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The Role of Industrial Property in the Economic Development of States

Reprinted from *Industrial Property*, March 1967, Review of the United International Bureaux for the Protection of Intellectual Property (BIRPI)
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The Role of Industrial Property in the Economic Development of States*)

Professor P. J. POINTET, Zurich

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*) Expanded text of an address delivered at Madrid, December 5, 1966, within the framework of a Course on Industrial Property, organized by the Spanish Group of the International Association for the Protection of Industrial Property (IAPIP). — BIRPI translation.

I. Introduction

It would not be possible to speak of the rôle played by the rights of industrial property in the economic development of countries without first recalling the nature of the different rights and their economic functions, as well as the evolution of industrial property legislation. This will enable account to be taken more readily of the need for the protection of these rights.

We will next examine tendencies contrary to the protection of industrial property rights, both present and past; then the factual matter of the exchange of technology between countries, and more especially the transfer of technology to developing countries.

Finally, there will be the question of clarifying the reasons for the importance of adequate protection of industrial property rights in connection with the economic development of countries.

II. Industrial Property Rights

1. The Nature of the Different Rights

Whereas a *trade name* is used by an enterprise for the purpose of making itself known, a *trademark* serves to distinguish certain goods from goods which compete with them. An *indi-*

cation of source enables the recognition, among similar goods, of those which have their origin in a locality, a region or a country from which a product derives its reputation. A *patent* protects a technical realization, and *industrial designs* protect the form, that is to say, the external and special appearance of an object. Finally, the *provisions for the repression of unfair competition* are designed to combat abuses of the right of free competition.

These different rights constitute, as it were, the basis of industrial property, and they are generally taken into consideration in all legislations.

Certain countries, such as the Federal Republic of Germany, further recognize *utility models*, which are designed to protect what might be called "minor inventions": these, in the countries which do not recognize this category, are protected by patents.

Several countries of Eastern Europe (Bulgaria, Czechoslovakia, Poland, Rumania and the USSR) also recognize *inventors' certificates*, which are granted to the author of an invention who agrees to assign to the State, in return for an indemnity, all his rights as regards the exploitation of the invention.

Finally, there are countries, for example, France, where a special category of indications of source is recognized, namely the *appellation of origin*, which is the geographical name of the place where a product is cultivated, manufactured, or obtained in any other manner, in so far as it derives its qualities from the soil, the climate, the usages or the techniques of the place concerned.

2. Justification of Industrial Property Rights

The different rights of industrial property have as their first objective to guarantee fair competition between enterprises.

The legislator has, in effect, sought to avoid the operation of fair competition being undermined by competitors who, for

example, in seeking to benefit from the efforts of others, by slavish imitation of their inventions or good reputation, usurp or infringe their names or their trademarks.

Since legislation relating to the repression of unfair competition has been judged to be insufficient to assure adequate protection of industrial property rights, these rights have become the subject of special laws, better adapted to take account of differing situations.

In protecting patents, utility models, and industrial designs, an effort has manifestly been made to assist technical progress and, as a consequence, also economic and social development.

In effect, if all States (including those with socialist or communist régimes) possess legislation in the field of patents, granting, for a certain period, an exclusive right of exploitation of inventions forming the subject of a patent, this is not so much for the purpose of rewarding the inventor who has discovered something new, from which the community can benefit, as for the purpose of encouraging inventors not to keep their inventions secret.

A person who wishes to obtain the protection which results from a patent is, in practice, required to define his invention precisely in his application. Since any other person can take note of this description once the specification of the invention has been published, technical advances so realized are thus placed at the disposal of the entire community. All interested parties can draw upon this common fund of techniques, not in order to copy, in a slavish manner, and during the period of protection, inventions which have been made by others, but in order to proceed to further inventions. Once the duration of the validity of a patent has expired, the invention, from the fact of the publication that has occurred, can be freely exploited by all who wish to do so.

The privilege granted to the owner of the patent to be the sole person authorized, during a specified period, to derive benefit from his invention is equitable compensation for his contribution to the development of technology.

As regards the protection of a trade name, a trademark, an indication of source, and an appellation of origin, this does not benefit only the person who exercises the right: it is equally in the interest of the consumer. In effect, it prevents the public from being misled, a situation which would certainly occur if any person were free, if he so wished, to utilize or infringe the name or the trademark of others, or even to utilize an indication of source or an appellation of origin without fulfilling the essential conditions. And this is, indeed, the reason for which the protection of a trademark can be renewed, and for which the protection of a name, an indication of source and an appellation of origin is limited only by the fulfilment of the conditions specified for the utilization of the designation.

3. The Economic Importance of Industrial Property Rights

In our age of intense economic competition, it is obvious that industrial property rights are of great importance to their owners. They are assets which, although not tangible, nevertheless are capable of ownership.

If interested parties endeavor, to the full extent of their means, to secure, if not the strengthening, at least the maintenance of the protection granted by these rights, they cannot be blamed for doing so. This is in the natural order of events, and this order must, it seems, be sound, since 77 countries are to-day members of the International Union for the Protection of Industrial Property, of which the charter, the Paris Convention, has, as its specific objective, the assurance of a minimum of protection in all Unionist States.

If this is the position, it is because the protection of industrial property rights is judged to be in the interest of the community. In effect, the community benefits, directly or indirectly, from the fair competition between enterprises which this protection makes possible.

For its part, the State is essentially interested in all measures capable of encouraging the economic prosperity of the

country by an increase in production and exchanges, both on a national and an international basis. Now, experience proves that, thanks to the protection of industrial property rights, research and activities from which the entire economy benefits can be undertaken on a private basis. This, it seems, could not occur to the same extent if respect for fair competition was not assured by way of the grant of industrial property rights to those who, by their initiative and by the risks which they take, are able to bring more to society than their competitors and especially, in the very important field of patents, to enrich the common fund of technical knowledge

III. The Evolution of Industrial Property Law

1. General Remarks

Given, on the one hand, the importance of industrial property rights from an economic point of view and, on the other hand, the extraordinary evolution in the exchange of goods between countries that has occurred in the course of the last hundred years and, in particular, since the beginning of the 20th century, it is not surprising that, among the different fields of international law, that of industrial property is one of the most highly developed.

