

Industrial Property

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INTERNATIONAL UNION

CUBA

Adhesion

to the Agreement of Madrid for the Prevention of False
or Misleading Indications of Source
(Lisbon Text)

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

(Translation)

“In compliance with the instructions dated September 11, 1964, of the Federal Political Department, the Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that the Embassy of the Republic of Cuba at Berne has sent to the Swiss Government on July 24, 1964, the instrument of adhesion by Cuba to the Agreement of Madrid for the Prevention of False or Misleading Indications of Source of April 14, 1891, revised at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, and at Lisbon on October 31, 1958.

“In application of Article 16 of the Convention of Paris for the Protection of Industrial Property, to which Article 6 (2) of the Agreement of Madrid refers, this adhesion will take effect on October 11, 1964.”

* * *

The Agreement of Madrid, as revised at Lisbon, has now been ratified by the following six countries: France, Federal Republic of Germany, Czechoslovak Socialist Republic, Principality of Monaco, United Kingdom of Great Britain and Northern Ireland and Switzerland; Cuba has adhered to it.

LUXEMBURG

Ratification

of the Agreement of Madrid concerning the International
Registration of Trademarks (Nice Text)

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

(Translation)

“The Swiss Embassy has the honour to inform the Ministry of Foreign Affairs that, according to a recent communication from the French Ministry of Foreign Affairs, addressed to the Swiss Embassy in Paris, Luxemburg has deposited in

Paris on January 20, 1964, its instrument of ratification in respect of the Agreement of Madrid concerning the International Registration of Trademarks of April 14, 1891, as last revised at Nice on June 15, 1957.

“The Embassy further adds that the Grand Duchy of Luxemburg, in a note to its Embassy in Rome dated February 12, 1964, invoked the benefits of Article 3^{bis} of this Agreement.”

* * *

With this ratification, there are now 11 States which have so far ratified or adhered to the Nice Text.

CZECHOSLOVAKIA

Agreement of Madrid

concerning the International Registration of Trademarks
(Nice Text)

Supplementary communication

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

(Translation)

“The Swiss Embassy has the honour to inform the Ministry of Foreign Affairs of the following:

“In a note dated February 2, 1961¹⁾, the Embassy had informed the Ministry of the deposit, in Paris, on October 21, 1960, of the instrument of ratification by the Czechoslovak Republic in respect of the Agreement of Madrid concerning the International Registration of Trademarks of April 14, 1891, as last revised at Nice on June 15, 1957.

“According to a recent communication from the French Ministry of Foreign Affairs, the above-mentioned instrument of ratification was accompanied by a declaration invoking the benefits of Article 3^{bis} of the said Agreement. The declaration stated that:

‘Within the meaning of Article 3^{bis} the protection arising from the international registry of the trademark shall apply to Czechoslovak territory only if the applicant files an explicit request to this effect.’

“The Ministry is invited to take note of this declaration which, until now, was unknown to the Swiss Government.”

¹⁾ See *Industrial Property Quarterly*, 1961, No. 1, p. 36.

LEGISLATION

IRELAND

I

Industrial Property (Amendment) Rules

(No. 176, of July 20, 1964)

1. — These Rules may be cited as the Industrial Property (Amendment) Rules, 1964.

2. — (1) The Office shall be open to the public for the transaction by the public of business under the Industrial and Commercial Property (Protection) Acts, 1927 to 1958, every Monday, Tuesday, Wednesday, Thursday and Friday between the hours of 9.45 a. m. and 4.15 p. m. and any other days and hours which may from time to time be notified under this Rule.

(2) Notwithstanding the provisions of paragraph (1) of this Rule, the Office shall not be open:

- (a) on the following days: Christmas Day, Good Friday, Saint Patrick's Day, Bank Holidays and days which may from time to time be notified under this Rule, or
- (b) at any times which may from time to time be so notified on days which may from time to time be so notified.

(3) Notification under this Rule shall be by notice posted in a conspicuous place at the Office.

3. — Rule 17 of the Industrial Property Rules, 1927 (S. R. & O. No. 78 of 1927), is hereby revoked¹).

EXPLANATORY NOTE

(This note is not part of the instrument and does not purport to be a legal interpretation)

These Rules repeal Rule 17 of the Industrial Property Rules, 1927, which deals with days and hours of business at the Office. They provide that, subject to certain exceptions, the Office will be open to the public from Monday to Friday of each week between 9.45 a. m. and 4.15 p. m.

¹ See *La Propriété industrielle*, 1928, p. 49.

II

Patents Act, 1964

An Act to make new provision in respect of patents and related matters in substitution for the provisions of the Industrial and Commercial Property (Protection) Act, 1927, relating to patents and of other enactments relating to patents, and to provide for other matters connected with the matters aforesaid

(Of June 24, 1964)

(First Part)

Arrangement of Sections

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2. Interpretation
3. Orders and rules
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FIRST SCHEDULE

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SECOND SCHEDULE

Transitional Provisions

Be it enacted by the *Oireachtas* as follows:

PART I

Preliminary and General*Short title and commencement*

1. — (1) This Act may be cited as the Patents Act, 1964.
- (2) This Act shall come into operation on such day as the Minister may by order appoint.

Interpretation

2. — In this Act, unless the context otherwise requires:
 - "the Act of 1927" means the Industrial and Commercial Property (Protection) Act, 1927;
 - "applicant", in relation to an application, means the person making the application and includes a person in whose favour a direction has been given under section 22 of this Act, and the personal representative of a deceased applicant;
 - "article" includes any substance or material, and any plant, machinery or apparatus, whether affixed to land or not;
 - "assignee" includes the personal representative of a deceased assignee, and references to the assignee of any person include references to the assignee of the personal representative or assignee of that person;
 - "commercially worked" means the manufacture of the article or the carrying on of the process described and claimed in a specification for a patent in or by means of a definite and substantial establishment or organisation, and on a scale which is adequate and reasonable in all the circumstances;
 - "the Controller" means the Controller of Patents, Designs and Trade Marks appointed under this Act;
 - "convention application" has the meaning assigned to it by subsection (3) of section 6 of this Act;

- “convention country” has the meaning assigned to it by subsection (1) of section 93 of this Act;
- “the Court” means the High Court;
- “date of filing”, in relation to any document filed under this Act, means the date on which the document is filed or, where it is deemed by virtue of any provision of this Act or of rules made thereunder to have been filed on any different date, means the date on which it is deemed to be filed;
- “exclusive licence” means a licence from a patentee which confers on the licensee, or on the licensee and persons authorised by him, to the exclusion of all other persons (including the patentee), any right in respect of the invention, and “exclusive licensee” shall be construed accordingly;
- “invention” means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter, and includes an alleged invention and also any new method or process of testing applicable to the improvement or control of manufacture;
- “the Journal” means the journal issued by the Controller pursuant to section 81 of this Act;
- “the Minister” means the Minister for Industry and Commerce;
- “the Office” means the Patents Office established by the Act of 1927 and continued in being by section 77 of this Act;
- “patent” means letters patent for an invention;
- “patent of addition” means a patent granted in accordance with section 28 of this Act;
- “patentee” means the person or persons for the time being entered on the register of patents as grantee or proprietor of the patent;
- “prescribed” means, in the case of proceedings before the Court, prescribed by rules of court, and, in any other case, prescribed by rules made under this Act;
- “priority date” has the meaning assigned to it by section 10 of this Act;
- “published” means made available to the public by the written or spoken word or by public use, or in any other way.

Orders and rules

3. — (1) Where a power to make orders or rules is conferred by any provision of this Act, such orders or rules may be made either as respects all, or as respects any one or more, of the matters to which the provision relates; and different provisions may be made by any such orders or rules as respects different classes of cases to which the orders or rules apply.

(2) Every order or rule made under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and if a resolution annulling the order or rule is passed by either such House within the next subsequent twenty-one days on which that House has sat after the order or rule is laid before it, the order or rule shall be annulled

accordingly but without prejudice to the validity of anything previously done thereunder.

(3) Every order or rule made under this Act shall be advertised twice in the Journal.

Expenses

4. — The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Transitional provisions and repeals

5. — (1) The transitional provisions contained in the Second Schedule to this Act shall have effect for the purposes of this Act.

(2) Subject to the said transitional provisions, the enactments specified in the First Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

PART II

Application, Investigation, Opposition, etc.

Persons entitled to apply for patent

6. — (1) An application for a patent may be made by any person who claims:

- (a) to be the true and first inventor of the invention to which the application relates, or
- (b) that the true and first inventor of the invention to which the application relates has assigned to him the right to make the application,

and may be made either alone or jointly with another person.

(2) Notwithstanding the provisions of subsection (1) of this section, application for a patent may be made by a person who has applied in a convention country for protection for the invention to which the application for the patent relates or by a person to whom such person has assigned the right to make the application for the patent.

(3) An application for a patent under subsection (2) of this section (in this Act referred to as a convention application) shall be made during such period (not being less than twelve months) as may be prescribed commencing on the date of the relevant application for protection or, in the case of more than one application, the date of the first such application.

(4) An application for a patent may be made by the personal representative of a person who, immediately before his death was entitled to make such an application.

