

Industrial Property

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Plant Varieties

International Convention for the Protection of New Varieties of Plants

Accession

HUNGARY

The Government of Hungary deposited, on March 16, 1983, its instrument of accession to the International Convention for the Protection of New Varieties of Plants (UPOV) of December 2, 1961, as revised at

Geneva on November 10, 1972, and on October 23, 1978.

The said instrument of accession contains the declaration that Hungary will apply the said International Convention to all botanical genera and species.

For the purpose of determining its share in the total amount of the annual contributions to the budget of UPOV, one-half of one contribution unit is applicable to Hungary.

The said International Convention as revised in 1978 entered into force, with respect to Hungary, on April 16, 1983.

UPOV Notification No. 28, of March 21, 1983.

Activities of Other Organizations

JAPAN INSTITUTE OF INVENTION AND INNOVATION

World Exhibition of Young People's Inventions, Tokyo, 1985

WIPO has been informed by the Japan Institute of Invention and Innovation that it is planning to hold a "World Exhibition of Young People's Inventions" in 1985. The Exhibition has the support of the Ministry of Foreign Affairs, the Ministry of Education, the Ministry of International Trade and Industry, the Science and Technology Agency and the Japanese Patent Office.

The objects of the Exhibition are "to collect devices originally designed by young people from various countries of the world, with different manners and customs, based on their fresh scientific ideas, promote scientific, technological and cultural exchange between these countries through the Exhibition, and strengthen the ties of friendship and bring about a better understanding between the countries of the world."

Entrants must have been born on or after January 1, 1964. Applications must be posted on or before March 31, 1984. Transportation expenses of accepted entries will be paid by the sponsors. Three winners will be invited to the Exhibition. All the exhibits will be returned.

A pamphlet "Notes for Entrants" and application forms can be obtained from:

Administration Office for the World Exhibition
of Young People's Inventions
c/o Japan Institute of Invention and Innovation
9-14, Toranomon 2-chome, Minato-ku
Tokyo 105, Japan
Telephone: 03-502-0511.

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General Studies

Industrial Property in Peru

B. KRESALJA R.*

The purpose of this article is to point out the main characteristics of the current legal system governing industrial property in Peru, with reference to subject matter that has recently undergone amendment or given rise to controversy; it shall therefore not deal with or even mention every single provision in force, neither shall it make comparisons with other laws because, interesting though this may be, it is beyond the purpose and scope of the present work.

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I. Extent and Boundaries of Constitutional Protection

With the convocation of a Constituent Assembly from July 1978 to July 1979, a process began that brought into being the Eleventh Political Constitution of the Peruvian Republic, which came into force on July 28, 1980.

The new Constitution, which is long (307 sections) and goes into an excess of regulatory detail, has the merit of enshrining the principle that any person has the right to freedom of intellectual, artistic and scientific creation (Section 2(6)), and to property (Section 2(14)). It is thus not surprising that, under Title III, Concerning the Economic System, and in its Chapter III, Concerning Property, there should be a Section 129 expressly stating that:

"The State shall grant copyright to authors and inventors for their respective works and creations for the time and under the conditions provided by law. It likewise guarantees, and in similar form, industrial and commercial names, trademarks and designs. The law shall provide the legal system for each of those rights."

The drafting of Section 129 has been criticized as being faulty and confused, and to some extent this author endorses that criticism. Moreover, certain authors associated with Marxist ideas¹ consider that industrial property and copyright should have been treated separately on the grounds that, while it was certainly legitimate to grant recognition of long duration to authors, it was wrong to do the same for inventors and owners of distinctive signs used in industry and commerce. That criticism, in the opinion of this author, has the defect either of being charged with a subjectiveness attributable to events affecting the economic and political conjuncture, and unnecessarily emphasizing the defects and shortcomings of international legislation, or of overlooking, accidentally or otherwise, certain characteristics peculiar to scientific and technological research, the structure of industrial property institutions and, above all, their purposes expressed in legal terms; those critics otherwise would have been saved, in the author's opinion, from making such a drastic division and discrediting the social function of those whose creative work is protected by the provisions governing industrial property.

It is this author's belief that the ultimate purpose of Section 129, which undoubtedly could have been better drafted, is the adequate legal protection of authors and inventors and also owners of distinctive signs, these being internationally accepted concepts; in that way, the purpose is also the protection of consumers. It thus ensures the proper functioning of productive entities in a social market economy, which is something that the State has to promote but at the same time regulate in order to harmonize it with the public interest (Section 115).

Following an ancient liberal tradition that has been written into an overwhelming majority of Latin American constitutions since the time of the wars of independence at the beginning of the 19th century, with the exception of minor, acceptable restrictions, the new Constitution provides that, "as regards property, foreigners, be they natural persons or legal entities, enjoy the same status as Peruvians..." (Section 126). However, as the Constitution was bound to include in its text the rules associated with growing State intervention in every aspect of national life, the State, as the supreme body governing and administering the national heritage may, by virtue of social interest or national security, reserve productive activities or services for itself or for Peruvians (Section 114), or, for reasons of national interest, establish special restrictions and prohibitions on the acquisition, possession, exploitation and transfer of specific resources because of their nature, condition

or location (Section 127). These constitutional provisions therefore have to be borne in mind when certain aspects of the positive law of industrial property are considered.

The majority of the Constituent Assembly were clearly opposed to the excessive State intervention in economic matters that had occurred during the 12 previous years of military government. That is one of the main reasons why Section 131 specifies that the State recognizes the freedom of trade and industry, the law being responsible for determining its requirements, guarantees, obligations and limits, and why Section 133 provides as follows:

"Monopolies, oligopolies, holdings and restrictive practices and agreements in industrial and commercial activity are prohibited. The law shall ensure the normal operation of the market and provide appropriate sanctions."

Few articles have given rise to as much controversy as Sections 131 and 133, as much for ideological as for pragmatic reasons. The first are obvious; the second stem from the fact that, in a market as small as the Peruvian one, with no more than eight million low-income consumers (per capita average annual income is \$800), it is only possible in many areas of industry, for technical reasons and reasons that have to do with economies of scale, to operate in a monopolistic manner, that being a reality borne out by daily evidence. These facts, and the lack of any antitrust legislation or legislation on restrictive practices, make Section 133 into more of a desire than a reality. However, was the Constituent Assembly aware that the provisions regulating and protecting intellectual property are legal monopolies, albeit temporary, and that the guarantee written into Section 129 is cancelled out by Section 133? This author thinks not, and maintains that the purpose of Section 133 (which follows from the comments made by those who took part in the Assembly) was not to abolish the protection of authors, inventors and owners of distinctive signs, but rather to prohibit monopolies and illegal practices whose character and activities differed from those of the legal monopolies protecting intellectual property.

On the other hand, the Constitution establishes the principle that property is inviolable, even though it has to be used in keeping with the public interest, the Law providing for the forms, obligations, limitations and guarantees of the right to property. It specifies that no one may be deprived of his property except by virtue of public necessity and convenience or public interest, declared according to law and, subject to express exceptions, against previous cash payment of an indemnity (Sections 124 and 125). This raises the old question of whether intellectual property is subject to expropriation and what is meant by public interest. In principle, there is no doubt that industrial property is indeed subject to expropriation,² although it is highly debatable,³ and in

¹ Marcial Rubio C. and Enrique Bernaldes B., *Perú, Constitución y Sociedad Política*, Desco, Lima, 1981, pp. 528 and 529; Alberto Ruiz-Eldredge, *La constitución comentada*, Lima, 1979, p. 215.

² *Ibid.*

³ Enrique Chirinos S., *La nueva Constitución al alcance de todos*, Ed. Andina, Lima, 1979, p. 136.

Peru the only precedents, themselves partial, obscure and liable to be confused with confiscation, are those that were applied to individuals or legal entities of the countries on which war was declared in 1939 (Germany, Japan, etc.).

The constitutional protection of inventors and authors is an ancient concept in Peru and is to be found in almost all its Constitutions, from 1823 up to the most recent in 1980. This permanent legal protection has not, however, resulted in any great and rich development in the arts or in science and technology, as it is well known that economic and social and even cultural conditions play a more determinative role than do legal provisions. This fact, which is applicable to Peru, forms part of the drama of Latin American development; it is not, however, the reason for or the purpose of the present study to speak on this subject, which is nevertheless probably the most important.

In conclusion it can be said that, with the limitations imposed by the complexity of modern life and law, intellectual rights are adequately protected by the new Peruvian Constitution of 1980.

II. Provisions and Authorities that Regulate and Administer Industrial Property

For the purposes of the Peruvian Civil Code, the property concept includes the tangible as well as the intangible. Therefore, in dealing with the various types of property, Title I of the First Part of the Fourth Book of the Code includes objects of tangible appearance and also rights and other intangible things.

After classifying property as either movable or immovable, paragraph (6) of Section 819 of the Civil Code specifies that the rights embodied in literary and artistic property and in industrial property are movable property. As we know, the criterion for distinguishing immovable from movable property has traditionally been that of mobility. This criterion no longer applies nowadays, and the modern trend is to move away from this classification and replace it with another more in conformity with modern legal necessities.

