedom of the parties¹³³).

The two court decisions described above, which differ considerably both in time and content, give a relatively good idea of the way in which the Swiss courts judge agreements covering patents or patent licences, on the basis of existing civil law. It may be presumed that Swiss law will continue in the future to apply the principles stated, although a Federal Cartels and similar organizations Act has since been adopted by the Federal Chambers, i. e. on December 20, 1962¹³⁴).

A special feature of Swiss law is the comparatively important role played by the concept of boycotts, both in labour law and in cartel law; they have been the subject of numerous court decisions. After first adopting an attitude not unfavourable to boycott measures taken by associations and groupings, in the course of the fifties the Federal Tribunal gradually came to pronounce in favour of a stronger protection of groups and persons affected by boycotts and not organized

as cartels (outsiders)¹³⁵). In one of its most recent decisions the Supreme Court laid down the principle that a boycott of necessity violates the right of the individual to exercise economic activity freely, and that it is therefore, in principle, unlawful; on the other hand, the rights of the author of the boycott and those of the victim are both equally private in character. Both in intent and in the means used, a boycott may be lawful or not according to the circumstances of each case. The author of a boycott must, however, prove that he defends "manifestly preponderant lawful interests which he cannot protect in any other way"¹³⁶). A boycott may also, in principle, be exercised by means of industrial property rights, for example by preventing outsiders who wish to obtain a licence from using, in their industrial or commercial activity, patents, trademarks or industrial designs belonging to a cartel. Another form of partial boycott may be imagined, consisting of authority for a licensee to exercise industrial property rights owned by the cartel but on terms of price or manufacture which are discriminatory in character¹³⁷).

International Aspects of the Protection of Industrial Designs in the United Kingdom and in New Zealand

By J. W. MILES, Wellington, New Zealand

The proposals of the United Kingdom Design Committee¹) which were recently reviewed in *Industrial Property*²) are of relevant interest not only in the United Kingdom and British Commonwealth, but also in other member countries of the Paris and Berne Unions.

The protection of designs and models is a national obligation upon the Paris Convention countries and, of course, is the principal object of The Hague Agreement as revised in November 1960. The protection of "industrial designs" is also a current problem now being actively considered in the Scandinavian countries, by the E. E. C., and in the U. S. A.

From the standpoint of BIRPI it is therefore appropriate that these proposals be studied from the international aspect and in particular in relation to the present and future operation of the Paris and Berne Conventions.

This problem has an historical background and has been on the agenda of many Conferences for Revision of the Paris

¹³⁵) In connection with the numerous decisions of the Federal Tribunal concerning boycotts, see for example H. P. Zschokke, "Kartellpolitik und Kartellgesetzgebung in der Schweiz" (Swiss cartel policy and legislation), in Jahn-Junckerstorff, *Internationales Handbuch der Kartellpolitik* (International manual of cartel policy), Berlin, 1958, pp. 431 *et seq.*, in particular p. 446, note 25.

¹³⁶) Decision by the first Civil Court of the Federal Tribunal of December 20, 1960, in re Wwe. Alfred Giesbrecht Söhne v. "Vertglas", Genossenschaft der Schweiz. Glasgrosshändler, in *Recueil officiel des arrêts du Tribunal fédéral*, Vol. 86, Part II, pp. 365 *et seq.*, reproduced in part in a survey of the jurisprudence of the Federal Tribunal in regard to boycotts, published in the review *Schweizer Uhr* of March 15, 1961, pp. 9 *et seq.*

¹³⁷) The British Courts have given a decision on similar disputes (in favour of the cartel applying the boycott).

1) Report of Departmental Committee on Industrial Designs. Commd. 1808.

2) 1963, p. 102.

¹³³) *Basler Juristische Mitteilungen*, 1955, pp. 297 *et seq.*

¹³⁴) The law was published in the *Feuille fédérale* of January 10, 1963, pp. 1 *et seq.*

and Berne Conventions, but to a large extent it has for 50 years, fallen between two stools by reason of the fact that the scope of the subject matter was on each occasion considered wider than the issues before each particular Conference. It ultimately became obvious that if real progress were to be achieved all the issues, i. e. those affecting the Paris Convention, as well as those affecting the Berne Convention, would have to be considered together and the Resolutions of Geneva and Lisbon³⁾ formally confirmed this.

The subsequent Study Groups, however, did not achieve outstanding progress and there are two main reasons for this:

1. Some countries represented at such Study Groups had not yet considered the Design law aspect of the matter from the National law point of view and this was regarded as prerequisite to coming to any decision on the international aspects.
2. The United Kingdom which has had a Design law for many years, remained firmly opposed to providing a cumulative or alternative protection by Copyright.

The close competition in modern international trade, however, has now given some urgency to the need for better international protection and therefore the function of BIRPI can be of great assistance in reviewing the current projects for the development of the national law and considering their impact on the present and future operation of the Paris and Berne Conventions.

The Report of the United Kingdom Design Committee makes an important step forward, beyond what has long been the traditional attitude of Great Britain in confining the protection of industrial designs exclusively to the Design law. The Committee found that the evidence revealed "substantial support for the application of the principles of the law of Copyright to industrial designs"⁴⁾.

From the aspect of BIRPI however, it is regrettable that while the order of reference to the United Kingdom Committee stressed the importance of international protection, the whole problem seems to have been considered by the Committee primarily as a national one, and its investigation and report is mainly limited to the United Kingdom and to the traditional United Kingdom point of view. The position in other European countries is not seriously investigated⁵⁾ and it is particularly surprising that neither the Berne Convention, nor Article 18 of The Hague Agreement received any mention at all in the Report.

At European Conferences it has been difficult for delegates from other countries to contribute to a discussion involving the particularities of the United Kingdom law on this matter when opposed by legal experts from the United Kingdom explaining the reasons for the adoption and retention of the unique principle and provisions limiting the protection of industrial designs in the United Kingdom to the Design law.

It is for this reason that the recent change in the law affecting the protection of industrial designs in New Zealand

has a particular interest in other Paris and Berne Convention countries.

At the Lisbon Industrial Property Conference, New Zealand as a British Commonwealth country, voiced its disagreement with the traditional United Kingdom view on this matter. There is, of course, no question that New Zealand owes much to the law and legal traditions of Great Britain which, in general, it is proud to support and follow. On this point, however, it was considered that there were good reasons for disagreement. Moreover, it was considered important that such disagreement should be voiced at the international level because the stand that New Zealand took at Lisbon would bring New Zealand into line with the majority of Paris and Berne Convention countries.

This New Zealand view may be summarised as follows:

1. There are no major legal or practical difficulties involved in applying copyright in its full scope in respect of all artistic works.
2. Although in other Berne Convention countries there are differences of detail, the generally accepted principle — which has been repeatedly confirmed — is that an artistic work is protected by copyright even if essentially intended to serve an industrial purpose.
3. These principles would provide a solution of the present legal and practical defects of the United Kingdom and British Commonwealth Design law, and also result in a very desirable improvement in the national and international protection of industrial designs.
4. To deny copyright to some artistic works because they have a use or application in industry is repugnant to the whole law of copyright; such a discrimination is anomalous and inequitable because the utilitarian application or use of a copyright work is an inherent factor in the fundamental right which copyright confers — the right to make copies for profit.
5. The attempt to create a line of demarcation between so called "pure art" and other artistic works is a theoretical conception which does not fit the facts and is incapable of satisfactory application in practice. It is unrealistic in view of the fact that throughout the whole field of copyright the artistic and utilitarian factors are inextricably interwoven.
6. The protection provided by the Design law is inadequate to meet the needs of industry in regard to industrial designs coming within the category of "applied art".