Application for patent

7. — (1) An application for a patent shall be made in the prescribed form and shall be filed at the Office in the prescribed manner.

(2) If the application (not being a convention application) is made by virtue of an assignment of a right to apply for a patent, there shall be furnished with the application or within such period after the filing of the application as may be prescribed a declaration signed by the person claiming to

be the true and first inventor or by the personal representative of such person stating that he assents to the making of the application.

(3) An application (other than a convention application) shall state that the applicant is in possession of the invention and shall name the person claiming to be the true and first inventor, and where the person so claiming is not the applicant or one of the applicants, the application shall contain a declaration that the applicant believes him to be the true and first inventor.

(4) A convention application shall specify the date on which and the convention country in which the application for protection for the invention to which the convention application relates, or the first application for protection was made, and shall state that no application for protection has been made in a convention country in respect of that invention before that date by the applicant or any person from whom he derives title.

(5) Where applications for protection have been made in one or more convention countries in respect of two or more inventions that are cognate or of which one is a modification of another, a single convention application may, subject to the provisions of section 9 of this Act, be made in respect of those inventions at any time within the period prescribed under subsection (3) of section 6 of this Act commencing on the date of the first of the said applications for protection:

Provided that the fee payable on the making of any such application shall be the same as if separate applications had been made in respect of each of the said inventions, and the requirements of the last foregoing subsection shall in the case of any such application apply separately to the applications for protection in respect of each of the said inventions.

(6) Without prejudice to the provisions of subsection (4) of this section, every application for a patent shall give such information as may be prescribed.

Complete and provisional specifications

8. — (1) Every application for a patent (other than a convention application) shall be accompanied by either a complete specification or a provisional specification; and every convention application shall be accompanied by a complete specification.

(2) Where an application for a patent is accompanied by a provisional specification, a complete specification shall be filed within twelve months from the date of filing of the application and if the complete specification is not so filed the application shall be deemed to be abandoned:

Provided that the complete specification may be filed at any time after twelve months but within fifteen months from the date aforesaid if a request to that effect is made to the Controller and the prescribed fee paid on or before the date on which the specification is filed.

(3) Where two or more applications accompanied by provisional specifications have been filed in respect of inventions which are cognate or of which one is a modification of another, a single complete specification may, subject to the provisions of this and the next following section, be filed in

pursuance of those applications, or, if more than one complete specification has been filed, may with the leave of the Controller be proceeded with in respect of those applications.

(4) Where an application for a patent (not being a convention application) is accompanied by a specification purporting to be a complete specification, the Controller may, if the applicant so requests at any time before the acceptance of the specification, direct that it shall be treated for the purposes of this Act as a provisional specification, and proceed with the application accordingly.

(5) Where a complete specification has been filed in pursuance of an application for a patent accompanied by a provisional specification or by a specification treated by virtue of a direction under the last foregoing subsection as a provisional specification, the Controller may, if the applicant so requests at any time before the acceptance of the complete specification, cancel the provisional specification and post-date the application to the date of filing of the complete specification.

(6) Where a complete specification is filed in pursuance of an application for a patent, the applicant shall furnish, within the time prescribed, such evidence as may be prescribed of:

- (a) the result of any investigation made for the purpose of ascertaining whether the invention so far as claimed in any claim of the complete specification has been published before the date of filing of the complete specification in a specification filed in any of such patent offices outside the State as may be prescribed, or
- (b) the acceptance by any of such patent offices outside the State as may be prescribed of an application for a patent for the invention aforesaid.

Contents of specification

9. — (1) Every specification, whether complete or provisional, shall describe the invention, and shall begin with a title indicating the subject to which the invention relates.

(2) Subject to any rules made by the Minister under this Act, drawings may, and shall if the Controller so requires, be supplied for the purposes of any specification, whether complete or provisional, and any drawings so supplied shall, unless the Controller otherwise directs, be deemed to form part of the specification, and references in this Act to a specification shall be construed accordingly.

(3) Every complete specification:

- (a) shall particularly describe the invention and the method by which it is to be performed,
- (b) shall disclose the best method of performing the invention which is known to the applicant and for which he is entitled to claim protection, and
- (c) shall end with a claim or claims defining the scope of the invention claimed.

(4) The claim or claims of a complete specification must relate to a single invention, must be clear and succinct, and must be fairly based on the matter disclosed in the specification.

(5) Rules made by the Minister under this Act may require that in such cases as may be prescribed by the rules, a declaration as to the inventorship of the invention, in such form as may be so prescribed, shall be furnished with the complete specification or within such period as may be so prescribed after the filing of that specification.

(6) Subject to the foregoing provisions of this section, a complete specification filed after a provisional specification, or filed with a convention application, may include claims in respect of developments of or additions to the invention which was described in the provisional specification or, as the case may be, the invention in respect of which the application for protection was made in a convention country, being developments or additions in respect of which the applicant would be entitled under the provisions of section 6 of this Act to make a separate application for a patent.

(7) Where a complete specification claims a new substance, the claim shall be construed as not extending to that substance when found in nature.

Priority dates in relation to specifications

10. — (1) (a) Every claim of a complete specification shall have effect from the date provided for by this section in relation to that claim and in this Act a reference to a priority date is, unless the context otherwise requires, a reference to such date.

(b) A patent shall not be invalidated by reason only of the publication or use of the invention, so far as claimed in any claim of the complete specification, on or after the priority date of that claim, or by the grant of another patent upon a specification claiming the same invention in a claim of the same or later priority date.

(2) Where the complete specification is filed in pursuance of a single application accompanied by a provisional specification or by a specification which is treated by virtue of a direction under subsection (4) of section 8 of this Act as a provisional specification, and the claim is fairly based on the matter disclosed in that specification, the priority date of that claim shall be the date of filing of the application.

(3) Where the complete specification is filed or proceeded with in pursuance of two or more applications accompanied by such specifications as are mentioned in the last foregoing subsection, and the claim is fairly based on the matter disclosed in one of those specifications, the priority date of that claim shall be the date of filing of the application accompanied by that specification.

(4) Where the complete specification is filed in pursuance of a convention application and the claim is fairly based on the matter disclosed in the application for protection in a convention country or, where the convention application is founded upon more than one such application for protection, in one of those applications, the priority date of that claim shall be the date of the relevant application for protection.

(5) Where, under the foregoing provisions of this section, any claim of a complete specification would, but for this provision, have two or more priority dates, the priority date of that claim shall be the earlier or earliest of those dates.

(6) In any case to which subsections (2) to (5) of this section do not apply, the priority date of a claim shall be the date of filing of the complete specification.

(7) The priority date of any matter disclosed in the descriptive part of a specification shall be the date on which that matter was first disclosed in pursuance of the application for a patent of which the specification forms a part or (in the case of a convention application) was first disclosed in the relevant application for protection in a convention country.

Examination of application

11. — (1) When the complete specification has been filed in respect of an application for a patent, the application and specification or specifications shall be referred by the Controller to an officer of the Controller (in this Act referred to as an examiner) for examination together with any information furnished under subsection (6) of section 7 of this Act and any evidence furnished under subsection (6) of section 8 of this Act.

(2) If the examiner reports that the application or any specification filed in pursuance thereof does not comply with the requirements of this Act or of any rules made by the Minister thereunder, or that there is lawful ground of objection to the grant of a patent in pursuance of the application, the Controller may either:

- (a) refuse to proceed with the application, or
- (b) require the application or any such specification as aforesaid to be amended before he proceeds with the application.

(3) At any time after an application has been filed under this Act and before acceptance of the complete specification, the Controller may, at the request of the applicant and upon payment of the prescribed fee, direct that the application shall be post-dated to such date as may be specified in the request:

Provided that,

- (a) no application shall be post-dated under this subsection to a date later than six months from the date on which it was actually made or would, but for this subsection be deemed to have been made, and
- (b) a convention application shall not be post-dated under this subsection to a date later than the last date on which, under the foregoing provisions of this Act, the application could have been made.

(4) Where an application or specification filed under this Act is amended before acceptance of the complete specification, the Controller may direct that the application or specification shall be post-dated to the date on which it is amended or, if it has been returned to the applicant, to the date on which it is refiled.

(5) Rules made by the Minister under this Act may make provision for securing that where, at any time after an application or specification has been filed under this Act and before acceptance of the complete specification, a fresh application or specification is filed in respect of any part of the subject matter of the first-mentioned application or specifi-

cation, the Controller may direct that the fresh application or specification shall be ante-dated to a date not earlier than the date of filing of the first-mentioned application or specification.

(6) An appeal shall lie from any decision of the Controller under subsection (2) or subsection (4) of this section.

Search for anticipation by previous publication

12. — (1) Subject to the provisions of the last foregoing section of this Act, an examiner to whom an application for a patent is referred under this Act shall make investigation for the purpose of ascertaining whether the invention, so far as claimed in any claim of the complete specification, has been published before the date of filing of the applicant's complete specification in any specification filed in pursuance of an application for a patent made in the State.

(2) The examiner shall, in addition, make such investigation as the Controller may direct for the purpose of ascertaining whether the invention, so far as claimed in any claim of the complete specification, has been published in the State before the date of filing of the applicant's complete specification in any other document.