This is not solely due to the fact that it is a technical field, where States have been able, and can still continue, to find a common ground of agreement fairly easily.

Economic circles are always, and in all industrial countries, keenly interested in the development of industrial property rights. In effect, a person who has realized an invention, created a design, or who manufactures or sells goods under a given trademark or by reference to an indication of source, will always seek to obtain adequate protection, not only on a national basis, but also in the countries to which he exports, or in which he intends to set up an industrial or commercial establishment, or even where (as is becoming increasingly the case) he is seeking to establish a center for research.

Further, since Governments have an evident interest in the development of technology, in economic progress and in the intensification of exchanges within the framework of fair competition, States, as well as economic circles, have intervened in favor of the development of international law in respect of industrial property.

It has been possible to build up this international law on a favorable foundation, since the various national legislations in this field are of relatively recent date: they have, in effect, almost all been promulgated in the course of the second half of the 19th century. Consequently, those persons who negotiated international agreements did not have to take account of texts that had become obsolete and therefore, in some quarters, regarded as sacred from the sole fact of their existence.

2. National Legislations Prior to 1883

Since the various national legislations saw the light of day at more or less the same period, it might be thought that they were based upon principles which, if not identical, were at least similar, and that the elaboration of an international code would, in consequence, be facilitated. This, however, has not been the case. National laws have, quite naturally, taken account of juridical conceptions that were in force, and have reflected the economic conditions existing within the country. Consequently, according to whether a country was essentially industrial or agricultural, or whether or not it was prosperous, or for other reasons, a great diversity of laws has resulted.

Before any international conventional law existed, States were, to a certain extent, compelled to secure effective protection for their nationals in other countries by the insertion, in commercial treaties or other special agreements, of special provisions relating to industrial property.

The efforts expended in this direction did not, however, give satisfactory results. On the one hand, such agreements could only have a somewhat unstable character, since they followed the fate of the agreements in which they were included.

On the other hand, States which were anxious only to commit themselves to the smallest possible extent, in order to preserve their freedom of action, were generally only prepared to agree to very minor derogations from their national law.

In the absence of common provisions in the different national laws, the protection granted to foreigners varied considerably from State to State. Whereas in certain countries foreigners were assimilated to nationals, in others (and these were more numerous) protection depended upon reciprocity, in law or in fact.

The disadvantages of such a situation soon became so evident that the need for international protection became imperative. There were, however, two problems to be resolved: that of the application of domestic law to foreigners and that of the recognition of protection abroad of rights acquired within the country [1]).

The solving of these two important questions, which was due to efforts exerted on an international basis, resulted in the establishment of the various Conventions.

3. The International Conventions

The outstanding event in the field of international law relating to industrial property was the creation, in 1883, of the International Union for the Protection of Industrial Property, established by the conclusion of the Paris Convention, and followed by various special Agreements relating to the repression of false or deceptive indications of source, to the registration of trademarks, to the classification of goods and services to which trademarks are applied, to the international deposit of industrial designs, and to the protection of appellations of origin and their international registration.

This enumeration alone shows the diversity of the problems with which the States which are members of the Paris

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1) Cf. Stephen P. Ladas, *La protection internationale de la propriété industrielle*, Paris, 1933, p. 18.

Union have so far concerned themselves and which they have sought to regulate on a multilateral basis.

Certain South American States, having preferred to remain outside the Paris Union, inclined in favor of the conclusion of various South-American Conventions. The first Convention adopted in the field of patents and trademarks was that of Montevideo, in 1889. It was followed by several others. None of these Conventions has, however, succeeded in playing a role comparable to that exercised by the Paris Convention.

Since the end of the second world war, three Conventions have, moreover, been concluded within the framework of the *Council of Europe*, the first dealing with the formalities required for patent applications, the second with the international classification of patents, and the third (which has not yet come into force) with the unification of certain points of substantive law on patents for invention.

Within the framework of the co-ordination on an international basis of the efforts made with a view to assuring an effective protection of industrial property rights, mention should also be made of the establishment on June 6, 1947, of the *International Patent Institute of The Hague*, with the object of relieving national Patent Offices of documentary searches and of avoiding all duplication of work.

This rapid examination of the realizations achieved within an international multilateral framework cannot be concluded without reference to the *Draft Convention relating to a European Patent Law*, published in 1962 by the European Economic Community (EEC).

If discussion of the project is, for political reasons, temporarily suspended, there is no doubt that, one day, it will be taken up again, under one form or another.

The same applies as regards the *Draft Convention for a European Trademark*, similarly drawn up within the framework of the EEC, but which has not yet been made public.

Finally, there is also occasion to recall the numerous *bilateral agreements* concluded by States desirous of regulating their relations in a particular field of industrial property law in a more precise manner.

This extraordinary development of international law relating to industrial property has not only had the favorable consequence of bringing legislations closer together and, in certain directions, of producing unification of law. It has further, and by its very existence, served to encourage the various countries to keep adapting their national laws to the international standard and, in so doing, to ensure that national law is constantly following economic evolution.

As we have already shown, the Paris Union now comprises 77 States, and the adhesion of several other countries is imminent. Can there be any need for any more evident demonstration of the vitality of international conventional law and of the necessity, in the well-understood interests of these States, for adequate protection of industrial property rights? [2])

IV. The Necessity for the Protection of Industrial Property Rights

1. Industrial Property, an Element of Progress

At the present time, the majority of European countries are experiencing a period of economic prosperity. What are the reasons for this boom?