The value of the classification of property lies in the different legal systems introduced to regulate the wide range of types of property that exist. For instance, the acquisition of ownership, the obligations to which it may be subject, the right to sue for ownership, the taxes payable on it, etc., vary according to the movable or immovable nature of the property.

In this way, if we note that the mobility criterion is no longer applicable to industrial property, it is natural that the legislator should nevertheless have chosen to consider it movable with a view to regulating it according to the provisions established for that category of property.

For various reasons that are not necessary to analyze here, the provisions on movable property written into the Civil Code cannot be used in their entirety for

industrial property. This matter may nowadays be regarded as somewhat lacking in interest owing to the fact that, as special laws governing industrial property exist, the provisions of the Civil Code are of supplemental character only. However, if we consider, for instance, that the special laws on industrial property contain no provision on the encumbrances to which industrial property may be subject, only reference to the Civil Code would allow us to contemplate the provision of security, with the serious drawbacks involved for the dispossessed debtor, who will be deprived of the use of his property, and the fragile legal succession of the creditor to the property put up as security owing to its intangible character. As a system of organized publicity based on a public register exists, the logical and appropriate thing would have been to allow the mortgaging of this property; however, in the civil legislation mortgaging is reserved for immovable property.

The main text governing industrial property in Peru is Decree-Law No. 22,532,⁴ which on May 17, 1979, brought into effect Decision 85 of the Commission of the Cartagena Agreement, the supreme body of the Andean Group, also known as "Regulations for the Application of Rules Concerning Industrial Property" (hereinafter "Decision 85").⁵

Decision 85 regulates substantive and some procedural aspects of patents, industrial designs, trademarks and service marks, and certain aspects of agreements for their transfer and licensing. Also important is Presidential Decree No. 001-71 of January 25, 1971, also known as the Regulations of the General Law on Industries (hereinafter "Regulations"),⁶ which up to the promulgation of Decision 85 regulated practically all procedural and substantive aspects of industrial property; the provisions still in force today are those that govern so-called technical processes (manufacturing secrets), trade names and protection against unfair competition, and also some procedural provisions on opposition, invalidation and sanctions. This study will deal essentially with the provisions of Decision 85 and the Regulations.

Contracts for the import of technology, including license agreements, are regulated by the well-known Decisions Nos. 24, 37 and 37(a) of the above-mentioned Commission, which were incorporated in the Peruvian legislation by Decree-Law No. 18,900 of June 30, 1971 (hereinafter "Decision 24").

Although Peru has been a member of WIPO since April 1980 (Decree-Law No. 22,994), it is not party to the Paris Convention for the Protection of Industrial

⁴ See *Industrial Property Laws and Treaties*, PERU—Text I-001.

⁵ See *Industrial Property Laws and Treaties*, MULTILATERAL TREATIES—Text I-009.

⁶ See *Industrial Property*, 1973, p. 112. In May 1982 a new General Law on Industries No. 23407 was promulgated, which does not regulate aspects of industrial property and maintains in force, by means of an express final provision, the title of the Regulations relating to industrial property. Moreover, a Supreme Decree of December 1982 regulates the chapter on consumer protection of the said Law but introduces nothing of substance into the legal system.

Property, and it has only signed and ratified two treaties at the American level, namely, the Buenos Aires Convention for the Protection of Trade Marks of 1910 and the Washington General Inter-American Convention for Trade Mark and Commercial Protection of 1929, both of which are of restricted practical application.

The main public bodies administering industrial property provisions are two, namely, the Industrial Property Directorate of the Institute for Research into Industrial Technology and Technical Standards (*Dirección de Propiedad Industrial del Institución de Investigación Tecnológica Industrial y de Normas Técnicas*) (ITINTEC) and the Commission for Foreign Investment and Technology (*Comisión de Inversiones y Tecnologías Extranjeras*) (CONITE). The first is responsible for ruling on applications, novelty examinations, oppositions, invalidations, etc., and the second for license and technology importation contracts and royalty payments.

III. Some Facts about the Functioning of Industrial Property

Peru is a developing country with a population of approximately 18 million, more than 50% of whom are under 15 years of age; its terrain is rugged and difficult, and about 20% of its inhabitants are illiterate. Even though there have been genuine, albeit isolated, plans in the manufacturing sector since the end of the last century, no steady progress was made in industrial development until the 1940s. Consequently, scientific and technological research and development are still in their infancy. As in many other Latin American countries, in Peru it has begun to be understood in recent years how important and complex the scientific and technological problem is. For want of sufficient legal protection, as shall be seen below, and owing to the negligible degree of scientific and technological development, patent applications filed by Peruvians and foreigners have been and still are few and far between. For instance, quoting some unofficial figures, of 408 applications filed in 1979, 271 (66%) were filed by foreigners. In 1980, 462 applications were filed, 280 (60%) of them by foreigners.

The situation is different for distinctive signs, whether trademarks or trade names, concerning which progress has been substantially greater; thus, in 1979 and 1980, respectively, 8,432 and 9,345 trademark and service mark applications were filed, including 3,128 and 3,463 (37% and 37%) filed by Peruvians.

Although it is legally provided that industrial property disputes may be resolved before the judicial authorities, this is in fact exceptional; more than 98% of such disputes end at the administrative stage with a ruling issued by the Industrial Property Directorate. While it is only fair to acknowledge that some efforts have been made in recent years to improve the Industrial Property Directorate by providing it with resources and staff, it still has a long way to go before it operates efficiently. For instance, judicial and administrative case law is

suffering from a lack of foundation and depth, and the criteria for deciding cases are not consistent. Its lack of publicity, and consequently the lack of criticism and study by legal writers, could be one of the causes of this state of affairs; another could be the lack of specialized publications or the difficulty of access to such publications; a third could be the relatively recent introduction of industrial property courses in the law faculties of the major universities, and its absence at technical universities and graduate schools. Where the lack of material resources has been most keenly felt is in the prevention of violations of industrial property rights and in the repression of unfair competition.

In a number of cases the law allows any person to file applications, whether or not he has a legitimate interest, but when matters of a contentious nature are involved, the assistance of an attorney is necessary. And yet the work of industrial property agents, who in practice do exist, has not been regulated.

To summarize, the overall industrial property situation in Peru is typical of Latin American countries at an intermediate stage of development; the efforts that WIPO has been making in recent years with certain local bodies and individuals are greatly appreciated, and in the medium term it is hoped, assuming the achievement of a steady rate of social and economic development, that those efforts will be rewarded by the better operation of the public bodies responsible and by greater use of the means of legal protection on the part of those concerned. It may be argued that the highly developed countries do not appear to show any interest in collaborating in this improvement, which is why the conviction is more and more widely held that any lasting development will have to be based on local or regional efforts.

IV. Patents

4.1 There is no provision in the current Peruvian legal order for utility models or patents of introduction or importation, or for the grant of rights to persons whose contributions, without going so far as to constitute actual inventions, introduce some technical improvement; there are no patents for the makers of scientific discoveries; neither, finally, are there any inventors' certificates, which are found in some planned-economy countries. In Peru, subject to the limitations and requirements that shall be discussed below, the patents granted are of the classical or traditional type provided for in Decision 85, which in fact represented an important change, as the earlier legislation, in force up to May 16, 1979, allowed the grant of patents not only to those who "made an invention" but also to those who made "improvements of practical application and usefulness."

4.2 At present an invention, to be patentable, has to be new and capable of industrial application; patents of improvement, which expire at the same time as the

original patent, are also allowed (Decision 85, Articles 1 and 29). An invention is considered new if it is not included in the state of the art at world level (absolute novelty), meaning that it has not been made available to the public anywhere or in any way before the filing date of the application (Decision 85, Article 2). It is capable of industrial application if its subject can be manufactured or used in any kind of industry (Decision 85, Article 3).

The novelty criterion has undergone an important change. Before Decision 85 was promulgated, the criterion had a more local or territorial significance, and novelty was lost only if the invention was known or had been made in the country, except in the case of publications, which could be local or foreign. As expected, the broadening of the novelty concept gave rise to a good deal of criticism in a country whose level of inventive activity is low and whose Industrial Property Directorate does not have sufficient material with which to determine whether an invention is novel in world terms. The criticism relies on the fact that the system adopted will discourage many national researchers who, and enterprises which, need protection with the same legal characteristics as a patent in order to continue their research, but cannot comply with such stringent conditions of novelty; and also on the fact that absolute novelty would only have to be required in areas in which the country has a sufficiently developed industrial infrastructure, in which case it is indeed appropriate to have protected inventions with genuine world novelty.