The New Zealand Copyright legislation which came into force on April 1, 1963, and which gives sanction to these views, thus makes a contribution towards greater uniformity in Paris and Berne Convention countries. It, of course, does not mean that the existing Design law cannot, or should not be improved. The United Kingdom Design Committee has made some important recommendations which can still be, and no doubt will be, followed in New Zealand.

The effect of the recent change of the law governing the protection of industrial designs in New Zealand may be summarised as follows:

³⁾ *Industrial Property Quarterly*, No. 1, January 1959, p. 44.

⁴⁾ Paragraph 4, p. 7.

⁵⁾ See paragraph 38.

1. In the extensive field of "applied art", industrial designs coming within this category will now enjoy international protection by copyright in the large number of Berne Convention countries granting similar copyright protection.
2. This protection arises automatically without any formalities or payment of fees.
3. It does not preclude improvements to the existing Design law (e. g. as recommended by the Johnston Committee).
4. It takes into consideration the fact that international agreement upon the principles of Copyright and Design law is an important factor in the solution of this problem.
5. It can be reconciled with the existing provisions and principles of the Paris and Berne Conventions.

This recognition by New Zealand of "applied art" as being within the scope of copyright of course does not wholly solve the current problem of the national and international protection of designs. It is, however, a substantial solution, as the proportion of industrial designs coming within the category of "applied art" is probably now much greater than those outside this category, and for which the appropriate protection is under the industrial property law.

The great need is for "a cheap and effective international protection" for industrial designs, and in Berne Convention countries this can be provided by the law of copyright in the field of applied art.

The corner stone of the great edifice of the Berne Copyright Convention is "protection without formalities" and the surprising and outstanding success of the application of this principle also covers, in most member States, "applied art" as being legitimately within the scope of copyright.

New Zealand has now joined this majority and this lead among British Commonwealth countries may well be an important step towards similar action by other British Commonwealth countries.

The general attitude of the United Kingdom Designs Committee in regard to the international protection of "applied art" by copyright was that sufficient evidence was not available for consideration⁶⁾ and this action by New Zealand will give an added force to the majority view on "applied art" at Stockholm.

The forthcoming Conference at Stockholm will also provide the opportunity for a clarification of the issues in regard to the overlap of the Berne and Paris Conventions in this matter. It seems desirable to confirm that these Conventions are each complementary in covering a portion of the whole field embraced by this problem and that cumulative protection has long been found to work as satisfactorily in this field as in other branches of law⁷⁾. Where this principle is not accepted, however, alternative protection under the Copyright or the Design law, with the right to retain the advantages of copyright protection in the field of "applied art" seems to be the most satisfactory international solution.

⁶⁾ See paragraph 38.

⁷⁾ See Article 2 (1) of the Berne Convention; Article 18 of The Hague Agreement.

CONGRESSES AND MEETINGS

Congress of the International League against Unfair Competition

(Stresa, May 1 to 5, 1963)

The 18th Congress of the International League against Unfair Competition was held at the Conference Building at Stresa from May 1 to 5, 1963.

Mr. Coppola d'Anna, President of the League, presided at the opening meeting which was attended by a number of eminent persons from diplomatic, political, legal, economic and industrial circles, as well as by representatives of various public or private organizations of a national or international character, in particular the Commission and the Court of Justice of the European Economic Community.

The International Bureau for the Protection of Intellectual Property was represented by Mr. Ronga, Counsellor.

The working meetings were presided over in turn by Dr. Michel (Germany), Dr. Schönherr (Austria), Professor Franceschelli (Italy), Professor Plaisant (France), Maître de Caluwé (Belgium), Professor Martin-Achard (Switzerland), Professor Desbois (France) and Maître Ligi (Italy).

After discussion of the various international reports, based on national reports from fourteen countries, the following motions were adopted:

Question No. 1 (continuation)

*Repression of attacks on free competition
Formulation of a code of lawful practices*

The Congress, having heard Professor R. Plaisant and Maître Collin (France),

Reverting to its Dusseldorf resolution,

1. confirms its desire for harmonization of laws concerning the control of competition;
2. notes with interest that fourteen countries have responded to the wish expressed at Dusseldorf for the study of this question to be broadened;
3. notes the divergencies still remaining between the various legislations and, on the other hand, the appearance of supra-national control, considers that it would be premature to formulate a code of lawful practices which nevertheless continues to be a matter of concern to the League;

Considers it nonetheless necessary to continue to examine the most prevalent practices;

Considers, furthermore, that it would be useful to study relations between the repression of unfair competition, on the one hand, and rules guaranteeing free competition, on the other.

Question No. 2 (continuation)

Invocability of exclusivity contracts vis-à-vis third parties

- Study of a mode of publicity which could be adopted by the various countries.

— Harmonization of laws, particularly in the spirit of the Rome and Stockholm Treaties.

The Congress, having heard the report of Maître Benaventani (Italy) and statements by participants;

considering the interest of the economic sector in the exclusivity contract as a mode of distributing goods and services;

considering developments which have taken place in national and international legislation and jurisprudence since the Dusseldorf Congress,

decides:

1. to retain on its agenda the study of this contract, its scope, its effects and any publishing thereof;
2. to amend the title of the question, which shall become: "validity and scope of exclusivity contracts".

Question No. 3 (continuation)

Means of intervention to ensure respect for general interests in matters of unfair competition

The Congress, having heard the statement by Maître De Caluwé (Belgium), affirms, in the spirit of Article 10^{ter} of the Paris Convention, the value of admitting competent professional and interprofessional associations having legal competence to apply to a court of law, in the event of any act of unfair, fraudulent or prohibited competition adversely affecting the collective interests within their charge, for a stay leading at least to an interlocutory measure, without prejudice to other legal remedies relating to such acts.

Question No. 4 (continuation)

Sales regulations in the EEC and various other countries

The Congress, having heard the reports presented by Dr. Greifelt, Professor Hefermehl and Dr. Spengler (Germany), and having taken cognizance of the conclusions of the International Symposium on European Law, held at Brussels from October 12 to 14, 1961, regarding the problem of premium sales;

considering, on the one hand, that there is already fairly extensive concordance between the laws of most European countries regarding premiums and sales on special terms; that, on the other hand, only some of those States have laid down rules limiting the granting of consumer rebates,

is of opinion that it is not urgent to pursue the harmonization of municipal law but that having regard, in particular, to the Common Market, it appears desirable to tend towards the adoption of uniform solutions which reconcile the requirements of effective trade promotion with the interests of the consumer;

decides, accordingly, to pursue the study of this question and to retain it on its agenda.

New Question No. 1

Formulation of a theoretical definition of a commercial act which is unfair or fraudulent under present-day rules governing competition (civil, penal and administrative sanctions)

The Congress, having heard the report of Maître Ligi (Italy);

taking account of the evolution of facts and laws since the Paris Congress, decides

1. to continue to seek a definition of an act of unfair or fraudulent competition;
2. to study relations between the act of unfair or fraudulent competition and restrictive practices.

New Question No. 2

Conflicting legislation in matters of unfair competition

The Congress, having heard the statement by Maître Mosing (Austria),

notes that hitherto no agreement has been reached in the various countries for determining the law applicable to acts of unfair competition extending over several countries;

notes furthermore that the tendency of the courts to apply their national laws frequently leads to decisions which are not suited to the nature of the unfair competition;

and decides:

1. to continue the work undertaken:
 - (a) by examining the civil and penal regulations concerning conflicting legislation in matters of unfair competition. It is desirable to compare such regulations with the principles applicable in cases of infringement of laws on industrial property;
 - (b) by examining the criteria arising out of jurisprudence and doctrine and which tend towards a determination of the *locus delicti*;
 - (c) by seeking, particularly with respect to certain categories of acts of unfair competition, general principles for the determination of the applicable law whose selection can be recommended and which, should the case arise, could be the subject of an international convention;
2. to draw up a list of international conventions on the recognition and enforcement of judicial decisions, to the extent that such conventions are applicable to decisions handed down in matters of unfair competition.