Without wishing to examine here all the factors of a political, economic, social, or financial nature which influence this situation, we would simply recall that qualified economists

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[2]) We would here recall the study of S. Pretnar, "*La protection internationale de la propriété industrielle et les différents stades de développement économique des Etats*" (*La Propriété industrielle*, 1953, pp. 213 *et seq.*), which reached the conclusion that the Convention of the Paris Union was superseded, and the pertinent reply of Stephen P. Ladas, "*Les bases fondamentales de la protection internationale de la propriété industrielle*" (*ibid.*, 1954, pp. 93 *et seq.*).

attribute increase in the economy (in a general manner, and not only as a matter of the actual boom) to three main factors: the increase in population, technical progress, and the development of external trade.

Increase of population is a factual matter.

Technical progress depends upon the genius of men and, as a consequence, also upon the evolution of the population and its degree of education, with the fullest possible use of the resultant " grey matter."

The effects of technical progress do not make themselves felt immediately. New inventions call for accrued investments; from this, a chain reaction results, which extends rapidly to the whole of the economy.

As regards external trade, this, in itself, is largely helped by technical progress. The case of Switzerland is a typical example. Water being the only primary substance existing within the country, Switzerland depends upon its exports to assure the food supply to its population. Products manufactured within the country cannot be exported and hold their own against foreign competition unless their quality is being constantly improved and the range of products available constantly extended. This means that inventions and continuous technical improvements are essential. And this explains why, in relation to the number of the population, the number of applications for patents deposited each year in Switzerland is the highest in the world.

The key position occupied by technical progress in the life of a country is thus evident. Technical progress is the essential condition of all economic development.

Only rarely, however, is technical progress the outcome of chance. More generally, it calls more for financial resources, sometimes considerable, and for a particularly keen intelligence on the part of numerous researchers, and for long and patient effort. If it were possible to transform into energy the

sum total of effort expended in the course of a year by way of research by men of science and by practitioners (engineers, technicians or artisans) of the entire world, a force would probably be assembled comparable to the faith which is capable of moving mountains.

Consequently, it is not surprising that a State which aspires to industrialization does everything possible to assist research. The development of educational facilities, the creation of new schools and laboratories of ever-increasing quality, the sums expended to aid research in all forms, and its utilization in the most varied economic fields, are the means, among others, at the disposal of States.

There is, however, another much less onerous but more efficacious means available to a State: adequate legislation assuring protection of industrial property rights in general, and the rights in patents and trademarks in particular, these being the most widespread.

It is this that was understood by the European States which, in the course of the 19th century, realized the need for promulgating laws in respect of the different rights of industrial property, in order to protect inventors, producers and traders, whilst at the same time encouraging them ceaselessly to contribute to technical progress.

2. The Particularly Important Role of Patents

Industrial evolution since the beginning of the 20th century is evidence of the fact that the protection granted by patents has been a powerful stimulant to technical progress and economic development.

Firstly, inventors do not have to fear that their inventions will be exploited without payment by some enterprise possessing powerful financial resources; on the contrary, they are encouraged in their research work, since they are assured that, in the event of success, they will be able to derive profit from it.

Then, as we have seen, there is the consideration that the exact knowledge of the inventions made by other persons in a given field is conducive to further research and further inventions.

Finally, being assured of exclusive rights of exploitation during a certain period, inventors or persons deriving title from them can take suitable steps and invest the necessary capital to engage in large-scale manufacture of the article which is the subject of the invention. There is less possibility of risk, because they know that their inventions will be protected.

The measure of risk involved is reflected in the extremely large sums which are devoted to research.

The total world expenditure upon research for 1965 has been estimated at 60,000 million dollars, divided as follows: USA, one third, USSR, one third, rest of the world, one third. As regards Swiss expenditure, this has been estimated for the same year at 240 million dollars [3]).

It has been calculated that the highly industrialized countries devote 1 to 3 per cent of their national revenue to research; 30 to 65 per cent of these expenses are borne by the State and the rest by private enterprise.

The share of public authorities in the total research expenditure is evaluated at 66 per cent in the United States, France, the United Kingdom and the Federal Republic of Germany; 50 per cent in Belgium, Italy, Norway and Sweden; 33 per cent in the Netherlands; and 25 per cent in Switzerland.

As regards expenditure *per capita* of the population, this is estimated (the figures for the USSR are not known) at approximately 92 dollars in the United States, 33 dollars in Great Britain, 32 dollars in the Federal Republic of Germany, 30 dollars in Sweden, and 27 dollars in Switzerland.

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[3]) These figures, as well as those which follow, have been taken from an address given by Mr. Georg Heberlein, Wattwil, to the University of St. Gall, November 16, 1966.

V. Tendencies Contrary to the Protection of Industrial Property Rights

1. General Remarks

Against the efforts made on a national and an international level with the object of harmonizing legislations in the field of industrial property and of developing the protection of these rights, there are, unfortunately, certain opposing currents (often without being apparent) which, under widely-varying pretexts, tend to deprive these rights of a portion of their substance.

It is certainly essential for industrial property legislation to take account of the interests of the community and of the special position of the national economy. A balance must be established between the safeguarding of individual interests and those of the community in all cases in which such interests do not coincide.

It is, however, necessary to avoid the taking of excessive measures to prevent possible abuses, whenever such measures would gravely injure the interests of the owners of legitimate rights, and without the State concerned deriving any positive advantage.

Unfortunately, such tendencies can be discerned in certain countries where account does not appear to have been taken of the true scope of the rights in industrial property, or of the value of such rights to the community as a whole.

2. Measures Contrary to Patents

Recently, attacks against the exclusive rights (though of limited term) which result from patents have, in several countries, been especially directed against inventions realized in the pharmaceutical field. This field has been selected, in the first instance, probably because, from a psychological point of view, it lent itself particularly well to an attack from the moment when it was possible to invoke the opportuneness of reducing the price of pharmaceutical products in the interests

of the health of the population, whilst completely ignoring the enormous and ever-increasing cost of research.