(3) The examiner shall, in addition, consider any information furnished in pursuance of subsection (6) of section 7 of this Act and any evidence furnished in pursuance of subsection (6) of section 8 of this Act.

(4) If it appears to the Controller that the invention, so far as claimed in any claim of the complete specification, has been published as described in subsection (1) or subsection (2) of this section, or if he is not satisfied by the information and evidence referred to in subsection (3) of this section that the invention so claimed has not been published before the date of the complete specification in any specification filed in an office prescribed under paragraph (a) of subsection (6) of section 8 of this Act, he may refuse to accept the complete specification unless the applicant either:

- (a) shows to the satisfaction of the Controller that the priority date of the claim of his complete specification is not later than the date on which any relevant document or prescribed specification, as the case may be, was published,
- (b) furnishes further evidence to the satisfaction of the Controller in pursuance of subsection (6) of section 8 of this Act, or
- (c) amends his complete specification to the satisfaction of the Controller.

(5) An appeal shall lie from any decision of the Controller under this section.

Further search for anticipation

13. — (1) In addition to the investigation required by the last foregoing section, the examiner shall make investigation for the purpose of ascertaining whether the invention, so far as claimed in any claim of the complete specification, is claimed in, or included in matter disclosed in the descriptive part of, any other specification published on or after the

date of filing of the applicant's complete specification, being a specification filed:

- (a) in pursuance of an application for a patent made in the State and dated before that date, or
- (b) in pursuance of a convention application founded upon an application for protection made in a convention country before that date.

(2) If it appears to the Controller that the said invention is claimed in, or included in matter disclosed in the descriptive part of, any such other specification as aforesaid, he may, subject to the provisions of this section, direct that a reference to that other specification shall be inserted by way of notice to the public in the applicant's complete specification unless within such time as may be prescribed either:

- (a) the applicant shows to the satisfaction of the Controller that the priority date of his claim is not later than the priority date of the claim or the matter disclosed in the descriptive part of the said other specification, or
- (b) the complete specification is amended to the satisfaction of the Controller.

(3) If in consequence of the investigation under section 12 of this Act or otherwise it appears to the Controller:

- (a) that the invention, so far as claimed in any claim of the applicant's complete specification, has been claimed in, or included in matter disclosed in the descriptive part of, any such specification as is mentioned in subsection (1) of that section, and
- (b) that the other specification was published on or after the priority date of the applicant's claim,

then unless it has been shown to the satisfaction of the Controller under that section that the priority date of the applicant's claim is not later than the priority date of the relevant claim of, or the matter disclosed in the descriptive part of, that other specification, the provisions of subsection (2) of this section shall apply as they apply in relation to a specification published on or after the date of filing of the applicant's complete specification.

(4) An appeal shall lie from any direction of the Controller under this section.

Reference in case of potential infringement

14. — (1) If, in consequence of the investigations required by the foregoing provisions of this Act or of proceedings under section 19 or section 35 of this Act, it appears to the Controller that an invention in respect of which application for a patent has been made cannot be performed without substantial risk of infringement of a claim of any other patent, he may direct that a reference to that other patent shall be inserted in the applicant's complete specification by way of notice to the public unless within such time as may be prescribed either:

- (a) the applicant shows to the satisfaction of the Controller that there are reasonable grounds for contesting the validity of the said claim of the other patent, or
- (b) the complete specification is amended to the satisfaction of the Controller.

(2) Where, after a reference to another patent has been inserted in a complete specification in pursuance of a direction under the foregoing subsection:

- (a) that other patent is revoked or otherwise ceases to be in force,
- (b) the specification of that other patent is amended by the deletion of the relevant claim, or
- (c) it is found, in proceedings before the Court or the Controller, that the relevant claim of that other patent is invalid or is not infringed by any working of the applicant's invention,

the Controller may, on the application of the applicant, delete the reference to that other patent.

(3) An appeal shall lie from any decision or direction of the Controller under this section.

Refusal of application in certain cases

15. — (1) If it appears to the Controller in the case of any application for a patent:

- (a) that it claims as an invention anything obviously contrary to well-established natural laws,
- (b) that the use of the invention in respect of which the application is made would be contrary to public order or morality, or
- (c) that it claims as an invention a substance capable of being used as food or medicine which is a mixture of known ingredients possessing only the aggregate of the known properties of the ingredients, or that it claims as an invention a process producing such a substance by mere admixture,

he may refuse the application.

(2) If it appears to the Controller that any invention in respect of which an application for a patent is made might be used in any manner contrary to law, he may insert in the complete specification such disclaimer in respect of that use of the invention, or such other reference to the illegality thereof, as he thinks fit.

(3) An appeal shall lie from any decision of the Controller under this section.

Supplementary provisions as to searches, etc.

16. — (1) The powers of the Controller under section 13 or section 14 of this Act may be exercised either before or after the complete specification has been accepted or a patent granted to the applicant, and references in those sections to the applicant shall accordingly be construed as including references to the patentee.

(2) Where a complete specification is amended under the foregoing provisions of this Act before it has been accepted, the amended specification shall be examined and investigated in like manner as the original specification.

(3) The examination and investigations required by the foregoing provisions of this Act shall not be deemed to warrant the validity of any patent, and no liability shall be incurred by the Minister or Controller or any officer of the Minister or Controller by reason of or in connection with any

such examination or investigation or any report or other proceedings consequent thereon.

Time for putting application in order for acceptance

17. — (1) An application for a patent shall be void unless within such period, beginning with the date of filing of the complete specification, as may be prescribed, or within such longer period as may be allowed under the following provisions of this section or under rules made under this Act, the applicant has complied with all requirements imposed on him by or under this Act, whether in connection with the complete specification or otherwise in relation to the application, and where the application or any specification or, in the case of a convention application, any document filed as part of the application, has been returned to the applicant by the Controller in the course of the proceedings, the applicant shall not be deemed to have complied with the said requirements unless and until he has refiled it.

(2) The period allowed by subsection (1) of this section shall be extended to such period, ending not later than three months after the date on which the period allowed under that subsection or that period as extended under subsection (3) of this section or under rules made under this Act would otherwise have expired, as may be specified in a notice given by the applicant to the Controller, if the notice is given and the prescribed fee paid before the expiration of the period so specified.

(3) If at the expiration of the period allowed under the foregoing provisions of this section an appeal is pending under any of the provisions of this Act in respect of the application (or, in the case of an application for a patent of addition, either in respect of that application or in respect of the application for the patent for the main invention) or the time within which such an appeal could be brought (apart from any future extension of time thereunder) has not expired, then:

- (a) where such an appeal is pending, or is brought within the time aforesaid or before the expiration of any extension of that time granted (in the case of a first extension) on an application made within that time or (in the case of a subsequent extension) on an application made before the expiration of the last previous extension, the said period shall be extended until such date as the Court may determine,
- (b) where no such appeal is pending or is so brought, the said period shall continue until the end of the time aforesaid, or if any extension of that time is granted as aforesaid, until the expiration of the extension or last extension so granted.

Acceptance and publication of complete specification

18. — (1) Subject to the provisions of the last foregoing section, the complete specification filed in pursuance of an application for a patent may be accepted by the Controller at any time after the applicant has complied with the requirements mentioned in subsection (1) of that section, and if not so accepted within the period allowed under that section

for compliance with those requirements, shall be accepted as soon as may be thereafter:

Provided that the applicant may give notice to the Controller requesting him to postpone acceptance until such date, not being later than fifteen months from the date of filing of the complete specification, as may be specified in the notice; and if such notice is given and, where the notice requests a postponement to a date later than twelve months from the date aforesaid, the prescribed fee is paid, the Controller may postpone acceptance accordingly.

(2) On the acceptance of a complete specification the Controller shall give notice to the applicant, and shall advertise in the Journal the fact that the specification has been accepted and the date on which the application and the specification or specifications filed in pursuance thereof will be open to public inspection.

(3) Any reference in this Act to the date of the publication of a complete specification shall be construed as a reference to the date advertised as aforesaid.

(4) After the date of the publication of a complete specification and until the sealing of a patent in respect thereof, the applicant shall have the like privileges and rights as if a patent for the invention had been sealed on the date of the publication of the complete specification:

Provided that an applicant shall not be entitled to institute any proceedings for infringement until the patent has been sealed.

Opposition to grant of patent

19. — (1) At any time within three months from the date of the publication of a complete specification under this Act, any person interested may give notice to the Controller of opposition to the grant of the patent on any of the following grounds:

- (a) that the applicant for the patent, or the person described in the application as the true and first inventor, obtained the invention or any part thereof from him, or from a person of whom he is the personal representative,
- (b) that the invention, so far as claimed in any claim of the complete specification, has been published in the State, before the priority date of the claim:
 - (i) in any specification filed in pursuance of an application for a patent made in the State,
 - (ii) in any other document,
- (c) that the invention, so far as claimed in any claim of the complete specification, is claimed in, or included in matter disclosed in the descriptive part of, another specification published on or after the priority date of the applicant's claim and filed in pursuance of an application for a patent in the State, the priority date of the relevant claim or the matter disclosed in the descriptive part of the other specification being earlier than that of the applicant's claim,
- (d) that the invention, so far as claimed in any claim of the complete specification, was used in the State before the priority date of that claim,
- (e) that the invention, so far as claimed in any claim of the complete specification, is obvious and clearly does not

involve any inventive step having regard to any matter published in the manner specified in paragraph (b) of this subsection, any matter claimed or disclosed in the manner specified in paragraph (c) of this subsection or what was used in the State before the priority date of the applicant's claim,

- (f) that the subject of any claim of the complete specification is not an invention within the meaning of this Act,
 - (g) that the complete specification does not sufficiently and fairly describe the invention or the method by which it is to be performed,
 - (h) that, in the case of a convention application, the application was not made within the period prescribed under subsection (3) of section 6 of this Act from the date of the first application for protection for the invention made in a convention country by the applicant or a person from whom he derives title,
- but on no other ground.