Article 4 of Decision 85 determines the scope of application of the law by specifying that discoveries of a scientific character or of matter existing in nature, or accounting, financial or similar plans are not considered inventions. It should be mentioned that the exclusion of therapeutic or surgical methods for human or animal treatment and methods of diagnosis has also been the subject of some criticism.⁷

4.3 Not all inventions are eligible for protection by a patent, however. For instance, as in other laws, inventions contrary to public order or morality, plant varieties, biological processes, and foreign inventions where the patent is applied for one year after the filing date of the patent application in the first application country are excluded. But the law does not grant protection either—and this has been the subject of serious controversy—to pharmaceutical products and medicines, to foodstuffs for human and animal use or to inventions “affecting the development” of Member Countries of the Andean Group, or to “processes, products or groups of products excluded from patentability by the Governments” (Decision 85, Article 5). There is no point in repeating here the arguments that have been put forward for and against the protection of pharmaceutical products and processes, which are sufficiently well known; it is, however, important to note the high degree

of State power written into the law, the limits of which are either hidden or vaguely defined, for the exclusion from protection of a large number of products or groups of products, or processes for making such products, that “affect development,” which is, in essence, always debatable and can lend itself to serious abuses. More common and more acceptable is the situation where patents are made subject to conditions governing their working, in which case the decision of the Industrial Property Directorate has to state its reasons. This happens when the inventions relate to national security and their working is governed by special laws or relates to products or processes reserved to the State (Decision 85, Article 24, and Regulations, Section 67).

4.4 As in the great majority of laws, the owners of patents may be either natural persons or legal entities. Yet the terms used in Article 6 of Decision 85 do not resolve the problem of determining whether the legal entities can be regarded as original inventors, as they would appear to have to obtain that status through assignment by the inventor, the latter being presumed to be a natural person. Like those of most legal writers, opinions in Peru have been in favor of not regarding legal entities as original inventors. Edmundo Pizarro objected to a legal entity being given the status of intellectual creator, as he considered that only natural persons could have that status, and he insisted on the need to make a distinction between the terms “maker” and “owner,” arguing that makers were always owners, but that owners were not necessarily makers, as they exercised the right as usufructuaries of the real creators or as their agents.⁸ It is this author’s belief that Articles 6 and 9 of Decision 85 endorse this majority opinion, as only a natural person may be an original inventor, whereupon he can obviously assign the rights in his invention.

The same Article 6 and the Regulations state the principle that the patent belongs to the first person to file the application and that priority is determined by the date and time of the filing of the application. This system, as we know, “is based on the fact that the patent is a reward for social progress, and it is earned by whoever discloses it first by filing his application, regardless of who made it first, because, if it is kept secret, it does not exist in terms of the law.”⁹

This presumption has to be completed by rules introduced for inventions made by a worker or employee, either under an employment contract or in the form of casual or free inventions.

An invention made by an employee who is conducting research under contract belongs to the employer, unless otherwise provided in the contract; this provision is precisely contrary to the repealed Section 70 of the Regulations, in which it was presumed that any invention would belong to the employee who made it, unless otherwise provided by contract. However, one

⁷ Manuel Pachón, *La Propiedad Industrial en el Acuerdo de Cartagena*, Ed. Themis, Bogotá, 1975, p. 13.

⁸ Edmundo Pizarro D., *Los bienes y derechos intelectuales*, Ed. Arica, Lima, 1974, Volume I, p. 111.

⁹ Manuel Pachón, *op. cit.*, p. 27.

thing that has stayed in force from old legislation is the right of the employee under a research contract to collect special remuneration from his employer if he achieves an invention of great importance or of high economic value, it being for the Industrial Property Directorate to decide on the merit of the invention if no agreement has been reached by the parties concerned (Regulations, Section 71). There is no knowledge of persons who have availed themselves of this legal principle. In all other cases, the invention belongs, without any possibility of waiver, to the employee or agent, except where by reason of his duties he has had access to secrets or confidential research work (Decision 85, Article 8).

It is important in addition to mention that, with a view to setting up machinery similar to that of the Paris Convention, but at a regional level, Article 10 of Decision 85 provides that an application filed in any member country of the Andean Group confers on its owner a right of priority for a period of one year, during which time he may apply for a patent for the same invention in the other member countries.

4.5 Applications filed have to meet specific requirements, some of them on matters of form, such as the name of the applicant, the object or purpose of the invention, sufficient powers of attorney, clear descriptions, claims specifying the extent of novelty, etc., and they have to relate to a single invention (Decision 85, Articles 11, 12 and 13). The Industrial Property Directorate has to satisfy itself immediately whether those requirements have been met, and if they have not been met, it makes objections with which the applicant has to comply in a short period of time, failing which the application is declared abandoned. If, however, the "formal" requirements have been met, publication of an extract from the application takes place, in order that "any person" may make substantive observations which may adversely affect patentability, in which case the applicant may assert his rights or amend his application. In any event, whether opposition is filed or not, the Industrial Property Directorate is obliged to rule on the substance of the application, that is, on the novelty and industrial applicability of the invention, in which case its ruling may be either partially or totally favorable or unfavorable (Decision 85, Articles 14 to 19). In Peru there is the possibility of one appeal by an administrative route, namely, to the Director of Industrial Property. After such a second decision, the party concerned has no further choice but to take the matter to a court of law.

Clearly, then, the system adopted by Decision 85 for the grant of patents is that of prior examination with a period for opposition.

4.6 The lack of facilities at industrial property offices has made it necessary, and in this author's opinion appropriate, to provide the possibility of the substantive examination of inventions for novelty and industrial applicability being contracted out to experts or

scientific centers. The reports produced do not necessarily have a binding character, however, as the law does not so provide, but rather possess an illustrative character for the benefit of the authorities (Decision 85, Article 22). On the other hand, the Member Countries of the Andean Group may decide to carry out a complete examination of the prior art that may affect the patentability of inventions in specified sectors of industry; this is understandable owing to the lack of facilities affecting each one of them, or because they are obliged to give one or more countries a monopoly or oligopoly for the manufacture of products in areas such as steel-making, petrochemicals, etc., in order to achieve economies of scale (Decision 85, Article 21). This situation, however, contradicts the requirement of absolute novelty for the grant of patents.

In accordance with the foregoing, countries have to keep each other informed of patents granted or refused (Decision 85, Article 26); this is a preliminary stage for the setting up of a subregional industrial property office, which by implication is the eventual aim.

4.7 The owner of a patent has the exclusive right to work it for his own account or through third parties, and in the latter case to collect royalties or compensation (Decision 85, Articles 27 and 28). The scope of a patent is determined by the terms of the claims, which define the scope of the invention and constitute for the patent owner, in the words of the Supreme Court of the United States of America, "the measure of his right to relief."¹⁰ The owner also has the right, of course, to assign or transfer his patent, provided that he files and registers the contract of assignment or transfer with the Industrial Property Directorate (Decision 85, Article 30).

The owner of a patent does not, however, have the exclusive right to import the patented product or a product manufactured by the patented process (Decision 85, Article 28), which has always been one of his classical rights. The justification for this provision is to be found in the widespread belief that the monopoly given to a patentee by the grant of an exclusive import license is excessive, as the primary purpose of the grant of a patent is its working; moreover, it has been realized that cheaper articles or products can always be imported from countries that do not grant patents for the product or its manufacturing process. There is no need to mention once again the widespread and impassioned controversy that this provision has caused: some critics have gone as far as to argue that it is tantamount to an authorization to import counterfeit goods.

4.8 The patent is issued for a maximum term of ten years, which in many practical cases is reduced to three years, thereby causing a considerable loss in the national and international value of patents granted under Decision 85 (Article 29). Let us look further into this. The patent is granted initially for five years only, and, to obtain an extension up to the maximum of ten years, the

¹⁰ *McClain v. Ortmyer*, 141 U.S. 419, 424 (1891).

patentee has to prove that the patent is being adequately worked (Decision 85, Article 29). The burden of proof is on the patentee and adequate working is construed as the permanent and regular use of the invention and the supply of the end result under reasonable marketing conditions, and "provided that such acts have occurred on the territory of the Member Country that granted the patent," with the exception of industries officially established in one or more countries (Decision 85, Article 31). In other words, working is understood as having to take place in the country that granted the patent, not in those forming part of the Andean Group, which deprives the one-year priority period referred to earlier, during which time the owner can file his application in other countries (Decision 85, Article 10), of much of its significance.

The ten-year term, which itself is excessively short, is further shortened by the obligation on the patentee to notify the authorities of the commencement of working before expiry of the third year, failing which the patent is presumed to be unworked. As from that time, in the absence of a legitimate reason recognized as such by the Industrial Property Directorate, any person may apply for a compulsory license if the patented invention has not been worked, if working has been suspended for more than one year, if working does not meet the demand of the national market on reasonable terms as to quantity, quality or price, or if the patentee has not granted contractual licenses on reasonable terms.¹¹

What then is the reason for the initial period of five years if the events mentioned above can happen already after three years? Because after five years the Industrial Property Directorate may grant a compulsory license in practically all cases without any proof being necessary, the one exception being the need to determine whether the invention has been worked (Decision 85, Articles 30 and 34).

One can thus appreciate why, after Decision 85 was brought into force, many learned writers pointed out that the patent system was considerably weakened.

