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At their session in Geneva from September 23 to October 2, 1991, the Governing Bodies of WIPO adopted the Program and Budget of the Organization for the 1992-93 biennium. As regards the item "Periodicals and Other Publications," the Program as adopted provides that "the periodicals will no longer contain articles written by specialists in intellectual property but only material coming from official sources."

In implementation of the said decision, the periodicals will, as from January 1, 1992, contain only material concerning the activities of WIPO and accessions to treaties administered by it. They will provide comprehensive and up-to-date information about those activities, such as important working documents and reports of meetings organized by WIPO and information on WIPO's development cooperation and registration activities.

WIPO 1991

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AUSTRIA

Federal Law of June 7, 1990, on the Protection of Designs (Design Law 1990) Text 4-001

Order of the Federal Minister for Economic Affairs of October 29, 1990, Concerning
Design Filing Offices of the Chambers of Commerce (Design Filing Office Order) Text 4-002

FRANCE

Law on the Protection of Appellations of Origin (of May 6, 1919, as last amended and
completed by Law No. 90-558 of July 2, 1990) (*Replacement sheet*) Text 5-001

Notifications Concerning Treaties

International Convention for the Protection of New Varieties of Plants

New Member of UPOV

CZECHOSLOVAKIA

The Government of Czechoslovakia deposited, on November 4, 1991, its instrument of accession to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978.

Czechoslovakia has not heretofore been a member of the International Union for the Protection of New Varieties of Plants, founded by the said International Convention.

The said International Convention will enter into force, with respect to Czechoslovakia, on December 4, 1991. On that date, Czechoslovakia will become a member of UPOV.

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 Czechoslovakia.

UPOV Notification No. 38, of November 8, 1991.

Activities of Other Organizations

International Association for the Protection of Industrial Property (AIPPI)

Council of Presidents

(Lucerne, September 15 to 19, 1991)

NOTE*

The International Association for the Protection of Industrial Property (AIPPI) held a meeting of its Council of Presidents in Lucerne (Switzerland) from September 15 to September 19, 1991. The Presidents of 40 national groups of AIPPI as well as the members of the Bureau of AIPPI, presidents and members of honor and chairmen of various program committees participated in the meeting, which was presided over by the Executive President of AIPPI, Mr. Masahiko Takeda (Japan) and other officers of AIPPI. The World Intellectual Property Organization (WIPO) was represented by its Director General, Dr. Arpad Bogsch, and by Mr. Ludwig Baeumer, Director, Industrial Property Division.

On September 16, 1991, the Director General of WIPO delivered an address which is reproduced below.

The Council of Presidents dealt with the following questions: harmonization of certain provisions of the legal systems for protecting inventions; UPOV Convention and biotechnology; negotiations within GATT on trade-related aspects of intellectual property rights; PCT matters; harmonization of trademark laws; formal requirements of trademark applications, registration and amendments thereof; restoration of patent rights; improvement of international protection of industrial designs; international protection of appellations of origin and indications of source; and the reorganization of working methods of AIPPI.

At the conclusion of the meeting, the Council of Presidents adopted the resolutions reproduced below.

Address by the Director General of WIPO

*"Distinguished Officers of the International Association for the Protection of Industrial Property,
Ladies and Gentlemen,*

It hardly seems necessary, in view of the long-standing and highly fruitful relationship between WIPO and AIPPI, to say how pleased I am to have this opportunity to address the Council of Presidents meeting here in Lucerne on behalf of WIPO.

There has always been, by design, a similarity between the work program of AIPPI and the activities of WIPO. One has only to look through the list of Working Committees of AIPPI and the questions which they treat to realize the extent of this similarity. (I exclude, of course, Question 94 on GATT.) I should like, therefore, to start my very brief resumé of the activities of WIPO that have taken place or have been planned since the AIPPI Executive Committee meeting last year in Barcelona by dealing first with those areas that are the subject of AIPPI Committees. I shall treat those areas in the order in which the questions before the Committees appear on the Working Program of this meeting.

Harmonization of Patent Laws (Question 89)

As you are no doubt aware, the first part of a diplomatic conference for the purpose of negotiating a Treaty Supplementing the Paris Convention as Far as Patents are Concerned (the 'Patent Law Treaty') was held at The Hague over the three weeks from June 3 to 21, 1991, with the participation of some 400 persons. As had been decided in advance of the Conference, no final decisions concerning the draft Patent Law Treaty were taken at the Conference. However, the three weeks of discussions assisted in crystallizing the positions being adopted by the various delegations and groups participating in the negotiations.

The draft Patent Law Treaty contains some 39 Articles and there are 13 accompanying Rules. The provisional summary minutes of the discussions at the Conference comprise some 400 pages. In the time available to me now, therefore, I shall desist from making any detailed observations, particularly as a full report will be given this morning by the AIPPI representative at the Conference. I will simply

* Prepared by the International Bureau of WIPO.

say that the question of reconvening the Conference for its second part will be kept under constant review. Dates are unlikely to be set, however, until more certainty emerges in relation to the fate of the negotiations on trade-related aspects of intellectual property rights within the context of the Uruguay Round and the position in the United States with respect to certain key issues, in particular the question of first-to-file, becomes clearer. In the interim, it is heartening to see that the harmonization process is already producing results, since an increasing number of new laws are drawing inspiration from the draft Patent Law Treaty. The laws or proposed laws of Chile, China, Mexico, Romania and the Soviet Union may, in particular, be mentioned in this regard.

Biotechnology and UPOV (Questions 51 and 93)

No meetings have been held within WIPO on biotechnology since September last year. However, the draft Program and Budget for the 1992-93 biennium envisages that either a session of the Committee of Experts on Biotechnological Inventions will be held to further consider and preferably complete advice on suggested solutions to questions concerning the patent protection of biotechnological inventions or a forum will be convened on topical questions of patent protection of biotechnological inventions.

