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**Structural Evolution
of the International Unions
for the Protection
of Intellectual Property**

by

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Structural Evolution of the International Union for the Protection of Intellectual Property¹⁾

I

The traditional structure of the International Unions for the Protection of Intellectual Property

1. — The structure of the International Unions for the Protection of Intellectual Property and their joint International Bureau is at present undergoing a basic transformation.

The first factor which strikes the observer is the “antiquity” of the structure of the Unions and their International Bureau. This is clearly expressed in the following observations by Professor Robert Plaisant:

“The Bureau is no longer a surprise. When it was first established, it represented something novel, because international organisations did not then exist. It was established in order to meet certain well-defined requirements and not because of general concepts relating to the operating of an international society.

After seventy-five years it retains its originality but from another viewpoint. It no longer surprises by its existence but rather because it appears, however active it may be, as an institution of the past...”

¹⁾ The author wishes to express here his thanks to M. Richard Wipf, First Secretary at the United International Bureaux for the Protection of Industrial, Literary and Artistic Property, Assistant Head of the Legal Division, for his valuable contribution to this study.

2. — When internationalists write the history of inter-governmental organisations²⁾, they usually distinguish three periods:

(a) Before the First World War, the type of "Dependent Unions" first appeared which, with the exception of the International River Commissions, lacked representative bodies of the Member States, were not empowered to take steps against Members who did not respect their conventional obligations and whose management was entrusted to one State Member.

(b) After the First World War, with the League of Nations and the International Labour Office and, in particular after the Second World War with the establishment of the United Nations and their Specialised Agencies, the type of "Independent Unions" or intergovernmental organisations appeared which were autonomous and had general competence to take, within limits and according to procedures laid down by treaties, all necessary initiative to meet the requirements of an international society in their respective fields. Moreover, these intergovernmental organisations are endowed with bodies competent to take all necessary initiative on behalf of the organisation itself and to bind the States Members.

(c) Finally and more recently, "supra-national" organisations have made their appearance, symbolised by the European Communities which exercise powers which have hitherto never been conceded to international organisations; such powers are moreover characterised by the immediate action of the community which may affect persons directly i. e., without having to pass via the intermediary of any national procedure.

Now, if this evolution has taken place in a relatively short period of time, it has been such that the type of "de-

²⁾ See Jacques Secretan, "*Nations Unies ou Fédéralisme?*", reprinted from *Sirey*, 1958.

365/1966.

pendent Unions” which symbolise the past, have been obliged to transform their structure completely as is the case with the Universal Postal Union and the International Telecommunications Union, when such organisations have not been purely and simply absorbed by new organisations.

The reason for this change in the structure of international institutions is obvious. In a world in which international technical cooperation is being increasingly strengthened and in which it is inconceivable for example that the struggle against epidemics be limited by frontiers, former institutions of international cooperation tend to become real and effective supra-national public services among which those purely static international administrations, lacking the means of taking direct action, no longer find their place.

Hence the present tendency to strengthen the important international ministries which are the United Nations’ Specialised Agencies (Ministry of Health or World Health Organisation, Ministry of Labour or International Labour Organisation, Ministry of Education or UNESCO, etc.), and to do away with such Unions which formerly exercised certain powers in the fields now covered by these specialised agencies.

3. — After the Second World War it was discussed whether the International Bureau for the Protection of Industrial Property, known as the Paris Union and the International Bureau for the Protection of Literary and Artistic Works, known as the Berne Union, should be absorbed by other international organisations.

In fact, on the 29th August, 1948, the Economic and Social Council adopted the following Resolution 171 (VII):

“The Economic and Social Council,

Believing that the establishment of the United Nations and of the Specialised Agencies having wide responsibilities in the economic, social, cultural, educational, health and related fields makes desirable re-examination by Member Governments of possible duplication or dispersion of effort between these organisations and other existing inter-governmental organisations . . . ,

Recommends that Member States and the specialised agencies submit by the 1st February, 1949, their views regarding:

- (1) the possible termination, absorption or integration of any of these organisations into the United Nations or the specialised agencies;
- (2) relationships which might be established between any of the listed organisations and the United Nations or the specialised agencies . . .”

In the list of organisations susceptible of a “possible termination” were the Bureaux of the Unions of Paris and Berne³⁾.

If finally the United International Bureaux for the Protection of Industrial, Literary and Artistic Property survived this crisis, it is because the international ministry which was to absorb the Bureaux i. e. the International Trade Organisation, was never finally established⁴⁾.

These circumstances enabled the United International Bureaux for the Protection of Industrial, Literary and Artistic Property once more to take an active part between the International Ministry of Culture (UNESCO) and the International Ministry of Labour (ILO); the United International Bureaux were naturally called upon to play the role of Ministry of Intellectual Property as was pointed out by Professor Robert Plaisant:

“Perforce, the Bureau of the Union finds itself in the centre of a domain over which it alone can exercise a certain unifying influence. Documentation in itself and for itself is of no avail. Documentation must concern itself with people as well as texts. To be of any effective use it must be accompanied by information, discussions and persuasion. From then on, the Bureau abandons its work as a mere repository of archives and enters the path of diplomacy.”

4. — Since 1883 — when the Union of Paris was founded — and 1886 — when the Berne Union was first set up — the International Unions for the Protection of Industrial, Literary and Artistic Property possessed the following organs:

³⁾ United Nations Organisation, Economic and Social Council, Document E/818, 11th June, 1948, VIIth Session, pp. 11 and 29.

⁴⁾ See Resolution 262 (IX) of the Economic and Social Council of 10th August, 1949, and point 44 of United Nations document E/1687.