New Question No. 3

Unfair competition resulting from press reports giving a critical appraisal of a product or service

The Congress, having heard the report of Professor Sordelli (Italy),

notes that the discussion has led to the definition of several topics which have been mentioned in connexion with this question, namely:

1. the responsibility of the commercial or industrial undertaking on account of publications which it disseminates or causes to be disseminated:
 - (a) where such publications consist of advertisements or other presentations, whatever the medium used;
 - (b) where the undertaking causes to be published or gives rise to information whose advertising character is not apparent;
2. the responsibility of the press and of radio-broadcasting and television organisms on account of:

- (a) publications which they disseminate and cause to be disseminated at the request of certain undertaking;
- (b) publications for which they bear the initiative,

decides:

1. to retain new question No. 3, thus defined, on the agenda, with the following title: "Responsibility of undertakings and information media on account of advertisements concerning products and services as well as undertakings";
2. to extend the study to information disseminated by whatever means, and through whatever media.

New Question No. 4

Abnormal price reduction as a means of unfair competition

The Congress, having heard the report of Dr. Greifelt (Germany),

affirming that in principle every trader or manufacturer is at liberty to determine his own prices,

notes that, in numerous countries, abnormal price reduction is sanctioned when it is contrary to honest practice or when it is designed to suppress or distort competition;

decides to continue the study of this question with a view to determining the right of each trader having regard to the requirements of sound competition, such study to include in particular the distinction of the various instances of abnormal price reduction.

Brussels Symposium, March 5 and 6, 1963

We shall also mention that, under the auspices of the International League against Unfair Competition and its Vice-President, Maître Franck, and with the participation in particular of the Belgian Association for European Law, a Symposium was held at the Conference Building in Brussels on March 5 and 6, 1963, the subject for consideration being "*Competition between the public sector and the private sector within the framework of the European Economic Community*".

A number of eminent persons took part in the Symposium, including Mr. Hans von der Groeben, member of the EEC Commission, as well as members of the EEC Department of Competition, and Mr. Deringer, Rapporteur of the Internal Market Committee of the European Parliamentary Assembly. The International Bureau for the Protection of Intellectual Property was represented by Mr. Paul Van Reepingen.

Six questions were examined, the discussion being presided over, in turn, by Professor Grassetti (Italy), Professor Desbois (France), Professor J. Basijn, former Minister (Belgium), and Professor Arendt (Luxemburg).

The topics considered were as follows:

Question No. 1

"Inventory of undertakings subordinate to the public authorities (whatever their level) which might be in competition with the private sector. Definition of their economic activity and indication of special treatment applied to them in fact and in law."

International Rapporteur: Mr. Branger, Director-General of the National Fund of State Markets (France).

Question No. 2

"Inventory of laws, doctrine and judicial and administrative jurisprudence concerning the concepts covered by the general topic of the symposium."

International Rapporteurs: Maîtres Beneventani, Ligi and Ribolzi, lawyers (Italy).

Question No. 3

"Procedure pertaining to disputes brought before the European Commission and before the Court of Justice."

International Rapporteur: Mr. Van Reepingen, *Bâtonnier*, Royal Commissioner on the reform of judicial procedure, Professor at the University of Louvain (Belgium).

Question No. 4

"Definition of the concept of 'public undertaking'."

International Rapporteur: Mr. Buttgenbach, Professor at the University of Liege (Belgium).

Question No. 5

"Definition of the concept of 'service of general economic interest'."

International Rapporteur: Maître Franceschelli, Professor at the University of Milan and lawyer (Italy).

Question No. 6

"Definition of the concept of 'interest of the community'."

International Rapporteur: Baron Snoy et d'Oppuers, Honorary Secretary-General of the Ministry of Economic Affairs of Belgium (Belgium).

IVth Meeting of the Committee of Experts on the International Protection of Type Faces

(Geneva, October 7 to 10, 1963)

Report

by Th. Lorenz and J.-L. Marro

I

The IVth Meeting of the Committee of Experts charged with studying the international protection of type faces was held in Geneva from October 7 to 10, 1963. The Committee's task was to re-examine the texts of the drafts elaborated during the meeting of November 1962, taking into account the observations formulated by the States consulted since the last meeting. In addition, it had to decide on the form of the international instrument to be adopted for the international protection of type faces. Finally, it had to express its view as to how the work could be carried on in the light of what they had achieved.

Professor G. H. C. Bodenhausen, Director of the United International Bureaux for the Protection of Intellectual Property, welcomed the assembled experts and observers. Mr. J.-N. de Bavinchove, the French expert, was unanimously elected President. He gave an address which is attached to the present report (Annex I)¹).

The Committee of Experts was composed as follows:

Austria

Mr. Th. Lorenz (Rapporteur), Ratssekretär des Patentamtes, Bundesministerium für Handel und Wiederaufbau, Referat Gewerblicher Rechtsschutz, Vienna.

Czechoslovakia

Mr. J. Rodr, Technical Expert, The Graphic Arts Industries Association, Prague.

Mr. M. Spúnda, Head of Section, Office for Patents and Inventions, Prague.

France

Mr. J.-N. de Bavinchove (President), Civil Administrator, Ministry of Industry (Institut national de la propriété industrielle), Paris.

Mr. R. Labry, Counsellor of Embassy, Ministry of Foreign Affairs, Paris.

Germany (Fed. Rep.)

Mr. E. Born, Verbands-Geschäftsführer, Offenbach/Main.

Mr. G. Schneider, Regierungsdirektor, Bundesjustizministerium, Bonn.

Hungary

Mrs. I. Bognar, Jurist, National Office for Patents and Inventions.

Italy

Mr. Paul Marchetti, Central Patent Office (Ministry of Industry and Commerce), Rome.

Netherlands

Professor G. W. Ovink, Amsterdam.

Mr. W. M. J. C. Phaf, Head of the Legal Section of the Ministry of Economic Affairs, The Hague.

Mr. E. van Weel, Member of the Patent Council, The Hague.

Spain

Mr. E. Rua Benito, Jurist, Head of Section, Registry of Industrial Property, Madrid.

Sweden

Mr. G. Sterner, Assistant Judge of the City Court of Stockholm, Ministry of Justice, Stockholm.

Switzerland

Mr. A. Hoffmann, Vice-Director, Fonderie de caractères Haas S. A., Münchenstein (Bâle-Campagne).

Mr. J.-L. Marro (Rapporteur), Assistant to the Federal Bureau of Intellectual Property, Berne.

United Kingdom

Mr. J. G. Dreyfus, Typographical Adviser to the University Press, Cambridge, and to the Monotype Corporation, London.

Mr. W. E. C. Richards, H. M. Patent Office, London.

Observers

International Typographical Association

Mr. Ch. Peignot, President.

Maître G. Poulin, Legal Adviser.

International Association for the Protection of Industrial Property

International Chamber of Commerce

International Law Association

Professor E. Martin-Achard.

International League for the Prevention of Unfair Competition

Maître J. Guyet.

Professor E. Martin-Achard.

International Union of Lawyers

Maître J. Guyet.

International Literary and Artistic Association

Maître T. Limperg.

International Federation of Patents Agents

Mr. G. Jacobacci.

The *International Bureau* was represented by:

Mr. G. H. C. Bodenhausen, Director.