(2) Where any such notice is given, the Controller shall give notice of the opposition to the applicant, and shall give to the applicant and the opponent an opportunity to be heard before he decides on the case.

(3) For the purposes of paragraph (d) or paragraph (e) of subsection (1) of this section, no account shall be taken of any secret use.

(4) An appeal shall lie from any decision of the Controller under this section.

Refusal of patent without opposition

20. — (1) If at any time after the acceptance of the complete specification filed in pursuance of an application for a patent and before the grant of a patent thereon it comes to the notice of the Controller, otherwise than in consequence of proceedings in opposition to the grant under the last foregoing section, that the invention, so far as claimed in any claim of the complete specification, has been published in the State before the priority date of the claim:

- (a) in any specification filed in pursuance of an application for a patent in the State, or
 - (b) in any other document,
- the Controller may refuse to grant the patent unless within such time as may be prescribed the complete specification is amended to his satisfaction.

(2) An appeal shall lie from any decision of the Controller under this section.

Mention of inventor as such in patent

21. — (1) If the Controller is satisfied, upon a request or claim made in accordance with the provisions of this section:

- (a) that the person in respect of or by whom the request or claim is made is the inventor of an invention in respect of which application for a patent has been made, or of a substantial part of that invention, and
 - (b) that the application for the patent is a direct consequence of his being the inventor,
- the Controller shall, subject to the provisions of this section, cause him to be mentioned as inventor in any patent granted

in pursuance of the application, in the complete specification, and in the register of patents:

Provided that the mention of any person as inventor under this section shall not confer or derogate from any rights under the patent.

(2) For the purposes of this section the actual deviser of an invention or a part of an invention shall be deemed to be the inventor, notwithstanding that any other person is for any of the other purposes of this Act treated as the true and first inventor, and no person shall be deemed to be the inventor of an invention or a part of an invention by reason only that it was imported by him into the State.

(3) A request that any person shall be mentioned as aforesaid may be made in the prescribed manner by the applicant for the patent or (where the person alleged to be the inventor is not the applicant or one of the applicants) by the applicant and that person.

(4) If any person (other than a person in respect of whom a request in relation to the application in question has been made under the last foregoing subsection) desires to be mentioned as aforesaid, he may make a claim in the prescribed manner in that behalf.

(5) A request or claim under the foregoing provisions of this section must be made not later than two months after the date of the publication of the complete specification, or within such further period (not exceeding one month) as the Controller may, on an application made to him in that behalf before the expiration of the said period of two months and subject to payment of the prescribed fee, allow.

(6) No request or claim under the foregoing provisions of this section shall be entertained if it appears to the Controller that the request or claim is based upon facts which, if proved in the case of an opposition under the provisions of paragraph (a) of subsection (1) of section 19 of this Act by the person in respect of or by whom the request or claim is made, would have entitled him to relief under that section.

(7) Subject to the provisions of the last foregoing subsection, where a claim is made under subsection (4) of this section, the Controller shall give notice of the claim to every applicant for the patent (not being the claimant) and to any other person whom the Controller may consider to be interested, and before deciding upon any request or claim made under subsection (3) or subsection (4) of this section, the Controller shall, if required, hear the person in respect of or by whom the request or claim is made, and in the case of a claim under the said subsection (4), any person to whom notice of the claim has been given as aforesaid.

(8) Where any person has been mentioned as inventor in pursuance of this section, any other person who alleges that he ought not to have been so mentioned may at any time apply to the Controller for a certificate to that effect, and the Controller may, after hearing, if required, any person whom he may consider to be interested, issue such a certificate, and if he does so, he shall rectify the specification and the register accordingly.

(9) An appeal shall lie from any decision of the Controller under this section.

(To be continued)

GENERAL STUDIES

Committee of National Institutes of Patent Agents (CNIPA)

Report on the Draft Convention relating to a European Patent Law

In July 1963 CNIPA made a report (published in *Industrial Property*, November 1963) on the Draft Convention relating to a European Patent Law. Since then there has been an important development in international agreements on patents, namely the signature at Strasbourg on November 27, 1963, of a Convention on the Unification of certain points of substantive law on patents for invention. In addition CNIPA has had the opportunity of considering reports by other interested bodies and further proposals that have been suggested. CNIPA thinks it opportune in these circumstances to make a further brief report.

The ultimate objective of the original concept is the grant of a single patent effective throughout the territories of all the Contracting States, and the abolition of national patent systems. This objective cannot be realized in any foreseeable period of time. It is far better to start modestly, and to have regard to immediate practical considerations. One of these is the fact that the obtaining of an international patent will be very expensive.

Now in all countries there are many people who ask for protection of their ideas in their own countries only at a reasonable cost and by a simple procedure. It is unthinkable that any Government will deprive these people of what they want. It follows that national Patent Offices must be maintained to receive national applications, at any rate for many years to come.

This inevitable conclusion simplifies the problem of accessibility. If national Patent Offices remain to grant national patents, there is no necessity to render an international or European patent, which would ensure protection identical to that to be derived from national patents, accessible to all. Instead a most useful start can be made by a Convention under which residents of the Contracting States can obtain not a single patent but, by means of a single application, prosecution and grant, patents effective in all the Contracting States, or in other words a bundle of patents all in the same form. The matter ceases to be one of principle, raising the question whether the system is contrary to the Paris Convention; it becomes one of mechanism for obtaining patents, but nevertheless something from which much more might grow.

Clearly a single Patent Office cannot grant patents effective in different countries under their national laws unless there is substantial harmony among those laws. It is here that the Unification Convention of Strasbourg is valuable.

¹ Previous reports by CNIPA on the same subject were published in *Industrial Property*, 1962, pp. 18 and 130; 1963, p. 247.

Those countries which ratify it must bring their national laws into agreement with it. If, therefore, the proposed Convention is confined to such countries, or to countries in which the patent law is in agreement with the requirements of the Unification Convention, the grant by the international (or European) Patent Office of what would in effect be national patents would be practical.

Adherence to the proposed Convention should be confined to those countries prepared to accept the European patent as effective in their own territories.

But provision might still be made for association by any other country to allow residents of it to apply to the European Patent Office and so to facilitate the procedure of obtaining patents in a number of countries, with benefits in many ways. It would then be desirable to apply the procedure of association in such manner to ensure that the patent laws of the associating countries contained the provisions required by the Unification Convention. This might very well be useful in bringing about harmonization of the patent laws of the world, which is a most desirable object in itself.

With these proposals it would be possible, as CNIPA suggested in its report of July 1963, for any group of countries that has a common economic system to conclude a special arrangement fostering the aims of this system.

CORRESPONDENCE

(Translation)

Letter from Switzerland

By Edouard PETITPIERRE, Advocate, Lausanne

The last "Letter from Switzerland" was in August, 1960¹⁾.

Since then the general revision of the law relating to trademarks has now entered upon a decisive phase, the Federal Bureau having been officially instructed to prepare a draft Bill.

Further, we cannot refer to the Federal Bureau without mentioning, for the benefit of those persons who might be unaware of the fact, that the Bureau happily achieved its seventy-fifth anniversary on September 20, 1963.

As will be seen, our jurisprudence has not undergone any great changes since the last report was made upon it. The limited space now at our disposal compels us to be selective; but we hope that our report will not be regarded as too incomplete.

Patents

1. — As regards the notion of technical progress in the assessment of novelty, technical progress and inventive step, the Federal Court, on the basis of the Law of 1907, has laid down certain considerations to be taken into account.

In order to determine whether a new invention exists, the Court has declared that it is necessary first to ascertain the state of the art at the date of deposit of the application for the patent at issue.

An anticipation can consist in an earlier realisation or publication which has been ignored or completely forgotten by technicians. Thus, the Law introduces, as regards novelty, a notion of the state of the art which is pure fiction.

This is not the case in the field of technical progress and inventive step. Here, the state of the art is assessed according to the effective knowledge of persons skilled in the art. Account should not be taken of an earlier invention unless it has actually exercised influence upon the development of the art. Consequently if a publication has not been disclosed or has been forgotten, it cannot be taken into account in determining whether the application for a patent at issue constitutes an invention (*Fabrique des montres Vulcain and Studio S. A. v. Enicar S. A.*, November 14, 1961; ATF 87 II 269).

On the question of technical progress, the Federal Court has further ruled as follows:

The success of a new product demonstrates, in general, the existence of sufficient technical progress. On the other hand, it is of small account that certain of its effects have only manifested themselves after the deposit of the application for a patent (*Istituto De Angeli S. p. A., Unipharma S. A. and Dissan S. A. v. J. R. Geigy S. A.*, January 29, 1963; ATF 89 II 156).