(1) *An International Bureau charged with*

- (i) centralising information relating to the Unions and communicating it to the States, making studies of general utility and publishing periodical reviews concerning the Unions;
- (ii) establishing annual management reports and communicating them to the countries of the Union;
- (iii) assisting the Administrations of those countries responsible for organising conferences of revision; and
- (iv) finally, holding itself at all times at the disposal of the countries of the Unions in order to supply them with any special information they may need⁵).

Furthermore, this Bureau is responsible under the terms of separate Arrangements for certain other administrative tasks: the international registration of trade marks, the deposit of industrial designs or models, the registration of appellations of origin, etc.

(2) *A High Authority, the Government of the Swiss Confederation, responsible for*

- (i) regulating the organisation and supervising the working of the Bureau;
- (ii) superintending the expenses of the Bureau and making the advances of necessary funds and for rendering an annual account which is communicated to all the Administrations of the Unionist countries; and
- (iii) finally, for receiving from the States and for communicating to them all declarations regarding the application of the conventions (adhesions, denunciations, extension to dependent territories, entry into force of a convention, etc.

(3) *Periodical Diplomatic Conferences of Revision* charged with the revision of Conventions with a view to the intro-

⁵ See International Union for the Protection of Literary and Artistic Works, Convention of Berne, revised at Brussels on 26th June, 1948, and the International Union for the Protection of Industrial Property, Convention of Paris, revised at Lisbon on 31st October, 1958.

duction of amendments calculated to improve the system of the Union and to fix the ceiling of the expenditure of the International Bureau.

(4) Finally, in the interval between the Diplomatic Conferences of Revision, the Paris Union has recently instituted Conferences of Representatives of all the countries of the Union which are scheduled to meet every three years to draw up a report on the foreseeable expenditure of the International Bureau for the next three-yearly period and to consider questions relating to the protection and development of the Union.

Furthermore, they may modify, by unanimous decision, the maximum annual amount of the expenditure of the International Bureau, provided they meet as a Conference of Plenipotentiaries of all the countries of the Union, convened by the Government of the Swiss Confederation.

Moreover, the above-mentioned Conferences may be convened between their three-yearly meetings by either the Director of the International Bureau or the Government of the Swiss Confederation⁶⁾.

(5) Since the Diplomatic Conference which revised the Berne Convention in Brussels in 1948, the International Union for the Protection of Literary and Artistic Works possesses a *Permanent Committee* composed of representatives of twelve States. This Committee is exclusively responsible for

“ assisting the Bureau of the Union in fulfilling the task entrusted to it under the terms of Article 24, para. (2) of the Convention signed at Brussels on 26th June, 1948 ”,

that is to say, to assist the Bureau in its task of preparing, with the Administration of the State in which the Conference of Revision is scheduled to take place, the programme of the Conference.

⁶⁾ International Union for the Protection of Industrial Property. Convention revised at Lisbon on 31st October, 1958.

Anxious to hasten the development already begun, the Diplomatic Conference held in Lisbon from 6th to 31st October, 1958, by the International Union for the Protection of Industrial Property for the revision of the text of the Convention, decided by means of a Resolution:

“That every three years, at the invitation of the Government of the Swiss Confederation, a Consultative Committee composed of representatives of all the countries of the Union shall meet and draw up a report on the foreseeable expenditure of the Bureau for the next three-yearly period.

Further, the Consultative Committee may be convened between such three-yearly meetings on the initiative either of the Director of the International Bureau or of the Government of the Swiss Confederation.”

5. — The technical evolution of the modern world is continuously accelerating. To be convinced of this, one only needs to consider the important developments in processes available to those works protected by the Berne Convention: records, magnetic tape recorders, radio-telephony, television, etc. The appearance of new technical methods give rise to new problems. For example, the protection of the rights of performers, producers of phonograms and broadcasting organisations has recently been the subject of an International Convention signed in Rome in October, 1961, and the protection of new plant products has also given rise to another Convention, signed in Paris, in December, 1961.

6. — The International Unions for the Protection of Intellectual Property at present do not have at their disposal competent organs with sufficient powers to order the examination of such problems with their necessary costly studies or to bind the States Members financially or suggest solutions to them.

The consequences of this state of affairs are obvious. In a work recently published⁷⁾ we have pointed out that such a situation gives rise to at least two serious dangers.

⁷⁾ Jacques Secretan, “*Vers l'organisation internationale de la propriété industrielle*”, in *Mélanges Marcel Plaisant*, published by Sirey, Paris 1960, pp. 175-176.

"The first danger is that a dispersion of intellectual property ... might well bring about the disintegration of the basic principles on which are established both the Conventions of Paris and Berne.

Another danger exists: in view of the general and perfectly understandable desire to see the field of intellectual property put more in order, such a re-organisation might well be undertaken elsewhere by international institutions having other functions and protecting different interests."

II

International Economic and Social Cooperation

1. — Articles 55 to 60 of the United Nations Charter deal with "international economic and social cooperation".

In pursuance of Article 55 of the Charter, the Organisation may deal with questions relating to the promotion of "higher standards of living, full employment and conditions of economic and social progress and development; solutions of international economic, social, health and related problems; and international cultural and educational cooperation".

As will be seen, this power, recognised by more than 100 States, of which a large proportion are Member States of the International Unions for the Protection of Intellectual Property, is applicable to those fields covered by the Conventions of these Unions.

2. — The Economic and Social Council has been set up in order to exercise this competence. Its composition, functions and powers and the procedure which it must adopt are set out in Articles 61 to 72 of the Charter of the United Nations.