On reading Decision 85, one gets the impression that its authors had great faith in the operation of the compulsory license and believed quite literally in the precept that the license is the form in which society shows its right in the invention. There are a number of grounds in addition to those mentioned on which compulsory licenses may be granted (Decision 85, Articles 35 and 39—in this case "at any time" during the term of the patent), but it should be mentioned that this legal concept, which derives from an act of administrative, discretionary and technical character, has not been made use of, and has become a subject of theoretical discussion more than anything else.

¹¹ As an aside, it should be mentioned that there are some who believe that Section 69 of the Regulations is still in force; it provides that refusal to sell the patented product or the fixing of an unjustifiably high price is a ground for annulment of the patent. Prices indicated for the same product in countries where no patent is granted for it are not considered fair prices for the purposes of comparison.

4.9 License contracts, on the other hand, are prevalent; they have to be approved and registered (Decision 85, Article 32), and their content has to comply with the provisions of Article 20 of Decision 24, which specifies what clauses may not be accepted by the authorities or agreed upon by the parties. In such contracts—and this is also applicable to trademarks—terms have to be agreed upon that guarantee the quality of the goods supplied by the licensee (Decision 85, Article 82).

It should be pointed out that, while there is a consensus that considers the rules introduced by Decision 24 to be satisfactory in this connection, in view of the undeniable abuses that were committed before it was put into effect, its application has not been quite as beneficial as was expected, as the inflexibility of some of its requirements has led the parties concerned to enter into "private" contracts that are not submitted to the authorities and whose contents are contrary to the rules so introduced. Neither has there been any lack of persons claiming that the State's intervention in the approval of contracts is an unjustifiable interference and a violation of contractual freedom, and that the fact of not permitting the inclusion of clauses such as those on the fixing of prices, prohibition of exports, use of competing technology, etc., constitutes a curtailment of the lawful rights of patentees.¹² The debate on this question is still open and will continue for some time yet.

4.10 In order to finish off this summary picture of hard and perhaps ill-considered rules, it should be mentioned that, under Article 44 of Decision 85, the Industrial Property Directorate may, *ex officio* or at the request of any person, declare a patent null and void after the patentee and the licensee, if any, have been heard, in the event that the invention was not patentable (Decision 85, Articles 1 to 5). While this provision does provide a necessary outlet for cases in which the authorities have genuinely committed an error or abuse, it is regarded by many also as an acknowledgment of the lack of facilities and training in the offices responsible for granting patents, inasmuch as the law provides, in what otherwise is an improper way, that the office granting the patent and the office responsible for declaring it null and void are one and the same.

The overall picture of the system's weakness and fragility is clear, and the results may not—there is virtual unanimity on this—be convincing or their effects lasting.

V. Industrial Designs

5.1 Chapter II of Decision 85 is concerned with industrial designs, and its contents are, for Peru, an improvement on the earlier provisions which cited improperly the term "industrial design" in the Regulations. Article 45 of Decision 85 defines designs, both two-dimensional and three-dimensional, and, follow-

¹² Manuel Pachón, *op. cit.*, p. 55.

ing legislative precedent, does not grant protection to clothing designs, as it was considered that this would create serious problems in the textile industry, there being no special law in this area as there was in other countries.

5.2 The protection granted to the owners of designs is for five years, but there is no obligation to work or to grant any compulsory license as with patents; license agreements or changes of ownership have to be registered (Decision 85, Article 54).

5.3 The procedure for the acquisition of the right is similar to the one for patents, although less complex (Decision 85, Articles 47 *et seq*). The novelty required is absolute in world terms (Article 46) and is examined by the Industrial Property Directorate. It should be noted that the filing of the application confers a six-month right of priority in the other countries of the Andean Group (Decision 85, Article 53).

5.4 According to unofficial figures, 126 applications were filed in 1979 and 105 in 1980, including 14 and 26, respectively, filed by foreigners.

The International Classification for Industrial Designs established by the Locarno Agreement is to be adopted according to Article 55, but Peru has not yet done so despite the fact that the period laid down in that Article has expired.

VI. Distinctive Signs

The main distinctive signs provided for by law are, on the one hand, marks, be they trademarks, service marks or collective marks, and, on the other hand, trade names. The former are governed by Chapter III of Decision 85 and by certain sections of the Regulations while the latter are governed entirely by the Regulations.

Marks

6.1 Although various sets of provisions on marks have existed in recent years, the contents of those provisions have undergone less substantive change than their counterparts on patents and designs.

From January 1971 to May 1979 traders' marks and service marks (*marcas de comercio y de servicio*) were no longer recognized in Peru. Only trademarks (*marcas de fábrica*) were regulated and their owners had to be exclusively natural persons or legal entities pursuing industrial objectives. This requirement was strictly imposed in the case of Peruvians but not, oddly enough, when the owners were foreigners. The arguments for abolition were political and artificial as it was felt that both traders' marks and service marks would promote consumption for its own sake and that, in certain cases, their use would cause unnatural and excessive price increases. Although traders' marks do exist in certain

countries of the Andean Group, as Decision 85 is not expressly opposed to them, only trademarks and service marks are recognized in Peru, which is thus in conformity to the letter with Article 56 of Decision 85.

Collective marks have always been used to an extremely limited extent, despite their undeniable theoretical advantages. This situation is because of their practically unpublicized advantages and characteristics, the bad drafting of Article 57 which regulates them, and the lack of adequate provisions governing them.

6.2 For a mark to be given legal protection, it has to be new, visible and sufficiently distinctive (Decision 85, Article 56), and real or fanciful words, labels, envelopes, packaging, emblems, etc., may be registered as marks (Regulations, Section 96).

The novelty required for the mark is relative, as once registration has been approved in any particular class (of the currently applicable International Classification of Goods and Services for the Purposes of the Registration of Marks, as established by the Nice Agreement of 1957), novelty is determined by it (Decision 85, Articles 58(f) and 68). Nevertheless, under Section 101 of the Regulations, the owner of a mark may oppose the registration or use of any other mark which may be confused with his own even if it is not in the same class; in this way, the rigid system imposed by Article 68 of Decision 85 is moderated somewhat.

"Well-known" marks or marks of world reputation were an exception within the rigid, binding system of registration that was in force up to May 1979 since registration was not essential—although certainly appropriate—in order to be protected. This situation changed with Decision 85: according to Article 58(g), for a well-known mark to be protected, it is necessary for it to be registered "in the country or abroad for the same or similar goods or services." This then is a clear exception to the territorial principle that prevails in the entire trademark system. It is an exception that seems fitting, as it is intended, in the opinion of this author, to serve as protection for the consumer.

6.3 Article 58 of Decision 85 is an important provision that specifies what may not be registered as a mark, and its content is partly similar to its counterparts in other laws. For instance, it mentions marks that are contrary to public order or liable to deceive as to the nature and source of goods or services (*a*); descriptive or generic terms in any language (*c*); usual designations or their equivalents in other languages (*d*); marks that reproduce or imitate the armorial bearings, flags, emblems or names of any State or international organization (*e*); marks liable to be confused with others already registered or applied for (*f*); translations of marks registered in another language or well-known foreign marks, except for the benefit of the owner (*j*); etc. When the mark consists of a foreign word or a geographical name, the place of manufacture of the product has to be indicated beneath it in a visible and clearly legible form (Decision 85, Article 59).

6.4 As in other laws, the term or duration of exclusive rights granted to the holder or owner of a mark is five years, renewable for equal periods, subject to proof that the mark is being used in one of the Member Countries of the Andean Group (Decision 85, Articles 69 and 70).

Here three striking features become apparent. The first is that, in order to effect renewal of a mark, it is necessary to prove its use, either with invoices or proof of sale of the product or service covered by the mark. However, this "proof" is mitigated by the fact that the Industrial Property Directorate of Peru also accepts as proof a unilateral declaration on the part of the owner to the effect that he has been using his mark.

A second feature is that if, for any reason, the owner has not applied for renewal in time, he may file an application as if it were a new registration. Unless a third party comes forward first with an application for protection for the same mark, the registration procedure commences and can result in regained protection since the Industrial Property Directorate does not penalize the owner in any way for not having used the mark.

The third feature is more novel: the use of the mark may have occurred in any of the Member Countries of the Andean Group, and need not have occurred in all of them; use, therefore, need not necessarily have occurred in the country in which renewal is applied for (Decision 85, Article 70). This provision introduces a clear-cut difference as compared to proof of working a patent, which definitely is required for each specific territory in which the patent was granted (Decision 85, Article 31).

It is important to note that, up to now, the offices responsible for industrial property in the countries of the Andean Group have not standardized their criteria for the interpretation of use of the mark, and this is undoubtedly a defect that should be rectified as quickly as possible in view of the development of commercial exchanges between those countries.

6.5 The exclusive right to a mark is acquired by registration (Decision 85, Article 72), which thus has an attributive or constitutive character, and not by prior use, as in some other laws. The applicant has a right of priority of six months within which to seek protection in the other countries of the Andean Group (Decision 85, Article 73).