As regards inventive step, in particular, our High Court has confirmed its earlier jurisprudence.

An invention implies a creative idea which goes beyond what was within the reach of a well-informed person skilled in the art. In order to assess the existence of an inventive step, the Court has declared that it is necessary to take account of the state of the art, considered in its entirety, as it existed at the time of the first application. Account should be taken of all partial solutions and of all special work which, taken together, constitute the state of the art, and whether a well-informed person, skilled in the art, could, under these conditions, arrive at the invention without undue effort (*Krebs v. Gerätebau Ing. Wagner and Roth & Co. AG*, January 14, 1963; ATF 89 II 108).

2. — It is known that a patent cannot be asserted against a person who, in good faith, and at the moment of deposit of the application, was making professional use of the invention in Switzerland, or who had made special preparations to this end.

For the right of concurrent exploitation to exist, the Federal Court has declared that it is first of all necessary for there to be a "perfected" invention (*fertige Erfindung*). Only a person having all necessary knowledge for carrying out the invention can claim such a right. It is not sufficient to have made trials designed to find a solution to the problem at issue.

The "special preparations" are not only those which have been specially undertaken for the purpose of carrying out the invention. The right of concurrent exploitation can

¹⁾ See *La Propriété industrielle*, 1960, p. 154.

be claimed when preparations undertaken with a view to exploitation of the invention have attained a certain magnitude. This stems from the idea which forms the basis of this matter, namely that it would be inequitable to expose the person who has incurred a substantial outlay with the object of exploiting his invention to the risk of losing the money so expended.

In the case at issue, at the time when the plaintiff had deposited his application, the defendant had drawn up plans with the object of pursuing his work, and in so doing had incurred an expenditure of several hundred thousand francs. Further, he had organised a demonstration before specialists; but he had made no preparations for the industrial manufacture of the product of the invention. The judges accordingly decided that the legal conditions of prior use had not been fulfilled (*Aktiengesellschaft Brown, Boveri & Co. v. Compagnie générale d'Electricité*, December 13, 1960; ATF 86 II 406).

3. — Two interesting decisions have been given as regards restoration to an earlier condition.

According to the law, the applicant for and the owner of a patent cannot re-acquire an earlier condition if, by their own fault, they have failed to observe a time limit.

According to jurisprudence, the applicant for and the owner of a patent likewise cannot re-acquire an earlier condition if the non-observance of a time limit is due to a fault on the part of their agents. The applicant for and the owner of a patent are likewise subject to the consequences of the faults of employees of their agents, since such employees are, indirectly, their own auxiliaries (*Whirlpool Corporation v. Bureau fédéral de la propriété intellectuelle*, May 30, 1961; ATF 87 I 217).

It has further been held that the agent of an applicant was not entitled to apply in his own name for the restoration of his client to an earlier condition (*N. N. v. Bureau fédéral de la propriété intellectuelle*, June 13, 1961; ATF 67 I 223).

4. — What is the effect of a subsequent amendment of a claim on the date of deposit of an application?

The Federal Court has set out certain important considerations in this respect.

The Court has observed that an invention is not the subject of complete protection until after the patent has been issued. But, since administrative procedure is somewhat prolonged, the applicant should be guaranteed against the risk of losing his right by reason of the fact that, in the interval, a third party has made and utilized the same invention. This is the reason for according priority to an application for a patent. Doubtless, the application is valid, even if it still does not contain the claim, and once the patent is granted, the claim will be conclusive as to the extent of the protection. The application should, however, sufficiently determine the invention and, thus, the subject of the priority.

It is true that the claim can be amended, as long as the patent has not been granted. But the application can only retain its original date if the initial description or other written matter submitted at the same time already contains "indications" as to the amendments effected (Article 58,

para. 2 of the Law of 1954). This provision should be interpreted in the sense that only amendments which do not in any way extend or change the essence of an invention from that covered by the documents initially submitted can be made without affecting the date. If these considerations are not fulfilled, the application must be treated as a new application, and must bear a new date (*Sandoz AG v. Bureau fédéral de la propriété intellectuelle et Imperial Chemical Industries, Ltd.*, November 7, 1961; ATF 87 I 397).

Trademarks

1. — As everyone knows, the registration of marks which are contrary to public order (*bonnes mœurs*) is prohibited. The Federal Court has had occasion to re-iterate that any mark which is of such a nature as to deceive the public as regards the composition of goods is contrary to public order.

The mark "Spiralin", even when applied to textile products which are not made of linen, has been regarded as falling outside the scope of this rule since, according to the Federal Court, it directs attention more to the word spiral ("spirale") than to the word linen ("lin"); consequently, there is no risk of thinking that it designates fabrics made of linen (*Heinz Ginzel & Co. v. Bureau fédéral de la propriété intellectuelle*, March 22, 1960; ATF 86 I 55).

On the same basis, a mark may contain a geographical designation, provided such designation is not misleading.

In this respect, the Federal Court has ruled that when a known geographical designation is exploited, suggesting a country which is not the country of origin of the product, deception can only be excluded if the public can immediately recognise that the term is of a fanciful character, without bearing on the origin of the goods (*Istituto Sieroterapico Berna S. r. l. v. Bureau fédéral de la propriété intellectuelle*, February 11, 1963; ATF 98 I 49).

The Federal Court has applied the same principle in the case of *Florida International Fruchtsaftgetränke Gesellschaft GmbH. v. Bureau fédéral de la propriété intellectuelle*. In this case, registration of the mark "Florida" had been applied for in respect of non-alcoholic beverages. This mark was only accepted in respect of beverages originating in America or manufactured from products which came from America. The applicant objected, on the ground that his mark had been accepted without restriction in Germany. The Court replied that each State must pronounce freely and independently of others (*Florida International Fruchtsaftgetränke Gesellschaft GmbH. v. Bureau fédéral de la propriété intellectuelle*, September 18, 1963; ATF 89 I 298).

2. — The risks of confusion which marks or products can cause have led to new developments in the field of jurisprudence.

When two marks are not intended for goods or products of a totally different character, it is well known that the more recent mark must be distinguishable from the other by essential characteristics. But should this also apply when the goods involved are totally different in character?

The Federal Court has laid down that it is not sufficient that such marks can be capable of confusion, thereby con-

firming consistency in jurisprudence. It is necessary that there should not be such close relationship between the marks as to involve the risk of the public attributing the mark to the same manufacturer or trader. In effect, the proprietor of a mark has an interest to ensure not only that the products of another person are not confused with his own, but also that he himself is not regarded as the manufacturer or supplier of goods which have nothing to do with him and whose reputation might cause damage to his own establishment.

Basing itself upon these principles, the Federal Court considered that in view of the mark "Narok", used in respect of tea and coffee, the mark "Narok", intended for coffee-grinders and other household appliances, must be declared void, since the products in question had an obvious relationship.

In the event, the second applicant had not made actual use of the mark "Narok", but he had shown intention of so doing by obtaining its registration and refusing to cancel it. The High Court held that this was sufficient to justify the action for its withdrawal (*Narok AG v. Muller*, May 9, 1961; ATF 87 II 107).

It has just been seen that when two marks are intended for identical or similar products, the more recent mark must be distinguishable from the earlier mark by essential characteristics.

In accordance with well-established jurisprudence, the risk of confusion must be assessed according to the total impact created by the marks in question, and not in accordance with their different constituent elements, considered separately.

Further, the decisive factor is the impression which will be made upon ultimate purchasers. When relatively inexpensive articles of daily use are involved, to which purchasers devote relatively little attention, it is necessary for the marks to be differentiated in a particularly striking manner. Finally, since interested parties would not, in general, see the two marks simultaneously, it is particularly necessary to enquire as to the impression that would be retained in their memory.

Applying these principles, the Federal Court considered that the mark "Big-Pen", to be applied to ball-point pens, was not sufficiently distinguishable from the mark "Bic", despite the presence of the word "Pen", this latter word only possessing reduced distinctive quality. There would, at the least, be the risk of the purchaser thinking that the articles sold under one or other marks were the products of the same manufacturer; and that is sufficient, in itself, to show that there is a risk of confusion (*Plastofin AG v. Bich et consorts*, February 21, 1961; ATF 87 II 35).

Acting upon the same principles, the Federal Judges have ruled that the mark "Torero-Rum", to designate chocolate, was capable of confusion with the well-known mark "Tobler-o-Rum" (*Lanz & Co. et Terri-Schokoladen AG v. Aktiengesellschaft Chocolat Tobler*, August 6, 1962; ATF 88 II 378).

Similarly, it has been held that the mark "Florina, die Feiwäsche für Sie" (Florina, the fine underwear for you), to designate underwear for ladies and gentlemen, constituted an imitation of the mark "Felina", intended, in particular, for underwear for men and women (*Haldiman v. Felina GmbH.*, December 27, 1962; ATF 88 II 465).

In the case of *Th. Marthens & Co. GmbH. v. AG für Presseerzeugnisse* of the January 11, 1961, the Federal Court was called upon to resolve the question of the risk of confusion between the titles of newspapers.