In accordance with Article 62 of the Charter, it "may make or initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters"; in these fields it may "prepare draft conventions for submissions to the General Assembly" (of the Organisation) and "may call ... international conferences on matters falling within its competence".

Finally, under Article 63 of the Charter, the Economic and Social Council "may coordinate the activities of the

specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to Members of the United Nations”.

3. — The Economic and Social Council is, by reason of the powers ceded to it, the indispensable coordinating body with regard to international relations.

In this field its action is threefold.

(a) On the one hand, the Council may prepare draft international conventions and set up new intergovernmental organisations in respect of those fields in which conventions or organisations do not exist.

Thus it was that the Council convened a meeting in Havana from 21st November, 1947, to 24th March, 1948, namely the “International Conference on Trade and Employment”, which resulted in the creation of “the Interim Commission for the International Trade Organization” (ICITO), whose field of action is of particular interest to the Union of Paris since it covers the expansion of world economy and the development of industry and production (patents) as well as the exchange and consumption of goods (trade marks).

It also initiated the recently created “International Olive Oil Council”, charged with the development of the production, trade and consumption of olive oil, which is of direct interest to the Union of Paris and the separate Union of Lisbon for the Protection of Appellations of Origin.

(b) On the other hand, the Council may seek and propose to the States the appropriate means for remedying any possible over-lapping or dispersion of effort among the different intergovernmental organisations in the fields enumerated in Article 62 of the Charter. It is within the framework of this power that it adopted, in 1948, the Resolution already mentioned under point I which aimed at a considerable reduction in the number of intergovernmental organisations.

(c) Finally, the Economic and Social Council may “coordinate the activities of the specialised agencies”⁸⁾ through consultation with and by means of recommendations to them and through recommendations to the General Assembly and to the Members of the United Nations i. e. to the States (Art. 63 of the Charter).

4. — We have pointed out above that the traditional structure of the International Unions for the Protection of Intellectual Property present at least two main dangers: the first, that the dispersion of texts protecting intellectual property might well lead to a disintegration of the principles on which the Unions are based, and the second, that new conventions providing for the protection of intellectual property might be initiated within the framework of other international

⁸⁾ Article 57 of the Charter defines specialised agencies as inter-governmental organisations “established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health and related fields”;

in compliance with Article 63 of the Charter, “the Economic and Social Council may enter into agreement with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations”;

and by virtue of Article 57, para. 2 of the Charter, “such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialised agencies”;

there should not be confusion between the “organs of the United Nations” such as the Economic and Social Council, the International Court of Justice, the Permanent Central Committee for Opium or the Economic Commission for Europe, for instance, and the “specialised agencies” such as the International Labour Organisation, UNESCO, World Health Organisation, Universal Postal Union, or International Telecommunications Union for example. Whereas the “organs of the United Nations” are strictly dependent on the United Nations Organisation, the “specialised agencies” are independent organisations, often older than the United Nations or even the League of Nations and whose relationships with the United Nations or other intergovernmental organisations are governed by contractual agreements establishing mutual recognition, cooperation and reciprocal representation; these agreements have no other object than to provide for the indispensable coordination of the activities of intergovernmental organisations and do not entail any subordination of such organisations to the United Nations Organisation.

organisations representing other fields of activities and protecting different interests from those traditionally connected with such property.

The protection of intellectual property concerns both the conditions governing creations of the mind and the general interests of individuals and peoples and also the economic system. Articles 22 and 27 of the Universal Declaration of Human Rights recognises for everyone the right to "economic, social and cultural rights indispensable for the dignity and the free development of his personality" and to the "protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". Thus the objective sought by the authors of the International Unions for the Protection of Intellectual Property has been formally recognised by the United Nations and the competence of the Economic and Social Council is thereby established.

It is obvious that, if the legal principles which are at the bases of the International Unions for the Protection of Intellectual Property are to triumph, the competence of these Unions should not only be recognised by the intergovernmental organisations concerned but also by the Economic and Social Council of the United Nations, because of its own competence in this field and also because one of its tasks is to coordinate international activities.

It would be appropriate therefore to re-examine the Agreements concluded by the United International Bureaux for the Protection of Industrial, Literary and Artistic Property with UNESCO, ICITO, WHO, the Council of Europe, the Organisation of American States, the International Patent Institute and the International Olive Oil Council and to complete these Agreements by a general Accord with the Economic and Social Council of the United Nations.

It will not be sufficient to affirm the exclusive competence of the Unions so long as these are not represented in

regard to the States and the other international organisations by their own organs⁹⁾).

III

Recent Evolution of the International Unions for the Protection of Intellectual Property

A. International Union for the Protection of Industrial Property

1. — The proposals of the Director of the International Bureau to the Diplomatic Conference of Lisbon which, in 1958, revised the Convention of Paris, tended towards the above mentioned principles.

The Director of the International Bureau in fact suggested that, apart from the Conference of Revision whose task was to make amendments where necessary to the provisions of substantive law in the Convention, a periodical Conference composed of representatives of all the States of the Union should meet periodically in order to examine all administrative and financial questions; special tasks of the Conference were to be:

- (a) to appoint of a restricted Council;
- (b) to seek an Agreement with the Berne Union with a view to setting up a single Statute for the United International Bureaux;
- (c) to instruct the restricted Council as to the means of seeking an Agreement with the Economic and Social Council, including any other instructions on questions relating to the operation of the Union.

⁹⁾ An Agreement can only be concluded with the Economic and Social Council by an "agency" set up by an intergovernmental agreement, whereas neither the Convention of Paris, the Convention of Berne or even the United International Bureaux are "agencies". In order that their exclusive competence be recognised in the industrial property and copyright fields, each Union must become an "agency", i. e. a generally recognised juridical and international body, possessing organs fully representative of the States and a Secretariat; such transformation must be effected by means of an intergovernmental agreement.