The principal right is obviously that of exclusive use of the mark and the exercise of measures for its defense (Decision 85, Article 74). The owner of a mark may assign, license or transfer it or request its cancellation (Decision 85, Articles 76, 79 and 80). A contractual license, which is the commonest means of use apart from direct use by the owner, has to be evidenced in writing, as do assignments or transfers, and it also has to be submitted for approval by the authorities, which make their decision in the light of the specific provisions on the subject in Decision 24, and in relation to other, more subjective criteria, such as those relating to the amount of agreed royalties (Decision 85, Article 81).

6.6 There are two cases provided for in Decision 85 that are particularly interesting. The first is in Article 75, which was the subject of intense discussion between the representatives of the Andean Group countries and which, moreover, is an exception to the exclusive right to use the mark. It provides that the owner may not oppose the importation of goods bearing the same mark originating in other countries of the Andean Group; the packaging, labels, etc., are required to identify clearly the place of manufacture.

The reason for this provision is to be found in the need to recognize an established fact, namely, the coexistence of identical or very similar marks belonging to different owners and used to designate identical products or products of the same class, in the various countries; the intention, therefore, is to avoid paralyzing commercial exchanges. Although regarded as a simplistic solution, in practice it has not been a cause of serious problems, either because commercial exchanges are not yet so extensive or because those who export are careful to ensure that their marks are effectively novel. The final, overall solution to this problem can only be provided by the creation of an office at subregional level that grants titles or certificates on that scale.

The other case is that contemplated by Article 78, which has a clearer precedent in superseded Section 102 of the Peruvian Regulations. Under Article 78, Member Countries of the Andean Group may prescribe that not more than one mark can be used for goods or services that have the same characteristics, are prepared or supplied by the same owner and are intended for the same purposes. What was the purpose of this Article? What aim is to be achieved by it?

Section 102 of the Regulations was drafted in a similar way, but it did not give discretionary power to the State and instead obliged enterprises to offer under a single mark all goods that had the same technical characteristics and/or chemical composition and that were designed for the same use or purpose. This provision was intended to discourage consumption for its own sake and the use of comparative advertising between different products of the same establishment as a means of artificially raising prices. Article 78 of Decision 85 gives governments the discretionary power which, as far as can be determined, has not been used; however, the purpose cannot be other than that mentioned in relation to Section 102 of the superseded Regulations. That Section was the target of the severest criticism and unanimous non-observance: industrialists never respected it, alleging that to do so would do them serious economic harm, that it would lessen the number of employees at work and that it would be of absolutely no assistance to the consumer. This was a result observed in Peru between 1971 and 1979, and, against such a background, this author has serious doubts regarding the Governments of Andean Group countries ever making use of the option given them by Article 78 of Decision 85.

6.7 The procedure for obtaining the exclusive right to a mark is similar, but not identical, to the procedure applicable to patents, which was looked at earlier. Certain requirements as to form have to be met, which are examined by the competent office (Decision 85, Articles 60 to 64). Afterwards, publication is effected so that any person may file opposition within the following 30 days (Decision 85, Articles 65 and 66), and, as a result thereof, the Industrial Property Directorate either issues or refuses the appropriate certificate of ownership (Decision 85, Article 67).

6.8 Article 76 confers upon the authorities the right to cancel the registration of a mark during its term, either *ex officio* or at the request of a party, when the fundamental provisions of Articles 56 and 58 of Decision 85 have not been complied with; in addition, they are granted the possibility of imposing a penalty which may extend to the final cancellation of the mark or license concerned, when they are satisfied that the owner or licensee has speculated in the mark or has made an improper use of it with respect to the price or quality of a product covered by it, to the detriment of the public or of the economy of an Andean Group country (Decision 85, Article 77).

In the opinion of this author, Article 77 gives the authorities a frankly excessive discretionary power, and one fails to understand how, in this way, speculation as to price or quality is expected to disappear or be cancelled out. There is no doubt that there exist many other more appropriate means of attaining the proposed objective, without mentioning the ultimate and final authority on the subject, namely, the consumer. Article 77 is an open door to abuse of authority and a path leading to the possible satisfaction of political or personal grudges.

Trade Names

6.9 The protection of trade names is the protection of the name or business style of a firm, that is, the protection of the word or words that a natural person or legal entity uses to distinguish his business from that of another establishment.

The fact that Section 109 of the Regulations makes the provisions on marks applicable, *mutatis mutandis*, to trade names suggests that the owner's principal right is that of exclusive use of the name and of seeking such measures of protection as he considers necessary (Decision 85, Article 74). The principle of novelty by class does not seem applicable, in this author's opinion, since Section 108 of the Regulations speaks generically of the exercise of protection rights by the owner in the case of the same or a very similar economic activity, which does not necessarily correspond to classes of marks, and despite the fact that trade names have to be registered in relation to the same International Classification as that for marks, namely, the 1957 Nice Classification.

Adopting a *sui generis* interpretation, without any verifiable legal basis, the Industrial Property Directorate grants protection only to trade names consisting of words, whether or not accompanied by symbols, logos, etc., but not to those consisting exclusively of figurative elements. While such names could not constitute a business style, they certainly could, in this author's opinion, serve to distinguish another type of establishment.

6.10 Although Section 105 of the Regulations provides that, in order to enjoy the right to a trade name, there is no need for it to be registered, in practice, and without any clear legal foundation, the Industrial Property Directorate gives preference in litigation to those that are registered. Moreover, one notes a lack of coherence in the case law, for example, in the area of unfair competition, which refers to the extent of goodwill or to the geographical influence of the establishment; those aspects should prevail together with proven prior use, as registration of the name does not constitute the right in terms of Section 105 of the Regulations.

6.11 The same Section 105 clearly states that the protection of a trade name does not extend to the articles that the owner manufactures or trades in, except when the mark identifying those articles is the same as the name, as only the owner of a name and/or mark may adopt it as a mark and/or name, respectively, for his goods or his establishment (Regulations, Section 106).

6.12 Although the registration of a trade name is not compulsory for the acquisition of legal protection, those who do decide to register it have to comply with the same requirements as are imposed for the renewal of marks, as the protection of registration is granted only for five years. In other words, the registered owners have to prove the use of the name in the country, as it should not be overlooked that the provisions in question are applicable only in Peru. However, unlike in the case of marks, failure to renew the registration of a name does not carry the penalty of loss of legal protection, which is maintained as long as the name is still used. With regard to the loss of legal protection, Section 107 of the Regulations specifies that "the exclusive right to the use of a trade name shall cease on the dissolution of the enterprise, liquidation of the business or closing of the establishment where it is used."

Appellations of Origin

6.13 An analysis of Articles 58(i) and 59 of Decision 85 gives the impression that specific geographical names may be registered as marks, but not those that suggest a connection with a place of prestigious or symbolic character, as that might expose them to discredit or ridicule; in addition, the place of manufacture always has to be indicated beneath the mark.

There are no special rules in the legislation of Peru on the use of appellations of origin, despite their existence

and indeed the particular economic significance that many of them have. The result has been that there are cases of exclusive ownership by natural persons or legal entities, whether national or not, of appellations of origin of world renown, and this situation has serious adverse effects on the consuming public.

The only direct mention of false appellations of origin and false indications of geographical source is to be found in the provisions repressing unfair competition, which, without any doubt, is insufficient.

VII. Manufacturing Secrets

7.1 The Regulations of January 1971, which were inspired by the first WIPO Model Law for Developing Countries on Inventions (1965), included among their provisions on industrial property the protection of what it called "Technical Processes," undoubtedly an innovative step in Peruvian legislation, and most likely also in Latin America. The concept of a technical process in Peruvian law is different from that of know-how in Anglo-American law, which is far broader and indeed generic, since it refers specifically to manufacturing processes and to the use of industrial techniques that constitute a secret of the natural person or enterprise (Regulations, Section 87). Consequently, it is preferable to call such items "manufacturing secrets," which is a more extensive term, and better known by writers. One thing that is clear is that the manual skills or personal abilities of one or more workers are excluded from protection.

To be protected, then, manufacturing secrets have to be tied to manufacturing and industry, in their strict sense, and not to commercial, financial or accounting practices, and have to be the result of intellectual knowledge or ability. They may or may not be patentable, but what is certain is that, unlike in the case of patents, the law protects non-disclosure and secrecy, and consequently the owner has to have taken the necessary steps to preserve that character (Regulations, Section 88).

7.2 As may be imagined, the incorporation of this protection in the law gave rise to controversy, but in general the opinions of experts and industrialists have been favorable. The reason ultimately is that in a country in the process of industrialization with scant research capabilities, and thus depending on foreign technology in many areas, it is probable that the first stage of adaptation of that technology to local needs and constraints does not have the attributes of a patentable invention, but rather those of an industrial technique resulting from experience. Such technique has to be protected if it is effectively to become the first link in a long chain of research and development, perhaps eventually culminating in a patentable invention. This argument is quite attractive and, although on the fringe of the letter of the law, which is always subject to improvement, constitutes, in the opinion of this author, a direct approach to surmounting the technology lag.

7.3 As we mentioned, the State protects the owner, who has kept the knowledge concerned secret, against unlawful use, disclosure or exploitation, but the authority has to pronounce, once such acts have occurred and have been reported by the owner, on the genuinely novel character of the secret (Regulations, Section 88); this requirement presents a serious and delicate problem of proof.