In effect, the Court had to consider whether the title of the daily illustrated paper "Blick", published in Switzerland, constituted an imitation of the weekly illustrated paper "Quick", published in Germany, the title of which is registered as a trademark in respect of illustrated periodicals.

The Court decided in the negative.

Firstly, the Court considered that the consonance of the titles of the two publications would not suggest that they emanated from the same publisher, for it is in no way usual for an enterprise to give to two of its publications titles having the same aural effect.

On the other hand, it is of little consequence whether the consonance gives rise to confusion when the publications at issue are sold in the streets, as the public will immediately distinguish a magazine from a newspaper by reason of its appearance (printing, paper, folding, etc.). To this extent, the name is relatively unimportant. In order to avoid the risk of confusion between publications, it is therefore unnecessary to require marked differences in their titles. Thus, although the words "Quick" and "Blick" resemble one another in the aural sense, they both possess, in the German language, a meaning which enables the public to distinguish them readily. Thus, it could not be contended that the publisher of "Blick" was guilty of imitation of a kind liable to deceive the public.

Further, the publisher cannot be accused of an act of unfair competition, since, even if purchasers run the risk of possible confusion by reason of the similarity of two titles (particularly in the case of street sales), they would not fail to notice their mistake immediately the periodical was handed to them, since "Quick" has the standard form of a magazine, whereas "Blick" has that of a newspaper (*Th. Marthens & Co. GmbH. v. AG für Presseerzeugnisse*, January 11, 1961; ATF 87 II 40).

Whilst on the question of the risks of confusion, we would finally refer to an interesting judgment relating to the protection of colours, given by the Civil Court of the Canton of Vaud.

In 1956, the Company entitled Shell (Switzerland) S. A. had registered, in Switzerland, in respect of motor fuels, a mark reproducing a petrol pump, with a claim to the colours red and yellow: actually the Company had been using such pumps since 1923. For several years, a certain Henry Badan had been running a service station consisting of four pumps, the two outside pumps being painted red on the sides and yellow on their frontal surfaces. Badan was ordered to refrain from using the trademark of the plaintiffs for his petrol pumps (a petrol pump coloured red and yellow).

The Court took the view that the plaintiffs, by their trademark, meant to reserve to themselves the right to the exclusive use of the colours red and yellow for petrol pumps.

There can be no doubt that basic colours are in the public domain (Article 3 of the Law). One can, nevertheless, protect as a trademark a combination of colours which presents a

special figurative aspect. But this condition is not fulfilled here: the colours used are elementary and the combination is merely a matter of simple juxtaposition.

Nevertheless, a mark which initially lacks distinctiveness can, by prolonged use, become capable of distinguishing the goods of a given establishment. This is the case as regards the mark of the plaintiffs.

Although petrol only passes through the pump, it is possible to regard the pump as a package, in view of the very wide interpretation that the Federal Court has given to this notion.

In the event, the Court decided that there was risk of confusion between the pumps of the parties concerned (Cour civile du Tribunal cantonal vaudois, *Shell [Switzerland] S. A. v. Badan*, September 12, 1962; Journal des Tribunaux, 1963, I 602).

3. — As regards a mark owned by an international corporation (a "house" mark), we feel we must give a somewhat longer account of the judgment issued by the Federal Court on October 4, 1960, in the case of *Philips AG v. Radio-Import GmbH*.

The facts are as follow:

N. V. Philips' Gloeilampenfabrieken of Eindhoven (Netherlands) are proprietors of the mark "Philips", registered at the International Bureau. Their subsidiary, Philips AG of Zurich, had registered the same mark in the Swiss register. Société Radio-Import of Zurich, which was not a part of the Philips organisation, purchased television sets bearing the Philips trademark, but which had been manufactured by the German branch of the organisation, and proceeded to sell them in Switzerland at prices below those of Philips AG. The latter accordingly took the matter to the highest Court, but was unsuccessful for the following reasons:

(a) A trademark which is registered in the Swiss register is protected only in Switzerland, and only the person registered as proprietor has rights in respect of this mark (principle of territoriality). Accordingly, such proprietor can select a third party to use the mark in Switzerland, even if the mark has been applied to goods abroad by a person recognised abroad as the proprietor of the mark. This also applies when the proprietor of the Swiss mark is a part of the same organisation as that of the foreign mark.

(b) The defendant contended that, as far as the Swiss public were concerned, the mark "Philips" designated products of the "Philips" organisation, and not merely those of the plaintiff: consequently, there would be no deception by the use of this mark for the products of the German company.

The judgment states that trademarks are signs which serve to distinguish goods or merchandise, or to establish their origin. "Origin" means a given enterprise, and not merely a locality, region or country.

Doubtless, certification and "house" marks do not belong to a specific enterprise, but to a totality of enterprises. However, they constitute an indication of origin, since they cannot be used by third parties for the same products.

In accordance with the terms of the trademark law, the legislature has only sought to prevent the public from being deceived by the use of trademarks as to the origin of goods or merchandise.

Now, the Swiss public knows that the mark "Philips" belongs to an organisation and is used by the different enterprises which constitute that organisation. A person who, in Switzerland, buys a "Philips" radio or television set expects to receive a product of one of these enterprises. In selling under this mark sets manufactured by the German branch of Philips, the defendant has not run the risk of deceiving the public. The action by Philips AG was accordingly dismissed (*Philips AG v. Radio-Import GmbH*, October 4, 1960; ATF 86 II 270).

In another judgment of interest as regards cartels, the Federal Court has further enunciated the following principles on the subject of the territoriality of trademarks.

The proprietor of a registered trademark in Switzerland can demand protection of his right in relation to a foreign mark as soon as such mark appears on the Swiss market (principle of territoriality); his exclusive right exists, even if the mark has been lawfully applied and used abroad, and even when the goods which have been put into circulation are identical with his own products and emanate from enterprises which are economically linked with him, if he himself is the only person to have deposited the mark in Switzerland.

From this it results that a cartel can have recourse to trademark rights to impose territorial apportionment of markets between its members and to apply the re-enforcement of a protection endowed with a definite effect upon the cartel as a whole, its clauses of exclusivity and its organisation of private monopolies (*Armand Torre et Arts Ménagers S. A. v. Columbia Gramophone Company Ltd. et The Gramophone Company, Ltd.*, April 9, 1963; ATF 89 II 96).

Can the proprietor of a trademark oppose a trade name of similar character, if such trade name has been previously registered? In other words, can such trade name be the equivalent of a trademark?

The Federal Court has stated that, under the law, it is to be presumed that, in the absence of proof to the contrary, the first person to deposit a mark is also the person properly entitled thereto.

The law only assimilates trade names to registered marks to the extent that such trade names are "employed as trademarks". It is by this means alone that a trade name becomes a trademark. Thus, the presumption to the right to a trademark cannot result solely from registration in the Register of Commerce (*Junod et Au Bûcheron S. A. v. Grater*, February 13, 1962; ATF 88 II 28).

Trade Names

1. — According to the law governing the Register of Commerce, individual enterprises, commercial companies and co-operative societies need not, in principle, employ any national, territorial or regional designation in their trade name; the Federal Office of the Register of Commerce can,

however, authorise exceptions when special circumstances so justify.

The Federal Court has expressed itself on the following lines:

Trade names contain territorial designations when they indicate a certain geographical area, even when this is not a juridically defined territory (as, for example, a country or commune).

The regulation of the matter is not restricted to Swiss territories. Its essential purpose is to prevent the employment of names having a publicity character and the causing of deception to the public, particularly as regards the importance and the field of activity of an enterprise.

It is for this reason that territorial designations fall within the scope of the law, even when they refer to geographical areas situated partly or wholly outside Switzerland (*Rickenbach et consorts v. Office fédéral du registre du commerce*, October 11, 1960; ATF 86 I 243).

2. — When can a trade name include the term “international”?

The view of the Court is that such a term must be factual. This condition is not satisfied when the organisation, the installations or the activities of the proprietor are only international in an accessory sense. In order to be entitled to call itself “international”, an enterprise must be able to distinguish itself from the general run of those entered in the Register of Commerce. If this is not so, the designation can only be regarded as having publicity value, and this is not permissible. Further, even if the aforesaid conditions are satisfied, the addition of the adjective “international” is prohibited when it would involve the risk of deceiving the public, by creating the impression that the international relationships of the enterprise are of a kind other than they actually are. Finally, the public interest can also conflict with the use of the word “international”, for example, when it might create confusion with public bodies. Severity is necessary in the application of all these criteria, since a trade name may only serve to distinguish its owner from other persons; it must not serve to provide publicity for the enterprise with which it is associated, nor cause such enterprise to appear to be more important than is actually the case (*Asbiton AG v. Office fédéral du registre du commerce*, September 19, 1961; ATF 87 I 305).

3. — The Federal Court has had occasion to re-affirm that a person who chooses a new trade name or sign must avoid creating any risk of confusion with existing enterprises. If he neglects to take this precaution, the person who suffers unlawful injury to his personal interests as a result of such use is entitled, by virtue of Articles 28 and 29 of the Civil Code, to apply to the judge to order its cessation. The rights of the proprietor of the name or sign are always limited, in effect, to his field of commercial operation: since his rights arise from use, their scope cannot extend beyond the field in which they are effectively exercised (*Junod et Au Bücheron S. A. v. Graber*, February 13, 1962; ATF 88 II 28).