Mr. G. Ronga, Counsellor, in charge of Legal Affairs.

Mrs. I. Soutter, Assistant.

The members of the Committee were experts designated by their Governments. However, they acted in their personal capacity, as indicated in the invitation to the meeting of the said Committee which had been addressed to the States.

II

The Committee examined the draft Agreement concerning the protection of type faces and their international deposit. The following modifications were made in the text elaborated during the IIIrd Meeting:

Preamble

Certain particulars of the Preamble submitted to the Committee were omitted. It no longer refers to the desire expressed by the Diplomatic Conference of The Hague, seeing that the mandate thereby given was rather restricted. Similarly, it omits mention of systems of national protection currently in force.

Article 3

The terms "additional signs for reading purposes" of letter (b) were considered too vague, and were replaced by the terms "figurative signs". This envisages symbols, such as those used, for example, in railway time-tables to indicate sleeping cars, restaurant cars, etc.

Article 3 was completed by adding to the last sentence the words "destined to be inserted or used in typographical, typewritten or any other analogous compositions".

This addition was prompted, on the one hand, by the wish to restrict the meaning of the term "ornaments" to only those ornaments which are being used as accessories to typographical compositions.

¹) Annex omitted. (Ed.)

On the other hand, on the initiative of the Italian expert, it was thought necessary to explicitly include typewritten compositions within the definition of internationally protected subjects. This term aims primarily to cover type faces for typewriters.

The addition of the words "any other analogous compositions" covers the possibility of developments in printing technique.

This restriction, placed at the end of Article 3, also extends to the signs listed in (a) and (b), all of which serve the same purpose.

Article 4

Article 4 has been shortened and now only comprises one paragraph. The Berne Convention on the Protection of Literary and Artistic Works is no longer mentioned, since the present instrument is a Special Agreement within the meaning of Article 15 of the Paris Convention for the Protection of Industrial Property. The provision no longer stipulates the obligation for the Contracting States to adapt their legislation to the Agreement, since this requirement is considered obvious.

Article 5

The previous Article 5 gave rise to several objections.

The Committee of Experts considers that national legislation ought to be free to decide whether national protection shall be acquired by means of a deposit or by virtue of the provisions on copyright; it is also up to national legislation to stipulate which organ shall be competent to judge as to the validity of the deposits. Moreover, certain legislations admit the protection of a second deposit, if its holder has created type faces identical or similar to those of the first depositor, provided, however, that the contents of the first deposit were not known to him. Therefore, the Contracting States ought not to be held by the Agreement to consider that the existence of a previous deposit invalidated the subsequent deposit. Also, account has to be taken of certain legislations under which designs and models are protected only if they respond to two criteria, namely novelty and originality.

The new text consists of only one paragraph; it leaves the States free to make protection dependent either on the criterion of novelty, or on the criterion of originality, or on both criteria. The provision concerns protection acquired by means of the deposit as well as that obtained under the provisions on copyright. However, the experts are of the opinion that the application of the criterion of novelty is conceivable only if the protection is based on the system of deposit.

Article 6

The concept of novelty varies from one country to another. A conventional definition of novelty would compel a certain number of States to modify the principles of their legislation. This consequence might constitute an obstacle to several of them acceding to the present Agreement. Therefore, the definition of novelty contained in the previous text was omitted. The States are thus free to apply, on this point, their own legislation. Certain experts, among them particu-

larly those from the Netherlands, expressed regret that the draft did not contain at least a minimum definition of novelty.

Article 6 limits itself to defining the criteria of judging the novelty of type faces on the basis of their characteristic elements. The text of the provision implies the necessity for the tribunals to call upon the knowledge of professional circles qualified for such judgment.

The discussions at the meeting of the Committee of Experts clearly showed that the elements indicated under (d) and (e) should also form part of the designs deposited in order that they can be invoked subsequently for the judgment of novelty.

Article 7

Paragraph (1) contains two additions.

The first one explicitly states that protection entitles the owner of the right to prohibit any reproduction "for any use whatsoever". This provision concerns, for example, the reproduction of certain letters on watch faces. The Austrian expert opposed this provision since, in his view, it excessively broadens the field of protection. The Swiss expert associated himself with this reservation.

The second addition points out that a reproduction is illegal even if its author had no knowledge of the type faces deposited.

Paragraph (2) gave rise to detailed discussions. The text adopted is in accordance with the views expressed by the majority of the experts. According to these views, a reproduction of type faces obtained by purely technical means (particularly by photography, using processes of distortion) shall be prohibited, whatever the aspect of the type faces obtained by such method of reproduction. It appeared justified to protect the owner of the deposit against the illegal operation of a third party, who obtains a new type face, without a creative effort, on the basis of the deposited type face.

The Austrian expert declared that, in his view, the owner of the right ought not to be entitled to prohibit such a reproduction, unless there still remained a resemblance between the subject deposited and that obtained by distortion, that is to say, if the latter presented the same elements of style and general aspect as the type face deposited.

The Italian expert made an analogous reservation.

In the new paragraph (3), the term "imitation" has been replaced by a more explicit expression: this clearly states that the States where protection is based on the criterion of originality — whether or not such protection was subject to the requirement of a deposit — can provide for enabling a third party to use identical type faces to those deposited, if he has created them without prior knowledge of those deposited.

Paragraph (4) deals with the exceptions from protection. The suggestion for them is taken from the Rome Convention of October 26, 1961, concerning the protection of performers, producers of phonograms and broadcasting organisations. It shall be permitted to reproduce deposited type faces in publications exclusively serving purposes of instruction or scientific research, or for purposes of quotation. This applies, for example, to type faces reproduced in a historical work on the development of type faces or in a newspaper article pub-

lished on the occasion of an exposition of typographical material.

Paragraph (5) has been added in order to dispell the fears of users of not being able to use the type faces purchased according to professional practice. These principles are also expressed in a decision taken on the occasion of the Congress of the International Federation of Printers in Vienna in June, 1963, and is set out in Annex II attached to this report²⁾.

Article 10

Upon the request of the professionals, the period of secrecy of sealed deposits has been reduced from three years to one year [paragraph (2)], in consideration of the objections raised by certain experts, particularly those from Czechoslovakia.

It is provided that a sealed deposit shall be published after its opening [Art. 12, paragraph (2)]. A depositor wishing to avoid publication of type faces under sealed deposit — the opening of which has been requested by a tribunal or any other competent authority — will have the possibility of withdrawing the deposit before it is opened, provided he has knowledge of the request for the opening addressed to the International Bureau by the competent authority. To this end, it is provided that the decision of opening the deposit at the request of the competent authority shall be communicated to the depositor.

The words “and without prejudice to the provisions governing the term of protection” at the end of paragraph (3) were cancelled, since the meaning of this passage did not appear sufficiently clear. As a result of this cancellation that in the States availing themselves of the option of Article 10, paragraph (3), the minimum term of protection of 25 years provided by Article 8 shall be counted from the opening, or, according to the national provisions, the publication of the sealed deposit.

The previous paragraphs (4) and (5) of the draft were omitted, since the possibility of subsequently completing a deposit is liable to create a situation which, from the legal point of view, may give rise to ambiguities.

Article 12

In paragraph (2) the words “on the date of” have been replaced by “after”, in view of the fact that in practice the publication of the sealed deposits cannot be made on the very day of the opening of the deposit.

Article 14

The text of paragraph (1) has been slightly altered so as to bring it in harmony with the provision of Article 8 (term of protection).

Article 15

The terms “renounce the effects of their deposit” have been replaced by “renounce their deposit”, since in the case of an open deposit withdrawal cannot bring about the suppression of all effects resulting from the deposit.