3. Historical Background

It would seem that we are to-day witnessing a renewal of a movement which occurred in Europe in the middle of the 19th century and which tended to underestimate, and even to deny, the value of patents for inventions.

At this period, the exclusive rights inherent in patents were, in effect, considered in some quarters as being obstacles to the freedom of exchanges. Thus, in 1850, in Great Britain, the journal *The Economist* made itself the mouthpiece of a group of inventors, industrialists and parliamentarians who demanded, in the name of economic freedom, the suppression of the protection by patents, which had operated in the country since the Statute of Monopolies of 1623.

A similar movement manifested itself in Germany and in the Netherlands, in which latter country patent legislation was abrogated from 1869 to 1910.

France likewise encountered adversaries, not only as regards the protection by way of patents, but also as regards the creation of an international conventional right. Hence, the elaboration of the Paris Convention aroused keen criticism, which materialized in an article which appeared in the *Petit Journal* of August 13, 1885, proposing that the delegates should be charged with high treason!

At the same time, the adversaries of Swiss legislation invoked the injury which Swiss industry would suffer if inventions gave rise to exclusive rights, and a convinced opponent of patents (alas, a professor) declared, peremptorily, that patents impeded industrial progress.

If patent legislation is an impedance to anything, it is to the action of infringers, to those persons who, without effort or contribution on their own part, seek to profit from the efforts, the research and the investments of others, and from their cerebral activity and their spirit of initiative.

Actually, it is by invoking the desire to protect free competition, and by the need to combat abuses of economic power that, in certain circumstances, an effort is made to restrict the free exercise of industrial property rights.

Let us hope that to-day, as in the past, wisdom, good sense and regard for the true interests of the community, and therefore of the State, will once again prevail.

4. Repression of Possible Abuses

Effective protection of the rights of industrial property naturally does not mean that any abuse which could be made in the exercise of these rights should be tolerated. But these rights themselves cannot constitute an abuse. At the most, it is their use, or non-use, which could, in certain circumstances, be contrary to the interests of the community.

When one speaks of abuse in the field of industrial property, one immediately thinks of patents, for it is in this field that the question assumes the greatest importance.

It is clear that governments cannot remain indifferent to this subject. Moreover, they have not remained indifferent to it. This is proved by the provision inserted in the Convention of the Paris Union and again in national legislation.

Article 5 of the Paris Convention regulates, in effect, the cases in which member States may apply restrictions to the rights of a patentee. It is expressly provided that legislative measures may be taken " to prevent the abuses which might result from the exercise of the exclusive right conferred by the patent, for example, failure to work."

The IAPIP, at its Congress at Tokyo (1966), unanimously adopted (apart from several abstentions) a proposal for a new text of Article 5, regulating the matter in a more systematic manner than in the past.

Without going into the details of the present regulations, we would limit ourselves to observing that the principal abuse which could be made of a patent, namely, non-working, is the subject of two sanctions, having serious consequences for the

proprietor: the grant of a compulsory licence and revocation. Thus, States are able to intervene in connection with the exercise of patent rights on the basis of conventional provisions in force, without the need for imposing restrictions on the granting of a patent.

Further, when one speaks of abuse resulting from the non-working of a patent, account must also be taken of the economic effects of the obligation to exploit.

Already, voices have repeatedly been raised asking for some relaxation of this obligation; for example, the conclusion of bilateral or multilateral agreements has been suggested, specifying that the working of an invention in one of the contracting countries shall be considered sufficient, and that the proprietor of the patent shall not have to undertake the working of his invention in all the countries in which he has obtained a patent.

To-day, this question deserves very special attention, in view of the efforts which have been made with the object of realizing economic integration in certain regions or, within the framework of the European Economic Community (EEC), of harmonizing legislations, and even of arriving at a single patent.

From the point of view of judicious division of work and of the actual idea at the basis of all integration, it seems evident that the further one advances towards integration, the more opportune it will be to be able to manufacture at the place which is economically the most favorable and, consequently, if not to suppress, at least to reduce the obstacle which the obligation to exploit does, in fact, constitute.

As regards those persons who have misgivings about a step forward in this direction, it may be recalled that, on the occasion of the first Paris Conference of 1880, which three years later resulted in the conclusion of the Convention of the Paris Union, the Swiss delegate declared that suppression of the obligation to work could have serious consequences for his

country, since it would permit the proprietor of a patent to exploit his invention in the country where such action would be most advantageous to him, and then to import his goods into Switzerland, and this (he considered, most seriously) would result in " the crushing of Swiss industry."

Now, Switzerland is one of the few countries (apart from the United States of America, which does not recognize the obligation to work) to have concluded a bilateral agreement in this field and, moreover, with its big industrial neighbour, Germany, as long ago as 1892, without Swiss industry having had to suffer as a result.

This shows that exaggerated pessimism is often displayed towards liberal solutions which can, in the circumstances and at first sight, be judged to be detrimental but which, in the long run, turn out to be favorable to economic development.

It is in this way that we must guard against any injury to patent rights under the pretext of safeguarding free competition. Such attempts are generally only dictated by a desire to introduce anti-trust measures by a side channel. Those who advocate them unfortunately do not take account of the fact that they are of a nature that would result in serious damage to the national economy. In effect, instead of constituting a real protection of trade and industry, these measures are an obstacle to investment and to the transfer of technical knowledge that foreign enterprises would be ready to make if they were sure of being able to operate within the framework of a liberal regime.

VI. Industrial Property and the Exchange of Technology Between Countries

1. General Remarks

In the course of the last fifteen years, the problem of the exchange of technology in general, and that of their transfer to developing countries in particular, has been the subject of examination and recommendations on the part of various international organizations, both official and private.