Two aspects are worth mentioning. The first has to do with the scope of novelty, which is closely linked to the knowledge possessed by the authority on the subject, whose precedents, as this author understands it, should be of basically national character. The second is that the authority has on various occasions unofficially expressed its opinion to experts and interested parties, in order to assess the possibility of a prior, stamped and sealed deposit on the part of the owners of manufacturing secrets, in the belief that such method could be the most appropriate for adducing proof in the event of conflict. This author is opposed to such ideas, as he believes that they adulterate the institution and that such a path would never be sure and free of discussion.

7.4 Having said this, given the nature of manufacturing secrets, the State does well to recognize that any person who has devised, transferred or acquired a secret technical process may freely disclose it as well as use it even where the other party has not done so; neither party may assert his rights against the other in the absence of a specific agreement or contract on the subject (Regulations, Section 89). This stipulation is logical because, while the State does protect the manufacturing secret as a first stage in the technical development process, it is compelled by a more powerful interest, namely, the common good, to have the secret disclosed and disseminated as rapidly as possible.

7.5 The means of legal protection available to the owner are varied and, unlike in other industrial property institutions, they are to be found not only in this area but also in the fields of labor and criminal legislation.

For instance, the violation of staff and professional secrets is an offense specifically contemplated in Section 363 of the Criminal Code; it is included in the Part entitled "Offenses Against Duties Pertaining to Employment and Professional Duties" and a guilty party is liable to a sentence of imprisonment not exceeding two years. On the other hand, the unlawful communication or use of a manufacturing secret by a worker is a cause for dismissal as it is regarded as a serious offense, and the labor tribunals have a body of case law in that connection.

It should be noted that, according to Section 90 of the Regulations, the owner of a trade secret may place his employees under the obligation not to disclose it, even after they have left their place of work, and may bring action against any person who has unduly obtained it.

The fact that the infringer was abetted in obtaining information through his employment or contractual relations is an aggravating circumstance in the application of the criminal or labor law sanctions (Regulations, Sections 122 and 123).

The means of protection most widely used in practice after the labor law remedy, which applies to natural persons, is that whereby the owner of the secret reports the infringing enterprise to the authorities (Regulations, Sections 118, 119 and 120), with the purpose of having such measures immediately ordered as will put an end to the infringing acts. Those measures may go as far, although this is unusual, as the confiscation of the manufacturing process or the closing of the business.

The favorable issue of the denunciation constitutes, in a subsequent action for damages brought before a court of law, a very convincing proof.

VIII. Some Reflections on the Means of Legal Protection Used by the Owners of Industrial Property Rights

Even considering the administrative route alone, Decision 85 contains certain defensive measures for the protection of rights, which are complemented mainly by the provisions of the Regulations.

The first of those defensive measures is the filing of observations or oppositions after a legal publication has been effected; this measure applies to patents (Decision 85, Article 17), designs (Decision 85, Article 51), and marks and trade names (Decision 85, Article 66). In Peru this route comprises two administrative instances: the first is within the sphere of competence of the Industrial Property Directorate, and the second is before the Director himself. After a ruling has been made by the latter, the only recourse is the judicial route, that is, appeals before the courts, which can go as far as the Supreme Court, although the latter is very unusual.

Yet both interested and third parties may request the ordering of fines and cancellations, which may also be ordered *ex officio* (Decision 85, Articles 41, 42 and 43 on patents and 76 and 77 on marks), and which may go as far as declaring the patent null and void (Decision 85, Article 44). In such cases, the course to be taken is that known as "reporting"; it is provided for in Sections 118 and following of the Regulations and may be used for infringements committed against industrial property. It is an expeditious and short procedure, and may result in the application of severe sanctions, such as those mentioned under 7.5, above. In addition, seizure and destruction of articles bearing unlawful marks may be ordered regardless of the place in which they are

located; in such cases, the infringer is liable before third parties. Also included is the prohibition against importing articles bearing infringements of duly registered marks, names, designs and patents. In those cases, the two above-mentioned administrative instances are also competent.

IX. Protection Against Unfair Competition

In order to conclude this cursory look at the provisions on industrial property in Peru, one has to refer to those that regulate protection against unfair competition, which are to be found in Sections 110 and 111 of the Regulations. Those provisions are constantly being used by the owners of industrial property rights.

Unfair competition legislation is scanty and in the fullest sense private. Discussion centers on whether only those affected or any person may file reports, as that is the procedure used, and the consensus is for the elimination of third parties not involved. The right of the authorities to act *ex officio* under these provisions is unanimously ruled out.

Even though the subject is very rich in case law and theory, this discussion shall be confined to saying that, in Peru, any act of unfair competition is considered illegal, and that the provisions are applicable to all types of economic activity, including the protection of assets that do not form part of industrial property proper, such as information on credit or commercial reputation.

One thing that is certain is that the direct or indirect appropriation and imitation of marks, the false description of articles that mislead the public, the claimed ownership of awards that have not been received, the spread of damaging information to discredit competitors, the use of false appellations of origin, etc., are acts of unfair competition expressly mentioned in the law. Consequently, cases are common in which the lawful owners of marks file reports in which they ask the authority to pronounce on the act of unfair competition and order the sanctions provided for in the aforementioned law. In such cases, as in the previous ones, the same two administrative instances as were mentioned earlier are competent.

It is to be hoped that specific, complete provisions will be enacted in the near future to regulate not only unfair but also fair competition, which obliges those concerned to work together on the market, controls monopolies and punishes undesirable practices; in so doing, a legal system will have been devised that allows free and honest competition for the defense and protection of that most valuable person, the consumer.

News from Industrial Property Offices

CANADA

Activities of the Bureau of Corporate Affairs in 1980-81*

The Bureau administers a group of federal laws and regulations that constitute part of the general legal framework in which all economic activity takes place. These laws encompass the fields of bankruptcy, corporation law, and intellectual property, which covers patents, copyright, trade marks, industrial designs and timber marking. Each law contributes in its own field to a general orderliness in the conduct of business affairs.

The Bureau of Corporate Affairs consists of the Bankruptcy Branch, Corporations Branch, the Directorate of Intellectual Property which comprises the Patents Branch, Trade Marks Branch and the Copyright and Industrial Design Branch, and the Research and International Affairs Branch.

The Intellectual Property Directorate comprises the Patent Office, the Trade Marks Office, and the Copyright and Industrial Design Office. Besides contributing to the orderly conduct of business, intellectual property laws provide economic incentives intended to encourage the creation and dissemination of new ideas.

Much of the work of the Directorate, in administering Canada's intellectual property laws, consists of examining applications for the granting of intellectual property rights filed by Canadians and the citizens of over 60 countries around the world.

Reflecting the international scope of intellectual property, the Directorate cooperates with other industrialized countries, under the auspices of WIPO, in helping developing countries to establish intellectual property offices and in providing training in their administration. The Directorate also cooperates in international programs that facilitate the exchange of documentation and statistical data to make patented technology accessible to developing countries, and by sharing information on the development of computerized information storage and search systems.

Fiscal year 1980-81 was an active year for the Directorate in international cooperation. During the year the Directorate completed in-house training programs for a

number of representatives of the People's Republic of China and of the Government of Thailand, and also conducted a seminar in Bangkok on patents for inventions and designs. Information on recent accomplishments in the reduction of backlogs, the applications of word processing equipment and computerized production of the *Patent Office Record* and the *Trade Marks Journal* were shared with officials of the United States Patent and Trademark Office. Officers of the Patent Office represented Canada at meetings in Geneva of various working groups of WIPO, such as the Permanent Committee for Patent Information's Working Group on Search Information.

Patents

The Patent Office administers the Patent Act and Patent Rules, and grants patents for new and often unusual inventions. Examination of patent applications involves a search for novelty, a decision regarding patentability and verification of compliance with procedural requirements.

The inventor or owner of a patent has the right to exclude others from making, using or selling the invention in Canada for 17 years from the date of the grant.

The Office publishes the *Patent Office Record*, a weekly magazine providing details of all Canadian patents granted during the previous week. It also maintains a search room and library where the public may obtain information concerning Canadian and foreign patents.

In 1980-81, the Office dealt with an average of 463 requests for information daily. The number of search inquiries from patent agents and the public totalled 3,368, down from 3,525 inquiries last year.

The complete Patent Office file of 1,092,750 issued patents is organized in technological classes which are constantly reviewed, revised or extended as different technologies emerge or as new combinations of known technologies are developed. By March 31, 1981, the file consisted of 340 main classes of technology, which were then condensed into 35,081 subclasses. During the year, three classes consisting of 313 subclasses were completely revised, 623 new subclasses were established and 372 old subclasses were abolished in the partial revision of existing classes.

In the past ten years, 265,087 applications were filed and 231,036 patents were issued.

The following table summarizes the transactions of the Patent Office during the past two years:

* Excerpted from the Annual Report, Consumer and Commercial Affairs, Canada, for the year ended March 31, 1981.