Article 17

The terms “change in rights arising from a deposit” were considered too broad and too vague. They have been replaced

by the terms “change affecting the property of a design of a type face covered by a deposit”. Moreover, influenced by Article 12 of The Hague Agreement concerning the International Deposit of Industrial Designs, as revised in 1960 at The Hague, the Committee added the word “valid”.

Article 19

Paragraph (1) has been brought into agreement with Article 18 of the above-mentioned Agreement of The Hague.

Article 20

This Article literally reproduces the provisions of Article 21 of the above-mentioned Agreement, with the only difference that the powers and duties of the Committee, as listed in paragraph (2), number (3), also extend to the fixing of the ceiling of the reserve fund.

Article 28 (new)

This Article provides for the establishment of Regulations concerning the implementation of this Agreement.

Article 29

The new wording of paragraph (2) leaves the future Diplomatic Conference free to decide into which languages official translations shall have to be established, taking into account which States shall sign the Agreement.

Modifications of terminology or purely formal ones were made to Articles 1, 2, 9, paragraphs (1) and (4), and Article 13.

III

The working programme of the IVth Meeting of the Committee of Experts included examination of the proposal of the German experts concerning an additional protocol to The Hague Agreement on Industrial Designs, as well as the form to be given to the new international instrument for the protection of type faces.

In view of the modifications made to the draft Agreement, the German expert declared that the text adopted enabled him to withdraw his proposal for an additional protocol. This has, therefore, become immaterial.

IV

In regard to the Implementing Regulations, several amendments and additions have been proposed. In view of the nature and the number of modifications to be made to this text, it was decided to entrust a restricted committee with the task of resuming the examination of these Regulations as well as of the Table of Fees, on the basis of a text elaborated by the International Bureau.

V

The special provisions set out after the draft Table of Fees have been omitted.

The Committee considers that the deposits of type faces made on the basis of The Hague Agreement concerning the International Deposit of Industrial Designs, which are not very numerous, do not justify the adoption of special rules of a transitory nature.

²⁾ Annex omitted. (Ed.)

VI

The Committee of Experts considers that it is now for the Governments to decide on the appropriateness or otherwise of convening a Diplomatic Conference for the adoption of an Agreement concerning the International Protection of Type Faces.

It requests BIRPI

- to transmit to the States of the Paris Union the draft Agreement and the present report;
- to consult the countries of the Union who have shown, or who will show, an interest for the protection of type faces, on the question as to whether they desire the convocation of a Diplomatic Conference.

Geneva, October 10, 1963.

Annexes

- I. Text of Address given by the President, Mr. J.-N. de Bavinchove.
- II. Resolution adopted at the Congress of the International Federation of Printers (Vienna, June, 1963) by the Founding Committee of A.TYP.I. (PJ/12/Exp.Typ./No. 37)³⁾.

Texts adopted

Draft Agreement of for the Protection of Type Faces and the International Deposit thereof of, 1960 .

The Contracting States,

Moved by the desire to assure an adequate protection of type faces on an international basis;

Conscious of the special requirements to which such protection has to conform;

Considering, moreover, that certain systems of protection make such protection subject to a deposit;

Considering, therefore, that rules of substantive law should be drawn up to that end, and, on the other hand, that an International Deposit should be established;

Referring to Article 15 of the Paris Convention for the Protection of Industrial Property, of March 20, 1883, revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958,

Have agreed as follows:

Article 1

The States parties to the present Agreement shall constitute a Separate Union for the International Protection of Type Faces within the framework of the International Union of Paris for the Protection of Industrial Property.

Article 2

For the purposes of the present Agreement, the term "Separate Union" shall be understood to mean the International Union constituted by this Agreement; the term "Regulations", to mean the Rules governing the execution of the said Agreement;

the term "International Bureau", to mean the "International Bureau for the Protection of Industrial Property"; the term "International Deposit", the deposit of type faces with the said International Bureau.

Article 3

For the purposes of the present Agreement, the term "Type Faces" shall mean the designs of:

- (a) letters and alphabets as such with their accessories (such as accents, numerals and punctuation marks);
- (b) additional figurative signs;
- (c) ornaments (borders, fleurons, vignettes), intended to be inserted or used in typographical, typewritten or any other analogous compositions.

Article 4

The Contracting States shall undertake to ensure the protection of type faces in conformity with the provisions of the present Agreement, either by means of a special national deposit, or by the extension of the deposit already provided for designs and models by their national legislation, or by copyright provisions.

Article 5

The protection shall be subject to the condition that the type faces respond to at least one of the following two criteria:

- (a) novelty,
- (b) originality.

Article 6

The novelty of type faces shall be judged in relation to their general aspect and style, taking into account technical and aesthetic criteria recognized by qualified professional circles, in particular hereunder enumerated:

- (a) the relative proportion of the height and the width of the letters;
- (b) the relative proportions between the thick and thin strokes;
- (c) the particular shapes of the serifs and the terminals;
- (d) the spacing between the letters;
- (e) the alignment of type.

Article 7

(1) The protection entitles the owner of the right to prohibit any reproduction, whether identical or slightly modified, for any use whatsoever, of the type faces covered by the said protection, without his consent, whether the type faces had been known by the author of the reproduction or not, by any means, form or medium whatsoever.

(2) The protection shall also enable the owner to prohibit all reproduction obtained by the distortion of the said type faces by any purely technical means, whatever the results of such distortion.

(3) The Contracting States basing the protection on the criterion of originality may have the faculty to provide that the right defined in paragraph (1) of the present Article shall apply only in the case where the type faces were known to the author of the reproduction.

³⁾ Annexes omitted. (Ed.)

(4) The provisions of paragraphs (1), (2), (3) shall not apply to reproduction by a third party for his private use, nor to reproduction obtained exclusively for purposes of instruction, scientific research or quotation.

(5) The provisions of the present Article shall not prevent a person having legitimately acquired the rights of reproduction from using these rights in conformity with current professional practice, unless otherwise stipulated in the contract.

Article 8

The term of protection granted shall not be less than twenty-five years.

Article 9

(1) The nationals of the Contracting States or persons who are not nationals of one of the said States, but who are domiciled or who possess a real and effective industrial or commercial establishment in the territory of any one of the said States, shall be entitled to make an international deposit of type faces with the International Bureau in conformity with the provisions of the present Agreement.

(2) This international deposit shall enjoy protection identical with that provided by the national deposits referred to in Article 4 in all States members of the present Agreement.

(3) International deposits can be made with the International Bureau either:

- (a) directly, or
- (b) through the intermediary of the national Administration of a Contracting State providing that the laws of the said State so permit.

(4) The national legislation of each Contracting State may require that all international deposits, in respect of which the said State is held to be the country of origin, be dealt with through the channel of its national Administration. Non-observance of such regulations shall not, however, prejudice the effects of international deposit in the other Contracting States.

(5) Within the meaning of the present Article, the term country of origin shall denote the Contracting State wherein the depositor possesses a real and effective industrial or commercial establishment, or in the event of the possession by the said depositor of similar establishments in more than one of the Contracting States, the Contracting State he shall have designated in his application; if the said depositor has no domicile in any of the Contracting States, then the Contracting State of which he is a national.

Article 10

(1) The international deposit of type faces shall be made with the International Bureau under open or sealed deposit.

(2) Sealed deposits shall be opened at the end of a period of one year, or earlier at the request of the depositor or pursuant to the decision of a competent tribunal or any other competent authority, of which the depositor has been notified.

(3) Each Contracting State may declare at the time of the signature of the Agreement or of the deposit of its instrument of ratification or of accession, that a sealed deposit

shall be recognized as having legal effect in respect of the said State only as from the date of the opening thereof.