We will make a quick review of the principal work carried out in this connection and involving industrial property rights, without concerning ourselves with activities which, although capable of having repercussions on these rights, do not directly involve them. Such is the case, for example, as regards the draft Convention of the Organization for Economic Cooperation and Development (OECD) concerning the protection of private assets abroad, and the Convention for the settlement of disputes relating to investments between States and nationals of other States, of March 18, 1965, drawn up by the International Bank for Reconstruction and Development. This last Convention, which came into force on October 14, 1966, reveals, in its preamble, the need for international cooperation for economic development, and the rôle played in this field by international investments.

Similarly, we shall only mention by way of reminder the role played immediately after the second world war, within the scope of the Marshall Plan, by the " Bureau of Small Enterprises," with headquarters in Washington and Paris, with a view to encouraging the exchange of industrial technology by means of a program of manufacture under licences, designed to bring together industrialists of Western Europe and those of the United States who were desirous of securing manufacturing licences. In order to facilitate contacts between enterprises, a panel of sympathetic advisers was set up in all the interested countries.

2. The Work of the European Organization for Economic Cooperation (EOEC)

Following a very detailed examination of the problem by the Committee for Productivity and Applied Research and by the Mixed Committee for Exchanges and Payments, the Council of EOEC, being of opinion that the most complete utilization of inventions is an important means of increasing productivity, has, by a decision of July 23, 1953, recommended member and associated countries " to facilitate between themselves

the exchange of licences under privately-owned patents, in order to permit the maximum use of inventions, and to encourage those exchanges which are of such a nature as to contribute to the development of international trade."

In view of the fact that the recommendation of the EOEC has been adopted by the Council, that is to say, by the directing organ in which all the Governments of member States were represented, it can be accepted that its text faithfully reflects the point of view of these States as regards the importance of the exchange of licences and, in particular, as regards the necessity for taking all useful measures to facilitate such an exchange.

3. The Activities of the Organization for Economic Cooperation and Development (OECD)

Among the activities of OECD which closely concern industrial property rights may be mentioned the studies on the organization of scientific research. The results of work undertaken in this field have been published in the form of reports on the separate countries.

These reports contain very interesting information on the situation existing in each country concerned, both as regards research, and policy in connection with patents.

From the report dealing with Spain, it emerges that, in this country, scientific research is essentially a Government activity, and that 85 % of the cost that it involves is absorbed by seven important centers [4]).

According to this report, only several large industrial enterprises invest funds for the benefit of research. It seems, in effect, that, according to a very widespread tradition, Spanish enterprises seek more to acquire foreign technology than to obtain Spanish patents within the framework of their own research. It can be accepted that the magnitude of the sums

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4) Cf. Publication of OECD: *Scientific Research, Spain* (in particular pp. 12 and 21), Paris, June, 1964.

involved in all serious research is conductive to procedure of this kind.

It cannot be deduced from this that effective protection of inventions by means of patents is unnecessary: on the contrary. On the one hand, for all practical purposes, the importation of technology is possible only because the licensor has been able to protect his inventions in Spain and, on the other hand, because Spanish industrial enterprises are assured that their own inventions will be safeguarded; thus they can, in relation, naturally, to the extent of their financial resources, themselves undertake increasingly important research.

Under the title of " The effort in connection with research and development in Western Europe, North America and the Soviet Union," OECD, in 1965, also published a paper seeking to make a comparison, on an international basis, of the expenditure and resources devoted to research in 1962. Among the principal chapters of this extremely interesting publication, we would mention those concerned with expenditure in connection with research, the sharing of expenditure in connection with research and development, the balance of payments, and statistics in relation to patents.

Clearly, it is not possible to proceed to an analysis of this OECD document, and we will refrain from citing figures which, by the nature of events, are already old and are only relative in character; moreover, as the publication itself states, the statistics in this field still leave much to be desired. We will, however, quote one of the conclusions of the report. This declares, in effect, that " given the existence of mechanisms which assure the spread of knowledge and of new technology, certain countries would perhaps prefer to import technical processes rather than devote important resources to research and development."

In practice, all developing countries find themselves confronted with this alternative. The OECD report further adds, in referring to the importation of technology, that " for a num-

ber of the poorer countries, this is the only choice open to them, at any rate at the moment."

Certainly, the acquisition of licenses for the exploitation of technology developed abroad can only be effected by paying an agreed price. But it must be remembered that this price will always be relatively low in relation to the expenses which the country would have had to incur in research, if such technology had not been available by way of licenses.

Moreover, in acquiring a license, a person obtains exact knowledge of the technology involved. On the other hand, when a person engages in research, he takes a financial risk, which is often considerable, without ever knowing in advance what the results are going to be.

Naturally, this does not mean to say that the developing countries find themselves completely excluded from research. They simply have to limit their ambitions and not want everything at once, but rather seek to develop their resources step by step, starting with activities which are most familiar to them. And, even then, they are well advised to have adequate legislation in the matter of industrial property, in order to encourage initiative, both on the part of their own nationals and on the part of those foreign enterprises which might be prepared to make their technology available, by opening centers for research or manufacture, as the case may be.

4. The Action of the United Nations

Following a proposal by the delegation of Brazil, the General Assembly of the United Nations adopted, in 1962, a resolution inviting the Secretary-General of that organization to draw up a report containing a study of the effects of patents on the economy of under-developed countries, a study of the patent legislation in selected developed and under-developed countries with primary emphasis on the treatment given to foreign patents, and an analysis of the characteristics of the patent legislation of under-developed countries.

On the basis of various studies undertaken, the General Secretariat of the United Nations was able to submit to the Conference on Trade and Development, which was held at Geneva from March 23 to June 16, 1964, an important *Report on the role of patents in the transfer of technology to developing countries* [5]).

The first part of this report was devoted to the principal characteristics of patent systems and, in particular, examined existing legislations, international relations in the field of patents, and the regulations adopted by States in connection with the exercising of the right conferred by patents.