	1979-80	1980-81
Caveats registered	179	151
Applications for patents	24,347	25,431
Applications restored under Section 75 after failure to pay final fee	106	129
Applications reinstated under Section 32 after abandonment for failure to reply to an official action	129	83
Examiners' Reports	28,431	21,045
Applications allowed	24,354	23,525
Applications forfeited	407	653
Patents issued (for 17 years)	22,872	24,146
Patents reissued	22	19
Patents issued under Public Servants Inventions Act	75	76
Assignments recorded	21,993	19,662
Petitions for a compulsory licence under Sections 41 and 67	33	33
Duly Registered Patent Agents	1,645	1,615
Canadian Resident Agents	286	296
Canadian Firms	68	63
Non-resident	1,291	1,256

Patent Appeal Board

The Patent Appeal Board reviews final rejections of applications for the grant of patents and for the registration of industrial designs. The Board may hold formal hearings as part of the review procedure. The following table summarizes the rejections reviewed for the past two years:

	1979-80	1980-81
Patents		
Rejections referred to Board	185	124
Rejections affirmed	84	83
Rejections reversed	45	28
Otherwise disposed of	29	28
Hearings held	70	66
Pending	200	176
Decisions published in the <i>Patent Office Record</i>		
full	25	8
part	14	13
Industrial Designs		
Rejections affirmed	4	2
Rejections reversed	0	3
Hearings held	2	3

Compulsory Licenses

The Patent Appeal Board is also responsible for assisting the Commissioner of Patents in the exercise of his statutory powers to grant compulsory licences of patents. Under Section 41(3) of the Patent Act, licences may be granted to manufacture foods, and under Section 41(4) to manufacture or import medicines. Under Section 67, licences may be granted if the invention is not worked in Canada or for other abuses as defined in Section 67. The Board's activities for the past two years under these Sections of the Act are summarized in the following table:

	1979-80	1980-81
Section 41(3)		
Applications received	2	—
Licences granted	—	—
Applications pending	2	2
Section 41(4)		
Applications received	29	52
Licences granted	22	17
Licences refused	—	1
Applications withdrawn	6	—
Applications pending	39	73
Section 67		
Applications received	2	4
Licences granted	—	—
Licences refused	—	1
Applications withdrawn	4	—
Applications pending	6	9

Industrial Designs

The Copyright and Industrial Design Office administers the Copyright Act, Industrial Design Act, Timber Marking Act and their regulations.

The outward appearance of an article of manufacture—its shape, pattern or ornamentation—may be registered as an industrial design. Registration of a new design under the Industrial Design Act gives the registered owner sole rights to use the design in Canada for a period of five years, renewable for one further period of five years.

The following chart summarizes the industrial design transactions of the Copyright and Industrial Design Office during the last two fiscal years:

	1979-80	1980-81
Industrial Designs		
Applications received	1,818	1,707
Designs registered	1,544	1,313
Registrations renewed	283	340
Assignments recorded	369	232

Trade Marks

The Trade Marks Office is responsible for the administration of the Trade Marks Act. Applications for trade marks are examined and proceed to registration unless the mark applied for is an apt word for use by all traders or confusingly similar to marks already registered in Canada, in which event the application is refused. A newly registered mark remains on the register for an initial period of 15 years. Before a trade mark is licensed an application for registered user should be applied for at the Trade Marks Office.

Trade mark applications are advertised in the weekly issues of the *Trade Marks Journal* to enable persons to

oppose any marks that they feel may interfere with their existing rights. The Office maintains a search room for the public to refer to its registers and indexes of registered marks and users.

The following table summarizes the Office's transactions over the past two years:

	1979-80	1980-81
Trade mark applications filed	14,448	16,126
Trade mark applications advertised	16,327	16,799
Trade mark registrations	9,905	15,462
Registered user applications filed	2,696	4,922
Number of trade marks governed by registered user applications (registered and pending)	11,714	13,875
Registered users registered in respect of trade marks	18,403	12,683
Registered user registrations cancelled in respect of trade marks	4,797	3,277
Transfer applications filed	9,186	10,097
Transfers registered	9,283	8,660
Trade mark registrations renewed	3,659	3,192
Trade mark registrations expunged	3,976	3,524
Amendments entered on the register	5,379	1,985
Copies prepared	458,737	444,176
Duly registered trade mark agents	6,268	6,611
Oppositions filed	488	1,043

Research and International Affairs

The Research and International Affairs Branch is responsible for the Bureau's legislative revision, the economic and legal research associated with this process and the overall evaluation of the efficacy of the legislation. As well, the Branch is responsible for monitoring international developments and for negotiating treaties to which Canada adheres in those areas falling within the jurisdiction of the Bureau.

During 1980-81, work continued on revision of the four intellectual property acts. In the area of patents, approval was granted by Cabinet for the Department of Justice to begin drafting a patent law revision bill in cooperation with Consumer and Corporate Affairs Canada. This is currently in progress. Cabinet approval was also obtained to draft a bill related to trade marks, a first version of which was received from the Department of Justice in October 1980.

The Division's computerized patent data base, PATDAT, was augmented during fiscal year 1980-81 and now contains information on 145,000 patents, including all patents issued in 1978, 1979 and 1980.

News Items

EGYPT

Chairman of the Commercial Registration Administration

We have been informed that Mr. Ibrahim Fahmi Salem has been appointed Chairman of the Commercial Registration Administration.

Book Reviews

La Proprietà Industriale nel Mercato Comune, by Giorgio Florida (Extract of Vol. V of *Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia*, edited by Francesco Galgano). CEDAM, Padova, 1982. — 139 pages.

This study constitutes a substantial contribution to the ongoing debate on the relationship between European Community competition law and national industrial property systems. The author develops his examination of this complex subject along the following main lines: the coordination of European Community law with national industrial property laws; the integration of national industrial property rights in European Community law; and the future industrial property law of the European Communities as a result of this process of coordination and integration.

The author focuses his attention on the interpretation of Article 36 of the Rome Treaty as the basis of clarifying the relationship between Community law and national legislation and thus avoiding a conflict between the two systems. After having examined in detail the so-called theory of the *domaine réservé*, according to which the provisions of Article 36 are directed towards guaranteeing an institutional separation between national industrial property legislation and the competition law of the European Community, the author starts from the premise that there is no border line separating the competence of the Community from that of the Member States. He directs his research towards the discovery of a mechanism in the Rome Treaty to coordinate and integrate the two legal systems and identifies such a mechanism in Article 177. With that provision, the Member States have conferred on the Court of Justice the power to determine the scope of Community law and to modify national legislation to the same extent. The provisions of Article 36 are, therefore, seen as a vehicle which legitimizes the coordinating task conferred on the Court of Justice through the interpretation mechanism provided for under Article 177.

It is in the light of the considerations developed in Articles 36 and 177 that the author analyzes the case law of the Court of Justice on trademarks and patents, the exhaustion of national patent rights and the Community Patent Convention and, finally, patent license agreements in the framework of national industrial property systems and Community competition law.

The author devotes the final part of his study to examining the ongoing process of establishing an industrial property law of the European Community through the work of the Court of Justice and of the Commission. Particular attention is given, in this respect, to the draft regulations relating to patent licenses and to the draft regulations on the Community trademark prepared by the Commission; these two instruments are considered, together with the Community Patent Convention, as a concrete step towards the integration of national industrial property systems in the Community system.

This study can be recommended to everyone with a practical or academic interest in the complex issues arising in connection with the relationship between the Rome Treaty and national industrial property systems.

AI

The Industrial Property Citor, by M. Fysh and R.W. Thomas. European Law Centre Ltd., London, 1982. — 321 pages.

This citor of United Kingdom, Commonwealth and EEC case law on industrial property provides the practitioner with rapid and specific access to authorities as well as with a key to the principal topics within each object of industrial property. The decisions cited date back as far as 1956.

The work is divided into two parts. The first part consists of a general index showing all the cases listed in alphabetical order together with selected key words to indicate the principal issues in each case. The second part includes a detailed topical index of all United Kingdom cases as well as a subject matter index of the relevant decisions of each Commonwealth country and of the EEC.

Use of this citor will facilitate greatly the task of industrial property practitioners.

JE

Die europäische Patentanmeldung in Frage und Antwort, by Günter Gall. Carl Heymanns Verlag KG, Cologne, etc, 1982. — 155 pages.

This work, presented in a very handy format, is intended both for practitioners who have to interpret their national law in the light of the European Patent Convention and for the general public to inform them of the machinery set up to afford to inventors greater protection for their rights.

It deals, in the form of questions and answers, with problems concerning the European patent granting procedure which arise frequently in practice, whereby the most important subjects are arranged together in chapters.

Such subjects are principally the calculation of time limits, resumption of the procedure, reinstatement of rights, payment of fees, designation of States, appointment and powers of agents, naming of the inventor, priority, request for examination, annual fees, grant of the patent.

This handbook also contains an appendix giving a schematic presentation of the structure of the European Patent Convention and publication references of legal information published by the European Patent Office in its *Official Gazette*, gives models of new forms, describes the European patent granting procedure, shows very clearly, in schematic form, the interface between the national and European phases as regards notification by the examining division under Rule 51(4) of the Implementing Regulations to the Convention and, finally, gives a chronological example of the granting of a European patent from the priority date to publication of the notification of publication. It ends with an index of key words.