2. — It may be of interest to recall here that this problem of the protection and representation of interests protected under the Union Convention was raised in similar circumstances within the framework of all the other international organisations. Generally speaking, all the other international organisations have provided for a Conference composed of representatives of all the States Members whose task is to examine all questions relating to such organisations; moreover, those international organisations which have a large number of Member States have also set up a restricted Council alongside the Conference emerging from the said Conference and able to meet more often and more easily than the general Conference itself. Thus, the Universal Postal Union, the World Meteorological Organisation, the International Labour Organisation, the World Health Organisation, the International Telecommunications Union, the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the United Nations Food and Agricultural Organisation (FAO), the International Civil Aviation Organisation (ICAO), the International Monetary Fund, the International Bank for Reconstruction and Development, the Council of Europe, the Central Office for International Railway Transport, the International Institute for the Unification of Private Law, the International Bureau of Weights and Measures, and the International Institute of Refrigeration have, for example, set up General Assemblies (called Assemblies, Councils, Conferences, etc.) and a Council or restricted Committee; on the other hand the International Patent Institute, the International Exhibition Bureau and the International Vine and Wine Office which group a smaller number of States have only one representative body which groups all the States Members and holds all the powers which in other organisations are shared by the Assembly and the restricted Council.

As will be seen, the Director of the United International Bureaux proposed solutions which had already proved fully successful elsewhere.

3. — Unfortunately, as indicated by the texts previously quoted, the States were unwilling at Lisbon to go as far as the Director of the United International Bureaux had advised.

Thus the Lisbon Conference decided to set up a “Conference of representatives of all the countries of the Union” which will meet periodically — every three years — and possessing relatively extensive powers as it will “consider questions relating to the protection and development of the Union” and will report on the financing of the policy determined by it but the representative character of which is not sufficiently emphasised.

As can be seen, the Diplomatic Conference of Lisbon in 1958 initiated the structural reforms of the Union of Paris which must take place but maintained the traditional structures of the Union i. e. periodical Conference of Revision, limited to amending substantive law, and the High Authority of Supervision which continues to control the operation of the International Bureau of the Union in liaison with the newly established administrative and financial Conference.

There is still a considerable difference between “a Conference of Representatives of all the countries of the Union which shall meet in order to draw up a *report*¹⁰⁾ on the foreseeable expenditure of the International Bureau for each three-year period to come”, a Conference of plenipotentiaries empowered to “modify, by unanimous decision, the maximum annual amount of the expenditures of the International Bureau” and the representative organs with general competence to which we are referring.

4. — This movement towards reform has however been pursued since 1958 in spite of understandable resistance.

¹⁰⁾ Our italics.

With regard to the General Convention, it soon became apparent that it would be necessary to complete the Conference of Representatives of the countries of the Union with a restricted body capable of meeting more often and at less cost. Thus, the "Consultative Committee" set up by the Lisbon Conference pending the establishment of the Conference of Representatives (which is in fact an interim Conference of Representatives), provided in its Internal Regulations, for the establishment of a restricted council called the "Permanent Bureau". The Permanent Bureau is composed of representatives of fifteen countries and has the task of preparing the sessions of the Committee and of "considering and reporting on the action taken on its advice" which gives it a very large field of action and also the opportunity to meet as often as may be necessary.

5. — Meanwhile, the restricted Unions, i. e. for the classification of trade marks, the registration of trade marks, the deposit of industrial designs and models, the protection of appellations of origin, have followed suit.

In 1957 and 1958, the Conferences of Nice and Lisbon established, in respect of the two Unions concerned respectively with marks and appellations of origin, "councils" grouping representatives of all the Member countries of the said Unions responsible for their administration. In 1960, the Conference of The Hague completed this development by creating within the frameworks of the restricted Union for the deposit of industrial designs and models, an "International Designs Committee" charged with the technical, administrative and financial management of the Union (Art. 21 of the new Agreement).

As these separate Unions group a restricted number of States in comparison with the General Union of Paris, it will probably not be necessary to complete their structure by setting up, alongside the councils or committees of the Unions, organs which only group a limited number of the States Members.

B. Union for the Protection of New Plant Products

1. — In a field closely related to industrial property, the International Conference which took place in Paris in November of 1961 for establishing an international Convention for the protection of new plant products¹¹⁾ followed the path already taken by the Union for the Protection of Industrial Property.

The new Union, which will be the third general Union to come within the framework of the United International Bureaux for the Protection of Industrial, Literary and Artistic Property, and whose object is the protection of new varieties of plants, will in fact possess the following organs once it comes into force:

- (a) a Council;
- (b) an International Bureau;
- (c) a High Authority of Supervision;
- (d) Conferences of Revision.

2. — The Council will include representatives from all the Unionist States and will meet in ordinary session once a year. The Council will be empowered:

- (i) to adopt its rules of procedure and, "after having consulted the Government of the Swiss Confederation", the administrative and financial regulations of the Union;
- (ii) to adopt the programme of future work of the Union, fix the date and place of Conferences of Revision, prepare the working documents and give the necessary instructions to the International Bureau;
- (iii) to make proposals to the High Authority concerning the appointment of the Secretary-General and the senior officials of the International Bureau;
- (iv) to examine and approve the accounts and annual budget and determine the contributions of the States Members; and

¹¹⁾ This Convention was concluded in Paris on 2nd December, 1961; it will come into force following ratification by three countries — probably in the course of 1963.