The second part dealt with the effects of patents on the economy of developing countries and made a special study of the part played by patents in the transfer of technology, as well as of the relationship between patents and the progress of local technology.

The report was accompanied by five annexes, of which the most important (Annex C) gave an appreciation of the functioning of patents, founded upon information furnished by members of the United Nations.

After discussion of the report, the Geneva Conference, on June 12, 1964, adopted, without opposition, *a recommendation on the subject of the transfer of technology.*

In the terms of this recommendation, which can, perhaps, be considered as the conclusion of the report, the Conference first invited the developed countries to encourage the holders of patented and non-patented technology, to facilitate the transfer of their technology to developing countries. The latter, in turn, are invited to take all appropriate legislative and

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[5]) Doc. E 3861 Rev. 1, 1964. A German translation of this report, made by Dr. G. Ott and accompanied by an excellent introduction by H. G. Heine and Dr. R. Moser von Filseck appeared in *Patentschutz und Entwicklungsländer — Dokumente und Materialien,* Band 15 der "Schriftenreihe zum gewerblichen Rechtsschutz," published under the auspices of the "Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht," Carl Heymanns Verlag KG, Munich, 1966.

administrative measures in the field of industrial technology in order to encourage such transfers.

Further, the recommendation expressly mentions the United International Bureaux for the Protection of Intellectual Property (BIRPI) of Geneva, among the institutions invited to follow the entire problem attentively, and to assist in the adaptation of the national legislation of the developing countries.

The Geneva Conference of 1964, having a majority composition of representatives of developing countries (this should not be overlooked) has thus, in a very clear manner, shown the importance of adequate legislation for the transfer of technology and, consequently, for the economic development of a country.

It was for the purpose of taking account of the importance of such legislation that the United Nations Conference on Trade and Development (UNCTAD), created by the Geneva Conference of 1964, was charged, among other tasks, with that of seeking ways and means of improving the international system of industrial property and of encouraging the transfer of "know-how" to developing countries.

In a report of the Secretary-General of the United Nations on "*The Progressive Development of the Law of International Trade*" [6]) submitted to the 21st Session of the General Assembly, industrial property and copyright are among the matters taken into consideration.

The fact that industrial property should have been mentioned as an object of international commercial law shows the great importance attached by the Secretary-General of the United Nations to the different industrial property rights as important elements in the development of international exchanges.

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6) Cf. United Nations, Document No. A/6396 of September 23, 1966 (published in New York, October 10, 1966).

The report proposes the setting-up of a " United Nations Commission on International Trade Law" (UNCITRAL), which would have the special task of coordinating the activities between organizations active in this field and of promoting wider participation in existing international conventions, and existing model laws and uniform laws, to mention only two objectives (among several others) which are of special interest to us within the framework of the present study.

The United Nations, and more especially the Industry and Materials Committee of the Economic Commission for Europe have, further, had occasion to concern themselves, in the course of recent years, with problems of " know-how " from the point of view of efforts made with a view to establishing standard forms of contracts. This was done in the belief that standard clauses would encourage the exchange of know-how.

On the occasion of the meeting in April, 1966, of a group of experts at Geneva, the Secretariat was requested to prepare, for the use of the next meeting, a preliminary draft for a guide which, by taking into account rules that were generally accepted, would serve to facilitate the drawing-up of contracts relating to know-how [7]).

Without in any way discounting the importance of the problem, account must, however, be taken of the difficulties of the task in hand. So far, there is no international customary law in the matter, and the actual concept of know-how is itself the subject of widely-differing interpretations.

5. The United International Bureaux for the Protection of Intellectual Property (BIRPI)

(a) The Participation of BIRPI at International Meetings

During recent years, the United International Bureaux for the Protection of Intellectual Property (BIRPI), at Geneva, have, on several occasions, taken welcome initiative with a view to directing the attention of all countries, and especially

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7) Cf. Economic and Social Council of the United Nations. Consultation on " know-how " of April 12, 1966.

the developing countries, to the importance of judicious and efficacious legislation in the matter of industrial property, and to helping them to legislate in this field.

They organized, for example, an African Seminar of Intellectual Property at Brazzaville (Congo) in 1963, an Asian Seminar at Colombo (Ceylon) at the beginning of 1966, and an East-Asian Seminar on Copyright at New Delhi (India) in January, 1967.

In addition, BIRPI convened a Committee of Experts, which met at Geneva in October, 1963, charged with examining the protection of industrial property in industrially less developed countries. They have also participated actively in the Industrial Property Congress for Latin America, which was held at Bogota (Colombia) in July, 1964.

These are the principal manifestations which are of interest to developing countries, and with which BIRPI have been particularly associated in recent times. BIRPI have also been very closely associated with the preparation of the report of the Secretary-General of the United Nations and with the Geneva Conference on Trade and Development.

Further, in September, 1965, BIRPI organized, at Geneva, a *course devoted to the international problems of industrial property*[8]), and, in cooperation with the Hungarian Government, they have recently organized at Budapest (October 31 to November 5, 1966), an *East-West Industrial Property Symposium*, which has been highly successful.

(b) Practical Measures Taken by BIRPI

BIRPI, however, have not been content with this purely informatory work. They have especially sought to help developing countries by practical measures, in particular, by putting at their disposal texts which take account of their needs: consequently, these countries could more freely draw

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8) Cf. *BIRPI Lecture Course on Industrial Property*, Geneva, 1965, 1 volume, French and English, 198 pages.

upon these texts in the course of their legislating activities, since they themselves had been closely associated with the elaboration of the texts.

Thus, in the course of 1965, BIRPI published the text of a model law on inventions and technical know-how, together with a commentary. It may be recalled that, starting from a draft prepared by BIRPI, this text was perfected by a Committee of Experts which met at Geneva in October, 1964, and which consisted (apart from several representatives of international organizations) exclusively of representatives of developing countries.