This work therefore constitutes a very handy and clear reference book of particular value to practitioners and to those persons wishing to obtain protection under the European Patent Convention.

EG

Les marques de fabrique, de commerce ou de service (Documentation pratique No 62). Chambre de commerce et d'industrie de Paris, Paris, 1982. — 36 pages.

The launching of a new mark by an enterprise is a delicate and often costly operation. This short work, which was prepared by the *Institut de Recherche en Propriété Industrielle Henri Desbois (IRPI)*, explains in easily understandable terms the fundamental principles of the French law on marks. Its purpose is to assure that enterprises obtain the best possible protection for their marks in France.

The publication deals with the following topics: the definition of a mark; the conditions for registrability; the acquisition of trademark rights; the term of registration and its renewal; the loss of trademark rights; the defense of a mark; the assignment and licensing of marks; and the protection of marks abroad. It is a very useful guide that will benefit all those desiring a basic understanding of trademark law.

JE

Protection et défense des marques de fabrique et Concurrence déloyale (5th edition), by Yves Saint-Gall. Editions Jacques Delmas et Cie., Paris, 1982. — 336 pages.

This is the fifth, updated, edition of the classic by Yves Saint-Gall, which first appeared in 1959. During the ensuing 20 years or so, protection of trademarks has undergone considerable legislative and case law changes. This explains the successive revisions of the work, whose purpose is to set out not in detail, but in a condensed and systematic form, the basic notions of trademarks and service marks.

This fifth edition is particularly welcome following the rapid evolution of trademark law — particularly during the last decade — both nationally and internationally. Although maintaining the general structure of preceding editions, this new edition has been entirely recast. It takes into account the most recent developments and comprises a very large quantity of useful information not only on the

provisions of the French Law of December 31, 1964, but also on foreign laws — particularly those of the Common Market countries — and on international conventions in this field. It further gives valuable information on the suppression of unfair competition and infringing acts.

The author's intention is that this work, thanks to its practical nature and to the quantity of information it contains, should constitute an important tool for all those interested in the protection of trademarks and in fair and healthy competition.

FB

Gewerblicher Rechtsschutz und Urheberrecht — Grundriss — Allgemeiner Teil, by F. Schönherr. Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 1982. — 151 pages.

This summary of intellectual property law (industrial property and copyright) contains in a schematic form the essence of Austrian legislation in this field. It is aimed at students and sets out for them the general notions of intellectual property law, indicating the examination subjects by means of dots ahead of the margin notes. One of its purposes is also to assist future judges, lawyers, patent agents and notaries in preparing for their professional examinations. It similarly constitutes a reference work for practitioners who are not specialized in this subject by saving them lengthy research on a given point. For this purpose, the summary states the legal bases and the relevant court decisions. In addition, it constitutes an introduction to the study of Austrian legislation and case law for foreign specialists.

Following a clear scheme, the author has brought together the substance of a multitude of scattered provisions in order to study both the elements that are common to general civil law and the differences, which are often the result of mere chance.

The 1977 recast of the Patent Law and the Trademark Protection Law, which effected a vast unification of Austrian industrial property law, already took into account the suggestions made by the author, of whom a further aim is to assist the lawmaker in eliminating unnecessary differences.

In his day-to-day activity as a lawyer, the author was struck by the importance taken on by procedure and he has therefore dealt not only with actions for restraint and an injunction, but also with procedure before the Patent Office and the Supreme Patent and Trademark

Chamber, not to mention the most important points of taxation law.

In addition to a special chapter devoted to international law, particularly that of the major conventions, the book also contains references to comparative law, although it makes no claim to be exhaustive. Leading cases are cited in the notes as are the opinions of legal writers (where these do not duplicate case law).

EG

The New European Patent System, by R. Singer (translated and adapted by D.J. Devons). Seminar Services International, 1981. — 194 pages.

This book, which first appeared in German (R. Singer, *Das Neue Europäische Patentsystem*, Baden-Baden, 1979), has now been published in an English version, translated and adapted by D.J. Devons.

The author traces the evolution of the patent system from a territorially-limited system towards an extra-territorial and supra-national system through the close examination of the provisions of three international treaties: the European Patent Convention; the Community Patent Convention; and the Patent Cooperation Treaty (PCT). These international instruments (of which the Community Patent Convention, however, has not yet entered into force) permit the patent applicant to choose, instead of filing with each national office, between two options in order to seek protection for his invention: regional filing under the European Conventions and international filing under the PCT.

Dr. Singer's study analyzes in great detail the characteristics of the European patent system, of the international patent system under the PCT and the connections between those two systems and national patent systems.

The last chapter outlines the possibilities that the new European patent system offers to the applicant for filing applications in European States; it presents a detailed "map" of the various options available, their relevant advantages and the estimated costs involved for any of those options.

This study can be recommended to everyone interested in the evolution of the European patent system and to the users of this system.

AI

Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1983

May 26 to June 3 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Special Questions and Working Group on Planning

June 6 to 17 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Search Information

June 13 to 17 (Geneva) — Committee of Experts on the Legal Protection of Computer Software

June 20 to 24 (Geneva) — Permanent Committee on Patent Information (PCPI) — Ad Hoc Working Group on the Revision of the Guide to the IPC

July 4 to 8 (Geneva) — Joint Unesco-WIPO Consultative Committee on the Access by Developing Countries to Works Protected by Copyright (convened jointly with Unesco)

September 12 to 20 (Geneva) — International Patent Classification (IPC) Union — Committee of Experts

September 14 to 16 (Paris) — Forum of International Non-Governmental Organizations on Double Taxation of Copyright Royalties (convened jointly with Unesco)

September 19 to 23 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)

September 26 (Geneva) — Paris Union — Celebration of the Centenary of the Paris Convention for the Protection of Industrial Property

September 26 to October 4 (Geneva) — Governing Bodies (WIPO General Assembly, Conference and Coordination Committee; Assemblies of the Paris, Madrid, Hague, Nice, Lisbon, Locarno, IPC, PCT, Budapest, TRT and Berne Unions; Conferences of Representatives of the Paris, Hague, Nice and Berne Unions; Executive Committees of the Paris and Berne Unions; Committee of Directors of the Madrid Union; Council of the Lisbon Union)

October 12 to 14 (Geneva, ILO Headquarters) — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

October 17 to 21 (Geneva) — Committee of Governmental Experts on Model Statutes for Institutions Administering Authors' Rights in Developing Countries (convened jointly with Unesco)

November 21 to 25 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on General Information

November 28 to December 2 (Geneva) — Permanent Committee on Patent Information (PCPI) — Working Group on Special Questions and Working Group on Planning

December 5 to 7 (Geneva) — Berne Union, Universal Copyright Convention and Rome Convention — Subcommittees on Cable Distribution of the Executive Committee of the Berne Union, of the Intergovernmental Copyright Committee and of the Intergovernmental Committee of the Rome Convention (convened jointly with ILO and Unesco)

December 8 and 9 (Geneva, ILO Headquarters) — Rome Convention — Intergovernmental Committee (convened jointly with ILO and Unesco)

December 12 to 16 (Geneva) — Berne Union — Executive Committee — Extraordinary Session (sitting together, for the discussion of certain items, with the Intergovernmental Committee of the Universal Copyright Convention)

1984

February 27 to March 24 (Geneva) — Revision of the Paris Convention — Diplomatic Conference

UPOV Meetings

1983

May 30 to June 1 (Zaragoza) — Technical Working Party for Vegetables

June 7 (Tystofte, Skaelskør) — Technical Working Party for Agricultural Crops — Subgroups

June 8 to 10 (Tystofte, Skaelskør) — Technical Working Party for Agricultural Crops

September 20 (Rome) — Technical Working Party for Fruit Crops — Subgroup

September 21 to 23 (Rome) — Technical Working Party for Fruit Crops

September 27 to 29 (Conthey) — Technical Working Party for Ornamental Plants and Forest Trees

October 3 and 4 (Geneva) — Technical Committee

October 11 (Geneva) — Consultative Committee

October 12 to 14 (Geneva) — Council

November 7 and 8 (Geneva) — Administrative and Legal Committee

November 9 and 10 (Geneva) — Hearing of International Non-Governmental Organizations

Other Meetings Concerned with Industrial Property

1983

European Patent Organisation: June 6 to 10; December 6 to 9 (Munich) — Administrative Council

International Association for the Advancement of Teaching and Research in Intellectual Property: September 5 to 7 (Munich) — Assembly and Annual Meeting

International League Against Unfair Competition: September 18 to 21 (Montreal) — Working Session (*Journées d'Etudes*)

Pacific Industrial Property Association: October 19 to 21 (Washington) — 14th International Congress

Pharmaceutical Trade Marks Group: October 13 and 14 (Edinburgh) — 27th Conference

1984

Royal Patent and Registration Office: June 13 to 15 (Stockholm) — Symposium on the Centenary of the Swedish Patent System