(v) generally, to take all decisions necessary to assure the efficient operation of the Union.

3. — The International Bureau will be directed by a Secretary-General, responsible to the Council. The Secretary-General shall submit to the Council a draft budget and the annual accounts and shall report on the activities and financial position of the Union.

4. — The High Authority, the Government of the Confederation, shall appoint the Secretary-General and all the senior officials of the International Bureau on the proposal of the Council; it shall control the expenditure and accounts of the Bureau and shall present to the Council an annual report on its supervisory function; it shall give its opinion to the Council on the administrative and financial rules of the Union; lastly, it shall establish rules (in agreement with the Unions concerned) governing the procedures for the technical and administrative cooperation between the Bureau of the new Union and the other Unions administered by the United International Bureaux.

5. — The Conferences of Revision will, of course, be responsible for amending the substantive provisions.

6. — It will thus be seen that this new Union is following the movement already initiated by the Union of Paris and is developing along very interesting lines.

Incidentally, it may be noted here that the new Convention provides for only one administrative and financial organ, the Council, and has not completed it by a smaller body. If, at a later stage, the need was felt for completing the structure of the Union by setting up such a restricted organ, then the Council could always do so within the framework of its competence under the Convention in the same way as did the Union of Paris for the Protection of Industrial Property.

C. International Union for the Protection of Literary and Artistic Works

1. — It is inevitable that the evolution referred to above will be followed by the Union of Berne for the Protection of Literary and Artistic Works which incidently was the first of the International Unions for the Protection of Intellectual Property to set up an Intergovernmental Committee, even though this Committee has only a consultative function.

It is therefore likely that the Diplomatic Conference of Revision which is scheduled to take place in Stockholm in 1965 will establish in respect of the Berne Union such representative organs as are necessary, namely:

- (i) a periodical conference with competence to examine all administrative and financial problems relating to the Union, to raise all new questions and to decide on the convening of Committees of Experts, to prepare proposals for the States, to vote the budget etc.; in other words, to act as the directing organ of the Berne Union;
- (ii) a restricted Council with competence to meet as often as may be necessary, to execute such decisions as may be taken by Conference and to act as the executive organ of the Conference.

It is also possible that, because of the urgency, the Diplomatic Conference of Revision will be preceded by a general conference of the States of both Unions which will examine structural reforms.

2. — Whatever may be the final decision taken by the States — wheter it be a diplomatic conference of revision for each Union or a general conference — a number of problems will present themselves.

The first concerns the rule of unanimity.

We are of the opinion that this rule is necessary so long as it is a question of revising existing conventions of private international law, as this rule alone safeguards the subjective rights acquired by those persons protected by the conven-

tions but the same rule is difficult to justify when it is a question of deciding on the general policy of a Union or when it is a question of deciding on the financing of that policy.

Whatever the situation may be at present, the rule of unanimity is giving way more and more to the principle of a qualified or simple majority, even in the case of the revision of existing conventions.

Thus, in the field of intellectual property, the recent development is as follows:

The Consultative Committee of the Paris Union takes its decisions by a majority of four-fifths of the votes cast (Art. 11 of the Regulations).

The International Designs Committee takes its decisions by a majority of four-fifths of the members voting for certain important questions — such as the alteration of the ceiling of the reserve fund or the establishment of the International Designs Classification — and by a simple majority in all other cases (Art. 21 of the new Arrangement of The Hague).

The new Union for the Protection of New Plant Products has gone even further since the Council takes its more important decisions e. g., budgetary decisions, by a three-quarters majority and all other decisions by a simple majority (Art. 22 of the Convention). Unanimity is no longer required even for revising the Convention, as a majority of five-sixths of the States members represented at the Conference of Revision is sufficient.

Lastly, the new International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations has not adopted the rule of unanimity since the adoption of any revision of this Convention will require a majority vote of two-thirds of the States represented at the Conference of Revision provided that this majority includes two-thirds of the States which, at the time of the revision Conference, are parties to the Convention (Art. 29 of the Convention).

As can be seen, the States are in the process of abandoning more and more the rule of unanimity, even when it is a matter of revising substantive law. We believe however that the Conference of Revision should maintain the principle of unanimity when it is a case of revising fundamental rules of the Convention¹²⁾, but that it might follow the above-mentioned precedents, with respect to the administrative and financial Conference of the Berne Union so that it may take certain particularly important decisions, such as budgetary decisions, by a qualified majority of say three-quarters, all other decisions being taken by a simple majority.

3. — Another problem which the Conference will have to decide upon is the extent of the powers to be given to the new organs.

Between a very detailed enumeration of powers of the new organs, which might at some future date prove to be incomplete because, for instance, of an unpredictable evolution of technical methods of reproduction (and past experience proves that such an evolution is possible) and a very general drafting of such powers, the Conference would be well advised in entrusting to the new organs all questions relating to the "safeguard and development of the Union". It being understood that the new organs should be given full administrative and financial powers and be in position to direct and define the general policy of the Union and decide upon the financing of the policy they have determined¹³⁾.

¹²⁾ Such were the proposals made by the Bureaux at the Conferences of Rome for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, and at Paris for the Protection of New Plant Products; the States, however, preferred the majority system.

¹³⁾ As an example, Article 21 of the new International Convention for the Protection of New Plant Products is drafted in the following terms:

- The tasks of the Council shall be the following:
- (a) to study measures to safeguard the interests of and to encourage the development of the Union;
 - (b) to examine the annual report of the activities of the Union and adopt the programme of future work of the Union;
 - (c) to give to the Secretary-General, whose functions are set out in

Naturally, the revision of the Convention should continue to be a matter for the Conference of Revision, the administrative and financial Conference being restricted to the preparation of the work of the Conferences of Revision.