Article 11

(1) The deposit shall be accompanied by an application for international registration in triplicate, together with the fees, and the documents and declarations, in English or French, as required by the Regulations.

(2) An international deposit shall be considered valid from the date on which the International Bureau receives the application made in proper form together with the fees and all other documentation prescribed by the Regulations; if these are not received simultaneously, the said deposit shall only be valid from the date on which the last formality has been fulfilled.

(3) Upon receipt of an application for a deposit, whether open or sealed, the International Bureau shall immediately record the said application on a special register and shall publish it in the *Bulletin international des caractères typographiques*, copies of which shall be sent free of charge to the national Administrations of each of the Contracting States.

Article 12

(1) Each international deposit of type faces shall be published in the *Bulletin international des caractères typographiques* as soon as possible, and shall include in particular the following items:

- (a) the full reproduction in black and white, or, at the express request of the depositor, in colour, of the type faces;
- (b) the date of the international deposit;
- (c) whatever information shall have been prescribed by the Regulations.

(2) Sealed deposits shall only be published after the date of the opening thereof.

Article 13

Should an international deposit of type faces be effected within the six months following the prior deposit of the same type faces either in one of the States of the Union of Paris or in conformity with the provisions of The Hague Agreement, and should priority be subsequently claimed for the international deposit provided for by the present Agreement, the date of priority shall be the first of the aforesaid deposits.

Article 14

(1) The international deposit is effected for an initial period of fifteen years, with the possibility of renewal for further periods of ten years.

(2) During the first six months of the last year of each period the International Bureau shall send the depositor an unofficial warning of the date of expiry.

(3) Each depositor has the right to prolong the period of deposit of ten years by the payment of the fees prescribed by the Regulations and effected during the last year preceding the expiry of each period.

(4) Six months grace shall be granted in respect of renewals of international deposits upon payment of a surtax provided for by the Regulations.

Article 15

Depositors may, at any time, renounce their deposit by making a declaration addressed to the International Bureau which shall publish it in accordance with Article 11 above.

Article 16

The fees charged by the International Bureau shall be allotted:

- (a) to meeting the cost of the International Service of Type Faces;
- (b) to the establishment and maintenance of a reserve fund the amount of which shall be fixed and revised by the International Committee on Type Faces set up under Article 20 of the present Agreement.

Article 17

(1) The International Bureau shall enter in its registers and publish any change affecting the property of a design of a type face covered by a valid international deposit.

(2) These changes in registration shall be subject to a fee fixed by the Regulations.

Article 18

(1) The International Bureau shall deliver to any person, upon application and payment of a special fee, a certified copy of the entries on the Register opened in accordance with Article 11 (3) above.

(2) The information shall be accompanied by a certified copy, or, if required, by a reproduction of the type face certified as being in conformity with the open deposit.

Article 19

(1) The provisions of the present Agreement shall not impede the granting of rights wider in scope, that might eventually be enacted by the national legislation of a Contracting State and shall not in any way affect the protection extended to artistic works and works of applied art by the international Conventions and Treaties on Copyright.

(2) The Contracting States which have already granted special protection to type faces shall have the option of stipulating that the benefit of protection already covering designs or models shall not extend, within their territory, to type faces.

Article 20

(1) There shall be established an International Committee on Type Faces consisting of representatives of all the Contracting States.

(2) The Committee shall have the following duties and powers:

- 1. to establish its own rules of procedure;
- 2. to amend the Regulations;
- 3. to fix and to modify the ceiling of the reserve fund referred to in Article 16 (b);

4. to study matters concerning the application and possible revision of the present Agreement and all other problems concerning the international protection of type faces;

5. to comment on the yearly administrative reports of the International Bureau and to give general directives to the International Bureau concerning the discharge of the duties entrusted to it by virtue of this Agreement;

6. to draw up a report on the foreseeable expenditure of the International Bureau for each three-year period to come.

(3) The decisions of the Committee shall be taken by a majority of four fifths of its members present or represented and voting in the case of numbers 1, 2 and 3 of paragraph (2), and by a simple majority in all other cases. Abstentions shall not be considered as votes.

(4) The Committee shall be convened by the Director of the International Bureau:

- 1. at least once every three years;
- 2. at any time on request of one third of the Contracting States, or, if deemed necessary, at the initiative of the Director of the International Bureau or the Government of the Swiss Confederation.

(5) The travel expenses and subsistence allowances of the members of the Committee shall be borne by their respective Governments.

Article 21

The present Agreement shall be submitted to revision on the proposal of the International Committee on Type Faces.

Article 22

(1) Two or more Contracting States shall have the option at any time of notifying the Government of the Swiss Confederation that a common Administration has been substituted for their separate national Administrations and that, consequently, the whole of their territories shall be treated as a single State for the purpose of application of the provisions for international deposit.

(2) This notification shall only take effect after six months from the date of the communication thereof by the Government of the Swiss Confederation to the other Contracting States.

Article 23

(1) The present Agreement shall remain open for signature until

(2) It shall be ratified and the Instruments of Ratification shall be deposited with the Government

Article 24

(1) States members of the International Union for the Protection of Industrial Property which have not signed the present Agreement shall be permitted to accede thereto.

(2) This accession shall be notified to the Government of the Swiss Confederation through diplomatic channels, and notified by the said Government to the Governments of all the Contracting States.

Article 25

(1) The present Agreement shall come into force after the expiration of a period of one month from the date on which the Government of the Swiss Confederation shall have despatched a notification to the Contracting States of the deposit of three Instruments of Ratification or of Accession.

(2) Thereafter, the Government of the Swiss Confederation shall notify to the Contracting States all further deposits of instruments of ratification or of accession. Such ratifications and accessions shall become effective after the expiration of a period of one month from the date of the despatch of such notification, unless, in the case of accession, a later date shall have been indicated in the instrument of accession.

Article 26

The provisions of Article 16^{bis} of the Paris Convention for the Protection of Industrial Property shall be applicable to the present Agreement.

Article 27

In the event of the denunciation of the present Agreement, Article 17^{bis} of the Paris Convention for the Protection of Industrial Property will apply.

Article 28

The Regulations shall govern the details concerning the implementation of this Agreement.

Article 29

(1) The present Act shall be signed in a singly copy and deposited in the archives of the Government of

A certified copy thereof shall be forwarded to the Governments of each of the States signatories to, or having acceded to, the present Agreement.

(2) Official translations of the present Agreement shall be established in

**Draft Regulations for the Application of the Agreement
of for the International Protection
of Type Faces⁴⁾**

Article 1

(1) Every application referred to in Article 11 of the Agreement shall be worded in English or French, and submitted in triplicate on forms issued by the International Bureau.

(2) Each application shall contain:

- (a) the surname, name, or the business name, and address of the applicant; should there be an agent, the latter's name and address (it must be stated to which of the several addresses given the International Bureau is to send all correspondence);

⁴⁾ This draft regulation has been submitted to the members of a restricted Working Group and has led to certain observations on the part of some of the experts so far as the fees proposed are concerned, while the draft has been rejected by the International Typographical Association. The draft is nevertheless published for information.

- (b) a statement setting forth the details required under Article 9 (1) of the Agreement;
- (c) the nature of the deposit, namely, whether open or sealed;
- (d) a list of the documents and reproductions accompanying the application, together with a statement of the fees paid to the International Bureau;
- (e) if the applicant wishes to claim the priority referred to in Article 13 of the Agreement, a statement of the date and number of the deposit which gives rise to the right of priority, and, in the case of a national deposit, the name of the State;
- (f) the signature of the applicant or of his agent.

(3) The application may be accompanied by:

- (a) an application for publication in colour;
- (b) documents supporting any priority claim;
- (c) a statement revealing the name of the true inventor of the type faces which have been deposited.