The same case gave rise to another question: to what extent can a company invoke its trade name in opposition to a family name, when the main feature of the name of the company appears alongside the family name?

This is how the Federal Court has expressed itself on the subject:

A company has, throughout Switzerland, an exclusive right to its trade name. If, within the territory of the Confederation, a third party makes unwarranted use of such a name, the company can request the judge to order the cessation of such use and, if the use has been improper, to award damages. The action of a private individual in adding to his family name the principal feature of the trade name of a company does not necessarily constitute improper use; improper use would only occur if the addition might mislead the public and cause confusion between the two enterprises.

The protection attaching to the name of a company extends, in principle, to the whole of Switzerland, and is not limited to concurrent enterprises. However, since the risk of confusion must be assessed according to the special circumstances of the case, consideration must, in this respect, be given to the distance separating the headquarters of the parties, the circle of their clientele and the nature of their activities. Finally, in order to assess the risk of confusion, it is necessary to take account of the impression left by the trade name upon the memory of a person reading it with the degree of attention customary in such matters. As regards a personal name, the public is somewhat inclined to fix attention on the family name, especially if it is placed first (*Junod et Au Bücheron S. A. v. Graber*, February 13, 1962; ATF 88 II 28).

Unfair Competition

1. — Within the terms of the law of unfair competition, any person who takes steps intended to cause confusion, or of such a nature as to cause confusion, with the business of another person acts contrary to good faith and commits an act of unfair competition.

In such a case, it is generally the proprietor of the more recent business who should take steps to prevent the risk of confusion. But the law is based upon good faith, and the Federal Court has ruled that this is a principle which enables account to be taken of special circumstances. Thus, when confusion arises from the fact that one of the enterprises has modified its activities then, in accordance with the principles of good faith, it is that enterprise which should change its trade name, even if it is of earlier date than that of its competitor (*Gottfr. Gennheimer & Co., Max-Weber-Gennheimer, successeur, v. Carl Gennheimer & Cie*, October 20, 1959; ATF 85 II 323).

2. — To what extent does comparative publicity constitute an act of unfair competition?

The Federal Court has maintained its jurisprudence. Comparative publicity, even between individuals, is not illegal, provided it is objectively exact, does not deceive the public and is not of a disparaging character (*Ing. W. Oertli Aktiengesellschaft v. AG für Oelfeuerungen & consorts*, May 9, 1961; ATF 87 II 113).

Can the imitation of the external appearance of a product which is not covered by a patent constitute an act of unfair competition?

The Federal Court has maintained its jurisprudence.

In the case of products which are not the subject of a patent, the law of unfair competition cannot be invoked to protect their technical construction. On the other hand, this law guarantees their external appearance, provided it is not imposed by the requirements of construction and the purpose of the product. Hence, imitation of the appearance given to goods only constitutes an act of unfair competition if the author would have been able, without either modifying the technical construction or prejudicing the intended use, to select some other presentation, and if he has not done so when this could be reasonably required of him. However, a competitor cannot equitably be required to renounce a rational presentation in favour of one which is less practical in application, less enduring or more costly (*Pfäffli v. Monney & Forster S. A. et Stähli & Cie*, February 3, 1961; ATF 87 II 54).

BOOK REVIEWS

Immaterialgüterrecht, Patent-, Marken-, Urheber-, Muster- und Modell-Wettbewerbsrecht, Vol. II, by A. Troller. XX-480 pages, 17 × 24 cm. Published by Helbing & Lichtenhahn, Basle/Stuttgart, 1962. Price: Sfr. 52.—. In German.

Switzerland is fortunate to have at her disposal the learning of Professor Aloïs Troller (of Fribourg University) who has ventured to make an independent study of all aspects of intangible rights and to publish a book on the subject; it was, indeed, an unparalleled undertaking.

In 1948, Troller first published a study in one volume entitled *Der schweizerische gewerbliche Rechtsschutz*. He has since prepared a new edition, the second volume of which has recently been published. As a professor and a practising member of the Bar at Lucerne, he has successfully combined both theory and practice. It is not surprising therefore that since their recent publication, the two volumes of *Immaterialgüterrecht* have become an essential handbook for both students and practitioners. The study strikes a happy medium between summaries, which are often too short, and excessively detailed commentaries, which the layman has some difficulty in using.

The second volume is divided into three main parts — *Die Rechte, Verfügung über die Immaterialgüterrechte* and *Der Rechtsstreit im gewerblichen Rechtsschutz*. In *Die Rechte*, Troller deals especially with individual rights, the nullity of the patent, the registration of trademarks or the deposit of designs and the loss of intangible rights. The part *Verfügung über die Immaterialgüterrechte* contains chapters on total or partial assignment of rights, license contracts, the form of the deed of assignment, the responsibility of the assignee, and compulsory working and expropriation. The last part, *Der Rechtsstreit im gewerblichen Rechtsschutz*, comprises the following chapters: "Unlawful Acts", "Legal Sanctions" and "Legal action in industrial property law". The volume also contains a bibliography, a table of contents, a table of decisions of the Swiss Federal Tribunal and a list of abbreviations. It is unfortunate, perhaps, that the table of contents does not cover both volumes.

As can be seen from the structure of the work, the author has not made separate studies of patent law, trademark law or copyright law,

etc., as is usually the case (see, for example, Hubmann, *Gewerblicher Rechtsschutz*, or Roubier, *Propriété industrielle*); on the contrary, he has made a simultaneous or, what one might call, a horizontal, study of the various aspects common to those laws, so that they can be readily compared. The emphasis is laid on the didactic character of the book and the inconsistencies between the laws are clearly revealed. The reader must, however, have a fairly extensive knowledge to be able to consult this study and to examine any particular question.

In order to be complete, a review of this book should also mention what has been omitted. It lacks, in particular, a survey on administrative questions, or a study of corresponding legal provisions. This is regrettable, as there are still a number of essential problems to be solved in this field; one could mention, for example, the fourth part of the Patent Law, which relates to prior examination of inventions.

It is satisfying to note that Troller has not contented himself with expounding the current legal situation. On the contrary, he has not hesitated to criticize; and his criticisms are valuable because they are well founded. In the chapter on trademark infringement, for example, Troller submits, in convincing terms, that the principle laid down by the Federal Tribunal, to the effect that forgery, imitation and use of a trademark are unlawful only if such acts mislead the public or give rise to at least a risk of fraud, is not consistent with Article 24 of the Trademark Law. Furthermore, he rightly expresses the fear that as a result of the Federal Tribunal's ruling the affixing (by third parties) of trademarks protected in Switzerland on exported goods might not be considered unlawful, since Swiss purchasers do not see the goods and cannot therefore be misled. This logical, but quite untenable, inference which Troller draws from the principle laid down by the Federal Tribunal makes it imperative for the Court seriously to reconsider its decisions (see pp. 872 *et seq.*).

The Federal Tribunal is also rightly criticized for its present holding in connection with Article 67 of the Federal Law on the Organization of the Judiciary, because, paradoxically, it has the following effect: where the legislator wanted to enable the factual findings of the lower Court to be examined, the Federal Tribunal does everything possible to limit such examination, whereas, in the field of trademark law, it gives an independent ruling as before, on the question whether a mark misleads the purchaser or whether he might confuse it with another mark (see pp. 1020 *et seq.*).

The author's critical attitude is apparent throughout the volume, and this makes it interesting to read and undoubtedly adds to its value, because the criticism comes from a leading authority. An example may be seen in the first chapter, where the most vital question in the whole field of industrial property is broached in the following terms:

"Although rights and the powers deriving from them, as well as claims based on infringements thereof, are defined in legislation and clarified or completed by case law and doctrine, we are still beset by doubts and are often uncertain or perplexed. The crucial problem is to decide whether we seek a solution first in favour of the creator of the disputed intangible right or in favour of his competitors, who use the intangible right, or whether we must allow ourselves to be guided solely by economic considerations (full employment in industry, supply of consumer goods at low cost). Are we to uphold the supremacy of the individual, and of society considered as a community of free persons, or do we revere industry, trade, turnover and economic progress as assets *per se*, to which the development of personality must be subordinated? In the field of industrial property law and copyright, we are constantly faced with this fundamental question. In our analysis hereafter, when in doubt, we favour the creator. We have no wish to underestimate his duties towards society, his nature, or his social status; but the overriding consideration here is the relation between the creator and his creation: intellectual property" (see Troller, pp. 599 *et seq.*).

Troller's basic stand is attractive, but it does, to a certain extent, run counter to the currently prevailing trend, which is particularly apparent in patent and trademark law. The legitimate interests of the creator are often prejudiced to an alarming degree by this trend against monopolies. The interests of the collectivity, of the community, acquire increasing importance, so that the notion of "intellectual property" is progressively drained of its substance.

It is natural that some of the views expressed in this book should invite contradiction. One such passage is quoted below, in the hope that some competent person may consider that the problems raised deserve detailed study.