4. — Another problem is that of harmonising the respective tasks of the new organs and those of the High Authority of Supervision. As can be seen from the preceding pages, it is becoming more and more evident that the States consider that the Conference of Representatives of all the States Members is the directing organ of the Union which should possess all the necessary powers to direct the Union effectively, which includes all administrative, operational and financial powers. This fact has been observed in the setting up of the new Union for the Protection of New Plant Products.

5. — The problem of the relations of the Councils of each of the Unions with the United Bureaux will also have to be settled. We have seen that the Union for the Protection of New Plant Products has provided for a Secretary-General as head of the Bureau responsible to the Council, whereas at the head of the Bureaux of the two other International Unions for the Protection of Intellectual Property is a Director who is not responsible to representative organs of the States.

If the unity of the protection of intellectual property is to be maintained, it is necessary to maintain a single Inter-

Article 23, all necessary directions, including those concerning relations with national authorities;

- (d) to examine and approve the budget of the Union and fix the contribution of each Member State of the Union in accordance with the provisions of Article 26;
- (e) to examine and approve the accounts presented by the Secretary-General;
- (f) to fix, in accordance with the provisions of Article 27, the date and place of the conferences referred to in that Article and take the measures necessary for their preparation;
- (g) to make proposals to the Government of the Swiss Confederation concerning the appointment of the Secretary-General and the officials of the senior grade;
- (h) generally, to take all decisions necessary to assure the efficient functioning of the Union.

national Bureau. Moreover, if this unity is to be reinforced it will be advisable to complete the work already accomplished by adding to the single Bureau a single Assembly of representatives of all the Unions.

One might therefore appoint a Director-General or a Secretary-General at the head of the United International Bureaux to be responsible to this single Assembly and appointed on the proposal of this Assembly whereas the common services of each General Union would be the responsibility of Assistant Directors-General or Assistant Secretaries-General appointed on the proposals of the Assembly of the Union concerned.

6. — Finally, the last problem which the Conference of Revision will have to examine is the form of the instrument relating to the new administrative and financial organs.

It will be remembered that the provisions dealing with the administration and financing of the Union were not included in the original text of the Berne Convention of 1886 but were the object of a separate Protocol. Subsequently the Protocol was inserted in the Union Convention.

It would be advisable if the Conference would take out of the Conventional text all administrative and financial provisions as such provisions will come within the competence of the new organs.

It is sometimes necessary to revise very quickly certain administrative and financial provisions. The naturally slow rhythm for the revision of provisions of substantive law contained in the Union Conventions and the long intervals between the Conferences of Revision (on an average 20 years) might well paralyse the new organs if the revision of administrative and financial provisions remain within the competence of the Conference of Revision¹⁴).

¹⁴) It may be recalled here that the necessity of being able to change quickly the ceiling of expenditure of the Union was clearly understood at the Brussels Conference in 1948, since that Conference amended Article 23 of the Convention by allowing the "Countries of the

Moreover, the setting up of the new organs should not be dependent on the more or less slow procedure of ratification by the States of revisions of substantive law. These new organs should be able to operate immediately following the Conference of Revision. If the provisions relating to these organs are contained in a separate instrument from that of the Union Convention, the States would be in a position to ratify them within a relatively short time without having first to revise their national legislation.

Finally, if a State is not prepared to ratify the new text of the Convention from the point of view of substantive law because it does not agree, for instance, with the form of conventional regulation of cinematographic rights, it would hardly be logical to prevent that same State from being represented in the new organs on the sole grounds that it had not ratified the revised Convention, although it is prepared to ratify administrative and financial rules immediately.

For all these reasons, we therefore believe that the States would be well advised to insert the administrative and financial rules in a separate instrument from the Union Convention, in, say, an Additional Protocol which the States might ratify immediately.

IV

The Future Evolution of the International Unions for the Protection of Intellectual Property

1. — In 1956, at the Congress of Washington of the International Association for the Protection of Industrial Property, the Director of the United International Bureaux for the Protection of Industrial, Literary and Artistic Property made the following statement:

Union" to substitute themselves, when necessary, for the Conferences of Revision. It would therefore be logical to allow representatives of those countries to be able to discuss these problems within the framework of the new organs.

“ Three years of experience with the Paris Union and thirty years of experience with other Organisations of States have led me to conclusions which I hope will be duly considered by the Diplomatic Conference at Lisbon. These conclusions are as follow:

- (a) The intellectual rights, whether they concern patents and trade marks or copyright, should be protected internationally, as are the rights contained in the Declaration of Human Rights; to this end, they should have the benefit of their own intergovernmental organisation in the same way as labour rights, the rights of the individual to health, or the rights of the individual and of peoples to security.
- (b) This intergovernmental organisation should be given its own proper authority in intellectual rights, and suitable organs to represent it, and those rights, effectively in international relations.
- (c) Lastly, this organisation should become a part of the family of the United Nations ” ¹⁵⁾.

In 1958, the Director of the United International Bureaux made the following proposals to the Lisbon Conference:

“ ...and charge the administrative conference with the following functions in addition to the exercise of the financial authority:

- appointment of a Council;
- study of an agreement with the Berne Union for the Protection of Literary and Artistic Works with a view to the establishment of a single Statute for the United International Bureaux for the Protection of Industrial, Literary and Artistic Property;
- instructions to be given to the Council with a view to the study of an agreement with the Economic and Social Council, and for all other questions concerning the functioning of the Union ” ¹⁶⁾.