In response to an invitation from BIRPI, a new Committee of Experts of developing countries met quite recently at Geneva (November 7-11, 1966), to draw up, under the same conditions, a model law on trademarks, trade names, indications of source, and unfair competition. This text will also be published, with a commentary.

Finally, BIRPI intend to prepare a third model law for developing countries on the subject of industrial designs.

In order to avoid any misunderstanding, it should be emphasized that the model laws sponsored by BIRPI depart somewhat widely, in some respects, from the solutions which have been long accepted by the States which enjoy wide experience and, consequently, a well-established tradition in the field of industrial property. These texts will not, therefore, serve as a model for these latter countries, nor as a pretext for modifying or adapting their legislation.

Indeed, certain provisions of the model laws have been drawn up to take special account of developing countries which do not yet possess laws in the field of industrial property and which, with the harmonious development of their young economies in mind, are apprehensive of the possible consequences of the immediate application of a régime adopted by countries which have long known the protection of patents, trademarks, and industrial designs.

By the initiative taken in the matter of model laws and also by the information given and assistance lent in the matter of legislative technology on each occasion when they have been approached, BIRPI have not only shown the importance they attach to adequate legislation in the field of industrial property in the economic development of countries which are seeking to become industrialized, but they have also contributed, to a large extent, to a better understanding of the problem in the countries concerned.

The concern of BIRPI in seeking to help developing countries to the extent that intellectual property law permits is also shown by a proposal which will be examined in 1967 at the diplomatic Conference of Stockholm, dealing with the *international organization of intellectual property.*

The proposal envisages the possibility of States, which are not yet members of the Paris or Berne Unions, participating in the discussion of the general problems affecting industrial property as associate members (and not merely as observers) of a new organization, the actual Conference. Thus, BIRPI once more display proof of their desire to associate these countries with the efforts made on an international level for the protection of industrial property rights, in the interest of their economic development.

It is also with this object in view that BIRPI have, for several years, organized the training, in different national Offices of industrial property in industrialized countries, of *trainees* from developing countries, who, when they return home, are generally called upon to occupy an important position in the administration of intellectual property in their own country.

6. The Point of View of Private International Organizations (IAPIP and ICC)

In addition, the importance of industrial property rights in the economic development of countries has not escaped the notice of private international organizations. This is shown by

the intervention, on various occasions, of the *International Chamber of Commerce (ICC)* and the *International Association for the Protection of Industrial Property (IAPIP).*

(a) The Exchanges of Licenses

Immediately following the second world war, and even before the EOEC had concerned itself with the problem, the ICC had examined the question of the *steps to be taken with a view to facilitating the grant of licenses from country to country* " in the interest of international exchanges and the maximum development of technical progress "[9]).

A resolution in this sense was adopted by the Council of the Chamber on June 13 and 14, 1950. The text of the resolution, accompanied by a report of the Commission on the International Protection of Industrial Property, formed the subject of a publication by the ICC, which appeared in July 1950, and was widely diffused[10]). The resolution contained a certain number of recommendations as to the rules to be observed and the measures to be taken to achieve the end in view.

In order to take account of the changes which have occurred in the course of the last fifteen years in the economic life of countries, the ICC, by its Commission on Industrial Property, and in collaboration with national Groups of the Chamber, re-examined the entire question in the course of 1966, and the Council of the ICC, at its session of September 15/16, 1966, adopted a new resolution[11]).

The International Chamber of Commerce takes the view that relations between countries which are technically developed and the countries which are technically backward have become one of the major political problems of our time, and that the transfer of technical knowledge from the first group to the second constitutes an important aspect of the problem.

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[9]) Cf. Preamble to the resolution of June 13/14, 1950 (ICC brochure No. 143).

[10]) Cf. ICC brochure No. 143.

[11]) Cf. ICC doc. No. 450/284 Rev.

Further, it places on record that trademarks and know-how to-day form the subject of license contracts similar to those in respect of patents, and that where anti-trust legislation is concerned, concepts and practices hitherto essentially limited to the United States have made their appearance in Europe and elsewhere, and that legal uncertainties have resulted in respect of these license contracts; further, that the international fiscal régime has become more complex and more subtile, and this has had repercussions on royalties.

The resolution, after recalling that freedom of contract is the ideal guiding principle for licenses in the field of industrial property, affirms that the grant of licenses in respect of patents, trademarks, industrial designs, and know-how, constitutes an excellent means for disseminating technical and commercial advances.

The resolution adds that governments are in a position to facilitate the flow of technical knowledge across national frontiers by providing fiscal and other inducements for industrial property licenses and by refraining from applying restrictive and discriminatory measures to such licenses, so as not to distort artificially the bargain between the parties. In particular, uniform treatment in the taxation of royalties, non-discriminatory taxation in relation to other types of revenue, the absence of excessive restrictions imposed upon royalties, and refraining from modifications of such restrictions with retroactive effects, " are all factors which contribute substantially towards developing a favorable climate for licensing."

(b) The Protection of Patents and Trademarks

At its session at Stockholm on May 26, 1964, the Council of the ICC adopted an important resolution reaffirming its conviction that " the granting of patents in all fields of industry promotes the economical creation and commercialization of products, increases both the ability of enterprises to satisfy the needs of all and their incentive to do so, and, en-

sures the optimum development of international trade, for the benefit of all nations " [12]).

In referring to the Convention of the Council of Europe on the unification of certain points of substantive law on patents for invention and to the draft Convention establishing a European patent, both of which pronounced in favor of protection by means of patents in all fields, the resolution recalls that the grant of patents is based upon the idea that a patent:

encourages research and invention,

induces inventors to disclose their inventions rather than keep them as trade secrets, thereby communicating, in precise terms, the latest technology, for the benefit of all countries,

provides an opportunity for a return on the investment required to develop inventions to the stage at which they are commercially practicable,

creates the inducement for the investment of capital in new products and processes, which might not be profitable if others embarked on them simultaneously.