For example, Troller writes (pp. 814 *et seq.*): "If, within a certain period (two or three years should usually suffice), the licensee does not achieve a turnover that provides the licensor with sufficient income to cover the costs of maintaining the patents, the licensor cannot be expected to maintain them". In yet another passage (p. 822), Troller expresses the opinion that, in the absence of any specific clause in the contract, the appearance of competitive goods which, from the economic point of view, would no longer justify the manufacture and sale of the article under licence may, according to circumstances, entitle the judge to admit the existence of a lacuna in the contract and to acknowledge the parties' right to terminate it. Thus, the fact that the economic expectations attaching to the conclusion of the license contract are not fulfilled — which constitutes an error as to motives — would entitle the parties to terminate the contract, or to denounce it prematurely. This argument would be extremely dangerous, and it cannot be left unchallenged. If the subsequent nullity of the patent, after the license contract has been concluded, does not permit the contract to be challenged on grounds of error, in view of its aleatory nature (opinion defended by Troller, note 36, p. 825, referring to Blum, *GRUR/AIT*, 1955, pp. 101 *et seq.*), there is even less reason for allowing the contract to be terminated when economic difficulties arise. Dr. Rudolf BLUM, Zurich

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Offenbarung des beanspruchten Erfindungsgedankens und Schutzzumfang des Patentes (Divulgence of the inventive idea and scope of the protection conferred by the patent), by *Gerhard Zeunert*. One volume of 173 pages, 21 × 15 cm., with 12 annexes. Published by Verein Deutscher Ingenieure, Düsseldorf, 1961. Price: DM 38. In German.

The author, who is Head of one of the Divisions of the German Federal Court of Patents, deals in detail with German case law relating to the divulgence of inventive ideas. The correct application of principles established by present case law will alone be a guarantee against an indefinite and extensible interpretation of the patent, particularly when the patentee claims that his patent covers a so-called combined invention.

The author shows, with the aid of a few examples borrowed from the practice adopted in cases of patent disputes, how important it is to establish with exactitude the situation and to interpret it correctly from the point of view of patent rights.

To assist the reader, both in current work and in his scientific research, the material assembled in this study has been completed by a detailed index and a chronological list of decisions referred to by the author. R. W.

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Die Verkehrsgeltung im Warenzeichen- und Wettbewerbsrecht und ihre Feststellung im Prozess (Signs which have become well-known in commerce, in the field of trademarks and competition, and their establishment by Court decisions), by *Horst von der Osten*. One volume of 136 pages, 21 × 15 cm. The Industrial Property Collection of the Munich University Institute for the Study of Foreign and International Law on Patents, Copyright and Trademarks (vol. 7). Edited by Karl Heymans Verlag KG, Munich, Cologne, Bonn, 1960. Price DM 18.50. In German.

The author describes the expression "signs which have become well-known in commerce" as being the expression of a fact which can be confirmed in the field of competition; any sign becomes, in interested circles, the distinctive sign of a specific industrial or commercial enterprise. In other words, "the fact that a sign has become well-known in commerce expresses the sum-total of numerous associations of ideas all of which point in the same direction and by virtue of which the observation of the sign, in connection with a specific industrial or com-

mercial undertaking, evokes, in interested circles, the identification of a specific enterprise or its products".

The author deals in detail with signs originally devoid of any distinctive characteristic and which, by use, have become well-known in commerce and recognised as valid trademarks.

After having shown how signs which have become well-known in commerce are dealt with under the procedure of the *Patentamt*, the author examines the methods applied by the Courts in order to establish if a sign has, in fact, become well-known in commerce. In this connection, he examines in detail the sounding of current opinion. The practitioner will find in this volume material of considerable interest. R. W.

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Soviet Publications

Notes on some Soviet publications which have reached the Library of the BIRPI

BOGUSLAVSKII, M. M.: *Patentnye voprosy v mezhdunarodnykh otnosheniakh; Mezhdunarodno-pravovye problemy izobretatelstva* (Problems of patents in international relations; Problems of international law regarding inventions). Moscow, 1962, 343 pages, 2nd edition, USSR Academy of Science. In Russian.

The fact that the second edition of this basic work has been published two years after the first edition clearly shows its importance. The original title ("Fundamental questions regarding inventions in international private law") has been replaced by that shown above, perhaps indicating an alignment with customary terms in international usage. It may also be noted that the second edition has been published in German in the German Democratic Republic¹).

The author discusses the role of patents in the international trade of the so-called "capitalist", "socialist" and "developing" countries, as well as problems relating to the protection of inventions abroad in general (Ch. 1). He gives a brief description of the Paris Union, international agreements on patents in the field of nuclear energy and weapons, and European conventions on patents (Ch. 2). An analysis of the status of foreigners in the USSR as regards protection of their inventions (Ch. 3) is followed by the history of Soviet legislation on the protection of Soviet inventions abroad (Ch. 4). The international development at the level of the Council for Mutual Economic Aid (COMECON) is described in a comparative study of protection in the Socialist countries (Ch. 5) and an account of the efforts made by those countries in order to harmonize their legislation and eventually standardize it (Ch. 6). To complete the work, which has already become a classic, the author gives the text of the Paris Convention as revised at Lisbon, some data regarding the legislation of various countries in this field, the Soviet decrees of 1962 on the protection of Soviet inventions abroad, and a bibliography of Soviet and foreign publications and periodicals.

GALPERIN, G. I.: *Osnovy Izobretatel'skogo i avtorskogo prava v SSSR* (Fundamentals of invention rights and copyright in the USSR). Moscow, 1960, 29 pages. In Russian.

This brief analysis is designed to be of assistance in teaching Soviet civil law and comments on the two chapters of "Bases of Soviet civil legislation" which relate to copyright and invention rights, as well as on the fundamental concepts of the law on inventions of 1959 and the copyright law of 1928.

VADIMOVNA, A. T.: *Nosledovanie v avtorskom i izobretatel'skom prave* (Succession in copyright and invention rights). Moscow, 1963, 60 pages. In Russian.

The legal publishing agency in Moscow is publishing a series of booklets designed to popularize legal matters. The booklets are arranged in the form of questions and answers and are intended to explain everyday aspects of law. The above-mentioned booklet deals with succession rights of the heirs of authors and inventors.

Janós TÓTH

Privat-docent at the University of Geneva

Calendar of BIRPI Meetings

Place	Date	Title	Object	Invitations to participate	Observers
Geneva	September 28 to October 2, 1964	Interunion Coordination Committee	Program and budget of BIRPI	Belgium, Brazil, Czechoslovakia, Denmark, France, Germany (Fed. Rep.), Hungary, India, Italy, Japan, Morocco, Netherlands, Portugal, Rumania, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia	All other Member States of the Paris Union or of the Berne Union
Geneva	September 30 and October 1, 1964	Consultative Committee and Conference of Representatives (Paris Union)	Triennial budget of the Paris Union	All Member States of the Paris Union	—
Geneva	October 5 to 7, 1964	International Committee of Novelty-Examining Patent Offices	Examination of the problem: "Abandonment of inventions to the public by an international publication of patent applications where the grant of a patent is no longer required"	Australia, Austria, Brazil, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, Germany (Fed. Rep.), Hungary, Iceland, Ireland, Israel, Japan, Mexico, Netherlands, New Zealand, Norway, Poland, Rumania, South Africa, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia	Argentina, Chile, India, Pakistan, Philippines, USSR; United Nations, Council of Europe, International Patent Institute, Inter-American Association of Industrial Property, International Association for the Protection of Industrial Property, International Chamber of Commerce, International Federation of Patent Agents
Geneva	October 12 to 16, 1964	Committee of Experts concerning the international classification of industrial designs	Study of an international classification of industrial designs	All Member States of the Paris Union	—
Geneva	October 19 to 23, 1964	Committee of Experts for the study of a model law concerning inventions and technical know-how for developing countries	Study of a model law concerning inventions and technical know-how for developing countries	Afghanistan, Algeria, Argentina, Bolivia, Brazil, Burma, Burundi, Cambodia, Ceylon, Chile, China (Taiwan), Colombia, Congo (Leopoldville), Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Ethiopia, Ghana, Guatemala, Guinea, Haiti, Honduras, India, Indonesia, Iran, Iraq, Israel, Jamaica, Jordan, Kenya, Korea, Kuwait, Laos, Lebanon, Liberia, Libya, Malaysia, Mali, Mexico, Mongolia, Morocco, Nepal, Nicaragua, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Rwanda, Saudi Arabia, Sierra Leone, Somalia, Sudan, Syrian Arab Republic, Tanganyika and Zanzibar, Thailand, Togo, Trinidad and Tobago, Tunisia, Uganda, United Arab Republic, Uruguay, Venezuela, Viet Nam, Western Samoa, Yemen	United Nations Organization, Council of Europe, African and Malgasy Industrial Property Office, International Patent Institute, Interamerican Association of Industrial Property, International Association for the Protection of Industrial Property, International Chamber of Commerce, International Federation of Patent Agents
Geneva	November 30 to December 4, 1964	Committee of African Experts to study a draft model copyright law	Study of a draft model copyright law for African countries	Congo (Brazzaville), Ethiopia, Ghana, Ivory Coast, Liberia, Morocco, Nigeria	—