Article 2

(1) For publication in black and white, a photograph or other fac-simile of the type faces shall be attached to each of the triplicate forms of application.

(2) For publication in colour, one positive film in colour with colour prints in triplicate of the type faces shall accompany the application.

(3) The documents mentioned in paragraphs (1) and (2) above shall not exceed 20 by 25 centimetres.

(4) Publication shall be identical in size to the deposited documents.

Article 3

(1) Where an agent intervenes, the documents shall be accompanied by a power of attorney. No legalisation is required.

(2) Any interested party, who, by virtue of the provisions of Article 17 (1) of the Agreement, requests the registration of changes affecting the ownership of a design of a type face, the subject of an international deposit in force, must provide the necessary documentary proofs to the International Bureau.

Article 4

(1) Six months before the date from which each period for which an international deposit may be prolonged, the International Bureau shall send a reminder to the owner of the deposit or to his agent if the name of the agent is recorded in the Register. The failure to despatch this notification will not have any legal effect.

(2) (a) The prolongation will take effect merely on payment, during the last year of each period before expiry, of the prolongation fee.

(b) If the prolongation has not been effected during the period prescribed by (a) above, the applicant may effect it during the six months grace provided for by Article 14 (4) of the Agreement, if, in addition to the prolongation fee, he pays the surtax fixed for this purpose. The prolongation fees and the surtax must be paid simultaneously.

(c) When the prolongation fee is paid, the number of the international deposit shall be indicated.

Article 5

When a court or any other competent authority shall order the communication to it of type faces deposited under seal, the International Bureau, when properly required, shall proceed to the opening of the deposited package, and extract and remit the contents thereof to the authority requiring it. The documentation thus communicated shall be returned in the shortest possible time.

Article 6

(1) The schedule of fees herewith attached forms an integral part of the present Regulations.

(2) Every depositor shall pay:

(a) at the time of filing his application for deposit, the basic fee and the international publication fee;

(b) subsequently, the prolongation fee.

(3) All fees shall be payable in Swiss francs.

Article 7

(1) As soon as the International Bureau shall have received the application for deposit in good and due form together with the total fees payable and the photographs or other fac-simile designs of the type faces, the date of the international deposit, the number of the deposit and the seal of the International Bureau shall be affixed to the three copies of the application and on each of the reproductions, or, in the case of a sealed deposit, on the latter. Each copy of the application shall be signed by the Director of the International Bureau or by the representative he shall have designated for the purpose. One of the copies shall be incorporated in the Register, and shall constitute the official act of registration; the second copy, which shall constitute the registration certificate, shall be returned to the depositor; the third copy shall be transmitted on loan by the International Bureau to any national Administration of a State member of the Agreement which shall request it.

(2) All prolongations, changes affecting the ownership of a design of a type face, the subject of an international deposit in force, changes in the name or address of the owner of the deposit or his agent, and declarations of renunciation effected under the provisions of Article 15 of the Agreement, shall be recorded and published by the International Bureau.

Article 8

(1) The International Bureau shall publish a periodical bulletin entitled the *Bulletin international des caractères typographiques*.

(2) The *Bulletin* shall contain for each deposit registered: reproductions of type faces deposited; the date and number

of the international deposit, the name or business name and the address of the depositor, the name of the State of origin of the deposit, the date and number of the deposit on which a claim of a right of priority is based and all other necessary information.

(3) The *Bulletin* shall also contain any information relating to registrations referred to in Article 7 (2) above.

(4) The *Bulletin* may contain indexes, statistics and other information of general interest.

(5) Information on selected registrations shall be published in French and English. All information of a general nature shall also be published in French and English.

(6) The International Bureau shall transmit, as soon as possible, a free copy of the *Bulletin* to the national Administration of each of the Contracting States.

Every national Administration shall receive, upon request, a maximum of five free copies, and ten copies at one third of the normal subscription rates.

Article 9

The present Regulations shall come into force at the same date as the Agreement.

Schedule of Fees

Deposit fee for the first period (15 years):

100 francs, plus 5 francs per letter, sign or ornament.

Publication fee:

— for publication in black and white:

100 francs per standard space (20 × 25 centimetres) used.

— for publication in colour:

400 francs per standard space (20 × 25 centimetres) used.

Prolongation fee:

for each period of ten years: 500 francs;

surtax [Art. 14 (4) of the Agreement]: 100 francs.

For the registration and publication of changes affecting ownership [Art. 17 (1) of the Agreement] or changes of names and addresses: 100 francs.

For supplying a copy of the certificate of deposit:
25 francs.

For supplying information contained in the Register:
25 francs per hour or fraction thereof required for the furnishing of the information.

For the certification of a photograph or graphic representation by any person requesting such certification:
25 francs.

BOOK REVIEWS

Historical Patent Statistics, 1791 to 1961, by *P. J. Federico*, Examiner-in-Chief of the United States Patent Office.

Eighty-two of the 84 pages of the February 1964 issue of the *Journal of the Patent Office Society* of Washington D. C., U. S. A., are devoted to a statistical survey of the number of patents applied for and/or granted in a number of countries between the period 1791 and 1961, i. e., during *one hundred and seventy one years*.

These statistics have been compiled with the care and accuracy which characterize all the works of Mr. P. J. Federico, Examiner-in-Chief of the United States Patent Office.

The statistical tables are preceded by an explanation of the source used and a thumb-nail sketch of the patent laws of the 44 countries included in the tables.

The tables are broken down in four series:

- (1) The first series covers the period 1791-1900 and gives the number of patents issued annually by some countries, by decades, in eleven tables.
- (2) The second series covers the period 1901-1950. The tables are arranged by countries and in most cases not only the number of patents issued but also the number of applications filed is indicated; in some instances the division between domestic and foreign origin is also indicated. Forty-three countries are dealt with in this series.
- (3) The third series covers the period 1951-1961 applying the same principles as the second series. It deals with twenty-two countries.
- (4) The fourth series deals with 21 countries and gives the number of applications filed or patents issued, or both, *subdivided according to the countries of origin of the applicants* for the ten years 1951-1961.

This series is, of course, of particular interest to all those who try to forecast the savings which the establishment of regional patent offices or increased cooperation between national patent offices could yield in terms of avoiding duplication of effort.

* * *

The following tables do not appear in Mr. Federico's survey but the data on which they are based were taken from his survey. They serve to illustrate some of the many interesting uses to which the data of the survey may be put.

A) Progression of number of patents granted

	Year	1800	1850	1900	1961
U. S. A.		41	883	24,644	48,476
France		16	2,272	12,400	33,150
Great Britain - United Kingdom		96	523	13,710	28,871
Canada		—	35	4,522	21,631
German States - Germany		—	308	8,784	20,550
Japan		—	—	586	20,946
Russia - U. S. S. R.		—	8	1,711	9,098

B) Number of patent applications in the year 1961¹⁾

1. U. S. A.	83,396	11. Belgium	13,443
2. Germany	58,188	12. Sweden	13,186
3. U. S. S. R. (1960)	53,896	13. Australia	12,898
4. Japan	48,417	14. Austria	9,892
5. United Kingdom	46,811	15. Spain	9,652
6. France	37,435	16. Brazil (1958)	8,069
7. Canada	25,447	17. Czechoslovakia	7,742
8. Italy	23,606	18. South Africa	5,312
9. Switzerland ²⁾	15,175	19. India	5,289
10. Netherlands	13,461	20. Denmark	5,265

¹⁾ Unless another year date is indicated after the name of the country.

²⁾ Including Liechtenstein.