This point of view was re-affirmed on the occasion of the Congress of the ICC at New Delhi in 1965.

The IAPIP, for their part, in a resolution approved by its Executive Committee at Salzbourg, in September 1964, adopted a similar point of view [13]).

In effect, the resolution of the IAPIP takes up, textually, the wording of the Stockholm resolution of the ICC, fully affirming its conviction that the " true public interest, international cooperation and the legitimate rights of inventors are best served by non-discriminating and proper protection of new and useful inventions, as well as trademarks in all fields of creative activity."

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[12]) Cf. Declarations and Resolutions, 1963-1965 (brochure No. 239 of ICC, p. 99).

[13]) Cf. IAPIP Yearbook, 1966, II, p. 93.

On the occasion of the Tokyo Congress (April, 1966), the IAPIP further unanimously adopted, a resolution concerning industrial property in developing countries [14]).

The resolution points out that it cannot be disputed that the protection of industrial property and, in particular, the protection of inventions by the grant of patents is apt to promote the technical and economic progress, especially of developing countries and that the experience of countries which have nowadays developed their industrialization demonstrates this. In effect, the protection of industrial property, by the advantages it procures, stimulates financial investments in the developing countries and, in so doing, brings to these countries the technology of which they stand in need.

The resolution recognizes that certain adjustments of traditional legislation are necessary to take account of the particular situations of these countries; these adjustments should not, however, interfere with the basic principles underlying the protection of industrial property.

VII. Conclusions

The different aspects of industrial property rights which we have just reviewed enable account to be taken of the essential role of industrial property in the economic development of countries, and the recognition of this role by the Governments of the countries concerned, as well as by international, intergovernmental and private organizations.

In order to complete the demonstration of this, we should pose certain questions.

Why are industrial property rights protected in all economically-developed countries, including those with socialist or communist régimes?

Why has the development of the protection of industrial property rights acquired such impetus on an international, multi-lateral and bi-lateral basis?

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14) Cf. IAPIP Yearbook, 1966, IIa, p. 49.

Would research on its present scale still be possible without protection by patents and trademarks?

What would be the position if, in the immediate future, the protection granted by rights of industrial property, on a national and international basis, were abolished?

In such an event, what would happen, in particular, to the interests of consumers and, in consequence, to the public interest?

We will reply to these questions by quoting a passage from the commentary on the model law on trademarks, trade names, indications of source and unfair competition for developing countries, prepared by BIRPI and submitted to the Committee of Experts which met at Geneva from November 7 to 11, 1966 [15]):

> "The reasons for which the developing countries may have need of modern legislation, not only in respect of inventions, but also in respect of marks, trade names, indications of source, and the repression of unfair competition, are clear and do not call for much explanation. If, in fact, a well-balanced protection of inventions can stimulate inventive spirit and encourage research and the investment necessary to that end, together with the establishment of modern industries in the country, a well-regulated protection of marks, etc., will encourage the establishment and development of commercial enterprises within the country, will facilitate trade relations which will not be impeded by unfair competition, and will protect the public against confusion between goods, services and enterprises, and against the deception which results from such confusion."

What is true for developing countries, is also equally true, and applies to an even greater extent, as regards countries which have already acquired a certain measure of industrial development. We would further observe that economic evolu-

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[15]) Cf. doc. BIRPI-PJ/51/3 of April 20, 1966.

tion does not stand still. Each country must, unceasingly, continue its development, whatever position it may already have attained, if it does not wish soon to be overtaken by other industrial countries.

It is not, however, sufficient to be convinced of the importance of proper protection of industrial property rights. It is also necessary that responsible people should be aware of the position.

National and international periodicals devoted to industrial property, the activities of certain specialized institutes, such as that of Munich [16]), and of official or private organizations, as well as the various meetings which are held in respect of these matters, certainly contribute to an ever-increasing knowledge of the subject. But it is to be regretted that this knowledge is not disseminated more systematically.

Switzerland is one of the countries where courses on the subject of industrial property are well organized. Actually, the subject is taught in all universities, as well as in the *Ecole Polytechnique fédérale.* In other countries, unfortunately, either courses in the subject are not provided, or are left to the initiative of professors responsible for some other branch, and who benevolently devote a few hours to it.

Moreover, courses in the field of industrial property are generally restricted to jurists; these sometimes extend to economists. Now, it is becoming increasingly necessary that scientists and technicians in enterprises concerned with the protection of inventions, should be well-informed on industrial property legislation in general and that of patents and trademarks in particular.

With this in view, the Faculty of Law of the University of Strasbourg, in close conjunction with the French National Institute of Industrial Property, and private economic circles, created, in 1964, a Centre for international studies of indus-

[16]) *Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht.*

trial property. The essential object of the lectures given at this Center is to produce specialists who have already acquired scientific or technical education, both from a theoretical and a practical standpoint. Lectures are given in two different degree Courses, each of four months duration.

We have already referred to the Courses devoted to the international problems of industrial property, organized by BIRPI at Geneva, from the September 20 to 25, 1965. The fact that these Courses attracted some 300 participants from 27 different countries proves the extend to which they meet a need. The same applies to the symposium, equally organized by BIRPI, at Budapest, from October 31 to November 5, 1966, at which over 400 persons took part.

Independently of other Courses, held sporadically here and there, the first Course on industrial property organized by the Spanish Group of the IAPIP, from October to December, 1966, is deserving of special mention. It not only proves the dynamism of this Association, but also the importance wich it attaches, on the one hand, to the different problems dealt with and, on the other hand, to a better knowledge of industrial property legislation. And rightly so; for the protection of industrial property (and this shall be our conluding note) is an important element — among others, naturally — for the economic development of all countries.