Lastly in 1959, the Director of the United International Bureaux wrote the following ¹⁷⁾:

“ The Intellectual Property Unions will be able to function to the satisfaction of the States, the public and the creators when they have been given organs capable of winning back the initiative in the field of the international protection of intellectual property, that is to say, when the following structural reforms have been carried out:

¹⁵⁾ *Industrial Property Quarterly*, July, 1956, p. 65; *La Propriété industrielle*, 1956, pp. 148-149.

¹⁶⁾ Lisbon Conference, Preliminary Documents, Proposals with Explanatory Notes. First Volume, First Part, p. 10 of Point XXV.

¹⁷⁾ “Vers l’organisation internationale de la propriété industrielle”, *op. cit.*, pp. 179-180.

(1) The creation, at the head of all the Unions of intellectual property, both general and restricted, of a common organ with power to take all necessary steps with a view to the protection and strengthening of the Intellectual Property Unions.

(2) This common organ should, moreover, have the power to vote the overall budget necessary for implementing the policy which it is competent to determine, that is to say, the establishment of a single budget for intellectual property;

if this is not done, the multiplicity of separate budgets and special funds would make it very difficult for the representatives of States to control the expenditure of the sums paid to the United International Bureaux.

(3) A certain latitude should be left to this common organ enabling it to take decisions according to a majority system, be it simple or qualified;

here again, the rule of unanimity is valid so long as it is a question of revising provisions of international private law embodied in the existing Convention, but, applied to an organ charged with taking initiative, it can only cause difficulties; moreover, this rule is not effective and has never been effective when it is a case of adopting new international instruments.

(4) In other words, it is a question of creating a truly International Organisation of Intellectual Property, capable of taking its place beside the other existing important international organisations and of protecting the interests of intellectual property within the framework of the family of "specialised agencies".

2. — The Paris Union has already taken such a course. The Union for the Protection of New Plant Products has followed suit.

The Berne Union will inevitably follow the same path, either at Stockholm or even earlier.

3. — On the 19th December 1961, and at the instance of Brazil, the General Assembly of the United Nations adopted the following resolution:

The General Assembly,

Recalling its resolution 1429 (XIV) of 5 December 1959 on the possibilities of a further expansion of international contacts, as well as an increased exchange of knowledge and experience in the field of applied science and technology,

Taking note of Economic and Social Council resolution 375 (XIII) of 13 September 1951 and of the reports on restrictive business practices

prepared by the Secretariat and by the *Ad Hoc* Committee established under the above-mentioned Council resolution,

Bearing in mind that a United Nations Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas will be convened under Economic and Social Council resolution 834 (XXXII) of 3 August 1961,

Bearing in mind that access to knowledge and experience in the field of applied science and technology is essential to accelerate the economic development of under-developed countries and to enlarge the over-all productivity of their economies,

Realizing that the protection of the rights of the patent-holders both in their country of origin and in foreign countries has contributed to technical research and, therefore, to international and national industrial progress,

Affirming that it is in the best interest of all countries that the international patent system should be applied in such a way as to take fully into account the special needs and requirements of the economic development of under-developed countries, as well as the legitimate claims of patentees,

Requests the Secretary-General, in consultation with appropriate international and national institutions, and with the concurrence of the Governments concerned, to prepare for the Committee for Industrial Development, for the Economic and Social Council, and for the General Assembly at its eighteenth session, and taking into consideration any pertinent discussions which might take place in the United Nations Conference on the Application of Science and Technology for the Benefit of the Less Developed Areas, a report containing:

- (a) A study of the effects of patents on the economy of under-developed countries;
- (b) A survey of patent legislation in selected developed and under-developed countries, with primary emphasis on the treatment given to foreign patents;
- (c) An analysis of the characteristics of the patent legislation of under-developed countries in the light of economic development objectives, taking into account the need for the rapid absorption of new products and technology, and the rise in the productivity level of their economies;
- (d) A recommendation on the advisability of holding an international conference in order to examine the problems regarding the granting, protection and use of patents, taking into consideration the provisions of existing international conventions and the special needs of developing countries, and utilizing the existing machinery of the International Union for the Protection of Industrial Property.

This decision of the General Assembly once more gives rise to the possibility of a new international instrument dealing with industrial property being established within the framework of the United Nations, an instrument which might well be based on different principles from those which have been established in the Paris Convention.

4. — Consequently, the Permanent Bureau of the Consultative Committee of the Paris Union adopted, at its meeting on 29th and 30th March, 1962, a resolution charging a restricted Working Group to examine the entire structure and tasks of the Intellectual Property Unions and their Bureau and, in particular, (a) “the international status of the representative bodies and the United Bureaux of the Paris and Berne Unions and their Arrangements”; and (b) “relations with the United Nations and Switzerland”.

5. — It is obvious that any structural reform concerns both the Union of Berne and the Union of Paris. As M. G. Finniss, Inspector General, Chairman of the Consultative Committee and of its Permanent Bureau put it:

“It is also normal to envisage that the Member States of the Unions should be able to take part in the reorganisation of their Bureaux. Participation of the Member States might be foreseen in two ways:

- (a) either through the already existing consultative bodies whose terms of reference are precisely to give their opinion on all questions concerning the work, operations and development of the Unions and of the United International Bureaux; or
- (b) through a Joint Committee grouping representatives who would be appointed by each of the existing consultative bodies. This latter formula is obviously the simpler, since considerable practical problems would be raised if the Consultative Committees had to be convened, either in succession or simultaneously”¹⁸⁾.