21. Mexico	4,477	31. Portugal	1,214
22. Norway	4,049	32. Ireland	1,084
23. New Zealand	2,893	33. Rumania	961
24. Poland	2,525	34. Bulgaria	547
25. Finland	2,312	35. Turkey	475
26. Yugoslavia	1,834	36. Morocco	372
27. Israel	1,696	37. Tunis (1960)	227
28. Luxemburg	1,426	38. Syria	158
29. Egypt	1,383	39. Lebanon	133 ³⁾ 4)
30. Greece	1,379		

C) Proportion of Applications of Foreign Origin in 1961

(100 % = Total applications)

Canada	94 %	Australia	67 %
Belgium	85 % ⁵⁾	France	61 % ⁵⁾
Netherlands	83 %	United Kingdom	52 %
Sweden	71 %	Germany	38 %
Italy	68 %	Japan	28 %
Switzerland	68 %	U. S. A.	20 % ⁶⁾

D) Proportion of Patents granted to Foreign Applicants in 1961

(100 % = Total of patents granted)

Canada	94 %	Italy	63 %
Belgium	85 %	France	61 %
Netherlands	83 %	Germany	36 %
Sweden	71 %	Japan	35 %
Switzerland	66 %	U. S. A.	17 % ⁷⁾

E) Origin of Applications in 1961

	U. S. A.	Germany	United Kingdom
Total number of applications	83,396	58,188	46 811 ⁸⁾
Domestic	66,335 (80%)	35,895 (62%)	22,683 (48%)
Foreign	17,061 (20%)	22,293 (38%)	24,128 (52%)
Canada	1,646 (10%)*	195 (1%)*	446 (2%)*
France	1,774 (10%)*	2,440 (11%)*	1,968 (8%)*
Germany	4,175 (25%)*	See - Domestic -	5,677 (24%)*
Japan	1,082 (6%)*	639 (3%)*	604 (2%)*
Netherlands	594 (4%)*	1,212 (5%)*	783 (3%)*
Switzerland	1,248 (7%)*	2,174 (10%)*	1,476 (6%)*
United Kingdom	3,739 (22%)*	3,409 (15%)*	See - Domestic -
U. S. A.	See - Domestic -	8,073 (36%)*	9,574 (40%)*
Other foreign	2,803 (16%)*	4,151 (19%)*	3,600 (15%)*

It is interesting to note that *in the United States* 47 % of the foreign applications come from Germany and the United Kingdom; that *in Germany* 51 % of the foreign applications come from the United States and the United Kingdom; and that *in the United Kingdom* 64 % of the foreign applications come from the United States and Germany. A. B.

³⁾ The last data for Argentine are for 1950 (7039 applications).

⁴⁾ The total of these forty countries is 478,914.

⁵⁾ Proportion of patents granted to (rather than applications filed by) foreign applicants.

⁶⁾ No data published as to the U. S. S. R.

⁷⁾ No data published for Australia, the United Kingdom and the U. S. S. R.

⁸⁾ Includes provisional applications, not all of which are necessarily completed; when a convention priority is claimed, a complete specification *must* be filed.

* Percentages calculated on the basis that the total of foreign applications is considered as 100 %.

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The Protection of the Trademark (Proposals for the Revision of the Federal Trademark Law) (in French). Report presented by *Pierre-Jean Pointet*, Professor of Neuchâtel University, Secretary to the « Vorort de l'Union suisse du commerce et de l'industrie ». 1 Volume, 134 pages, 22 × 14 cm. Published by Helbing & Lichtenhahn, Basel, 1963. Price: SFr. 7.50.

In a report presented to the Swiss Society of Jurists, in September, 1963, which has since been reprinted in various reviews devoted to industrial property matters, Professor P.-J. Pointet has considered all the important questions in trademark law with a view to making a contribution to the revision of the Swiss Law of September 26, 1890, on trademarks.

Professor Pointet's study deserves special attention; instead of presenting compromise solutions which tend, as is so often the case with reports established by different groups which attempt to present an apparently unanimous opinion but whose theoretical basis remains weak for that very reason, it offers the fruits of the personal reflections of a man accustomed to legal analysis and the results of a practitioner's experience.

What characterises this study is, not merely a search for improvements of secondary importance, however necessary these may be either in national or international texts, but rather an attempt at a fundamental harmonization of the rules in the special field of trademarks with the general trends of the development of law and the structure of modern economy.

Far from being piecemeal, the solutions proposed by Professor Pointet form an entity which is not a mere codification of case law, but rather a reflection of basic considerations which no one can afford to overlook today.

The progressive development of industrial and commercial integration, arising from present day requirements, its intensification in spite of efforts to regulate agreements, mass production, the increasingly important role played by trademarks in modern economy, sometimes to the detriment of patents, the multiplicity and diversity of the forms of trademarks, their extension on an international level by means of radio and television publicity of which they are a primary element, are all factors which contribute to the transformation of trademark law and which cannot remain static in a developing world. Here, indeed, are ample subjects for lawyers to think about.

In his clear and concise work, Professor Pointet invites the reader to reflect upon the principal problems of today presented by the national

and international regulation of trademarks; the solutions proposed are always worth careful consideration even though they may not always lead to full agreement. At least, such solutions invite a detailed study of the problems by enabling the reader to appreciate more fully their complexity thanks to the many references to text-books and accompanying notes by the author which present a very valuable documentary of comparative law.

It is not our purpose here to go into the detail of the questions covered by Professor Pointet, whether these deal with the nature and the scope of trademark law or with the conditions under which they may be acquired and maintained, their transfer or their expiry. It is sufficient to say that the opinions of the author have been adapted to the most recent work in the field and take into account the exchange of views expressed at the Lishon Conference for the revision of the Paris Convention and in the course of subsequent international meetings. This will, I believe, suffice to emphasize the value of Professor Pointet's work.

Ch.-L. M.

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Copyright and Industrial Property Law Review (yearly review), Volume I, 25 × 18 cm. (1963). Edited by *Tassos Ioannou* and *Victor Mélas*. Athens (Akadimias 37).

In the field of copyright and industrial property a new annual review in Greek with a summary in English has made its appearance. To our knowledge, this is the first of its kind published in Greece and credit should be given to its promoters, Messrs. Tassos Ioannou and Victor Mélas.

This publication is in two parts, one devoted to copyright and the other to industrial property. In the first volume, apart from general studies such as the "Latest developments in Greek Copyright Legislation", by George Michaelidis-Nouaros, Professor at Athens University, and "Prevention of Competition in the Transfer of a Business", by Pan. Papapanayotou, Attorney-at-Law, there are published the principal legal decisions dealing with the subject matter in Greece in 1962.

The special interest of this new review should be emphasized. The efforts of its editorial board will certainly be rewarded by a wide distribution in interested circles; such distribution would no doubt be increased if the summary in English were accompanied by a summary in French.

C. M.

NEWS ITEMS

UNITED STATES OF AMERICA

Appointment of new Commissioner of Patents

We are informed that the nomination of Mr. Edward J. Brenner as Commissioner of Patents of the United States has now been confirmed by the United States Senate. He succeeds Mr. David L. Ladd.

We take this opportunity of congratulating the Commissioner on his appointment.

Calendar of BIRPI Meetings

Place	Date	Title	Object	Invitations to participate	Observers
Bogotá	July 6 to 11, 1964	Latin American Industrial Property Congress	Discussion of industrial property questions of interest to Latin American States	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 of Great Britain and Northern Ireland, 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 Member States of the Paris Union	—
Geneva	November 2 to 5, 1964	Committee of Experts for the study of a model law concerning inventions and technical improvements for developing countries	Study of a model law concerning inventions and technical improvements for developing countries	List of countries yet to be established	—