The Permanent Bureau of the Union of Paris has thus charged the Working Group, which it has set up, to submit a complete report on the question of the structure and tasks

¹⁸⁾ Report of the President to the Consultative Committee of the Paris Union, Paris, 13th March, 1962, p. 3.

of the Unions and of the United Bureaux¹⁹⁾ and to submit such report to a Joint meeting of the Permanent Bureau of the Paris Union and the Permanent Committee of the Berne Union; this joint meeting may take place in Geneva in October of 1962. Following the work of this joint meeting, an *ad hoc* Diplomatic Conference might be convened and in fact should be convened as soon as possible in view of the urgency of solving the problem of the relations of the Unions with the United Nations.

6. — What should be the task of this Diplomatic Conference:

(a) If we refer back to the Resolution adopted by the General Assembly of the United Nations on 19th December, 1961, it will be realised that it is indispensable that our Unions be recognised by the United Nations and such recognition should be determined by means of an Accord between the representative organs of the States Members of the Unions and those of the United Nations.

But, as we have seen, such an Accord can only be concluded by the Economic and Social Council with an "institution"; an institution is not merely a Union or a Bureau lacking a generally recognised international legal status²⁰⁾; it is an entity comprising one or several Unions of States, a Bureau *and*

¹⁹⁾ The Working Group met at the headquarters of the Bureaux from 12th to 14th June, 1962 under the Chairmanship of M. Guillaume Finnis, President of the Permanent Bureau of the Consultative Committee of the Paris Union, and included representatives from the United States of America, France, Italy, Netherlands and United Kingdom; the representative of Czechoslovakia was unable to attend but has addressed his observations in writing to the President of the Working Group.

The result of the work is contained in proposals for a re-organisation of the Unions and Bureaux which follow closely the views expressed in the present article and principles put forward by the Director of the United Bureaux since 1953.

²⁰⁾ At present, the legal status of the Unions and Bureaux as well as the privileges and immunities which they require have not been formally recognised by all the States Members; in Switzerland however, the Federal Council has made an unilateral recognition of the legal status, privileges and immunities.

representative organs of the Members established by "inter-governmental accord" and provided (by such intergovernmental accord) with an international legal status, privileges and immunities which it requires in order to carry out its task, such legal status and privileges being recognised by all the States parties to the intergovernmental accord.

Thus the first task of this diplomatic conference should be to create such an "institution" — which could be called the International Organisation of Intellectual Property.

(b) To this effect a number of problems must be solved.

We have already mentioned such problems above, in particular in connection with the Diplomatic Conference of Stockholm.

We can however recall as a reminder the problem concerning the form of the representative organs; there exist two possibilities: either a number of representative organs of the States (one per Union), or the setting up of a common organ in respect of all the Intellectual Property Unions.

The second formula is by far the most simple.

Furthermore, if the States Members of the Unions wish to strengthen the unity of intellectual property, then one should think of the *Organisation* of Intellectual Property and no longer of the *Unions*; it would then be necessary to envisage a single Organisation responsible for several Conventions and possessing a single Assembly which would adopt a single budget even if, for example, the separate budget of each Union is approved solely by the delegates of the States Members of that particular Union.

(c) Another problem is that of the form of the "Inter-governmental Accord". One might envisage the adoption of three Additional Protocols to the Conventions of Paris for the Protection of Industrial Property, of Berne for the Protection of Literary and Artistic Works and of Paris for the Protection of New Plant Products. Nevertheless, the preparation and the holding of simultaneous or consecutive diploma-

tic conferences will give rise to a number of practical problems difficult to solve. Moreover, in order to strengthen the unity of intellectual property, it would be preferable to have a *single* international instrument which would *ipso facto* abrogate the relevant provisions of the different existing Conventions.

This latter instrument could be a "Constitutive Act" whose ratification would not require any amendment of national legislation and would not give rise to any special problem. Thus the new Organisation could be set up very quickly.

(d) Other problems of a practical nature might be noted here, but these are of only secondary importance as compared with the question of principle which is to determine whether the States Members of the industrial property Unions wish to maintain, on the international level, the basic principles embodied in these Unions.

7. — To conclude, the only question which must finally be resolved is whether the States Members of the Intellectual Property Unions wish to maintain and strengthen, on the international level, those principles which have given birth to these Unions.

If the answer to this question is in the affirmative, then it is a matter for the States to set up a truly International Organisation for Intellectual Property and to seek the recognition of the competence of such an Organisation by the Economic and Social Council of the United Nations.

This is a question which is not within the competence of the United International Bureaux and can only be determined by the States Members of the Unions. It is a matter for the States alone to decide and to act accordingly. In effect, it is a problem of a political nature and must be settled through diplomatic channels.

For our part, we are firmly convinced that it is urgent to strengthen the intellectual property Unions on the international level and thus to create the International Organisation

of Intellectual Property and to seek recognition of its competence by the Economic and Social Council of the United Nations.

If this is achieved, the work of re-organisation undertaken for the past ten years by the States Members in agreement with the directing bodies of the United International Bureaux will finally lead to the horizons which we have envisaged in our address to the International Diplomatic Academy on 6th May, 1957 on the subject of the "Intellectual Rights of the United Nations":

"In 1883 and in 1886, courageous and enterprising men established the conventional foundations of intellectual property in the two Conventions of Paris and Berne.

Most precious assets for the development of our civilisation, that is to say, the opportunity for the author and the artist to work and the right of the inventor or manufacturer to benefit from his work, have been safeguarded and have thus enabled civilisation, by relatively simple and practical means, to shine with increasing brilliance.

It is the duty of our generation to complete this task and to establish the house of Intellectual Rights . . ." ²¹⁾.

²¹⁾ *La Propriété industrielle*, May, 1957, pp. 98 et seq.