I am happy to report that a diplomatic conference was held in March this year at which a new Act of the UPOV Convention was adopted. A number of significant changes were introduced by the 1991 Act which have the effect of strengthening the protection for plant varieties. Those changes include

- the removal of the so-called 'ban on double protection' so that UPOV member States are free, so far as the UPOV Convention is concerned, to grant patents in addition to plant breeders' rights for plant varieties;

- the establishment of the obligation for member States to grant plant breeders' rights for all plant species within a specified period; and

- the strengthening of the exclusive rights of the breeder, which extend to the production of propagating material of the variety and a list of specific acts of exploitation, as well as to acts of commercial exploitation of harvested material of the variety resulting from the infringing use of propagating material of the variety, 'unless the breeder had reasonable opportunity to exercise his right in relation to the said propagating material;'

- in contrast to the 1978 Act, under which any variety resulting from the plagiaristic reselection or manipulation of a protected variety that is clearly distinguishable from the protected variety falls outside the scope of protection of the protected variety, under the 1991 Act a variety resulting from

such plagiaristic activity will fall within the scope of protection given to the breeder of the protected variety if it is 'essentially derived' from the protected variety.

PCT (Question 109)

The steady increase in the use of the PCT has continued. Since September last year, the number of States party to the PCT has increased from 44 to 49, the latest adhesions comprising Poland, Côte d'Ivoire, Guinea, Mongolia and Czechoslovakia. The number of international applications has increased throughout 1991 at the rate of about 15%, and we expect to receive a total of some 22,000 international applications for the year (up from 19,159 in 1990).

The past year has also marked the completion of a major exercise in the revision of the PCT Regulations. At its July 1991 session, the PCT Assembly adopted a large package of amendments to the Regulations, including the substantive amendment of 122 of the 331 Rules presently in force and the addition of 18 new Rules. The changes are designed to streamline the procedures for filing and prosecuting an international patent application under the PCT, and to make the use of PCT procedures simpler, safer and more accessible to applicants. The amendments take into account 13 years' experience in the use and administration of the PCT.

Harmonization of Trademark Laws (Questions 92 and 92D) and Counterfeiting (Question 86)

No further meetings of the Committees of Experts dealing with the harmonization of trademark laws or the question of piracy and counterfeiting have been held since the meeting of the AIPPI Executive Committee last year. The matters remain, however, important items in our Program for the 1992-93 biennium but the dates of their implementation depend in part on the outcome of the Uruguay Round of GATT, since that Round deals with these two matters too.

The Possible Improvement of the System of International Deposit of Industrial Designs (Question 108)

The possibility of increasing the use of the Hague Agreement and of making it more attractive to more countries was the subject of a meeting of a Committee of Experts in April 1991. The Committee concluded that it was highly desirable that it should continue its work which, eventually, may lead to a new Act of the Agreement.

Geographical Indications (Question 62)

An international symposium on geographical indications will be held in Wiesbaden, Germany, on

October 17 and 18. In response to increasing interest in this area, national seminars on appellations of origin will also be held in November in Santiago, Chile and Lima, Peru.

Further meetings are also planned in the next biennium of the Committee of Experts that met in 1990 on the international protection of geographical indications. The Committee is investigating whether the formulation of a new treaty establishing minimum standards for the protection of geographical indications would be desirable.

The Madrid System (Question 88)

During the past 12 months, work has proceeded on an intensive basis on draft Regulations that will constitute a common set of Regulations under the Madrid Agreement and the Madrid Protocol when the Protocol comes into effect. The third session of a Working Group was held in Madrid in May and the fourth session is convened for November of this year. A complete draft of the Regulations now exists. It is pleasing to note the active participation in the work of the Working Group not only of the signatory States of the Madrid Protocol which, as you know, include several States not party to the Madrid Agreement, but also of the United States of America, where the United States Patent and Trademark Office has been working in close cooperation with the United States Trademark Association on investigating, with so far favorable conclusions, the possibility of becoming party to the Madrid Protocol.

At the same time, the International Bureau has been working on developing the computer facilities to make available the data of the International Registry through electronic access and on CD-ROM.

Copyright (Question 110)

Work commenced this year on what promises to be a very major exercise in the field of copyright, namely, a possible protocol to the Berne Convention. A first meeting of a Committee of Experts on this matter will be held in Geneva in November of this year. Among the very important and difficult questions which are to be addressed by the Committee of Experts are the following:

- the scope of works protected and, in particular, computer programs, data bases, expert systems and other artificial intelligence systems, and computer-produced works;
- the status of sound recordings (phonograms) and of the producers of sound recordings;
- the right of reproduction in respect of the storage of works in computer systems;
- the question of reprographic reproduction by libraries, archives and educational institutions;
- home taping and other private reproduction for personal use;

– the possible exclusion of the application of non-voluntary licenses for sound recordings and broadcasting;

- the right of public display;
- the right of rental and public lending;
- the right of importation;
- the right of broadcasting in respect of direct broadcasting by satellite;
- the definition of the notion of public use;
- the possible extension of the term of protection;
- certain aspects of collective administration.

You will observe that the scope of work in this area is extremely broad and that the nature of the questions to be dealt with is extremely challenging.

Settlement of Disputes Between States (Question 103)

The Committee of Experts on the Settlement of Intellectual Property Disputes Between States held its third session in Geneva at the beginning of this month. It considered a draft treaty and decided that one or possibly two further meetings were necessary before the draft could be considered to be reasonably final.

Arbitration and Other Means of Alternative Dispute Resolution Between Private Parties (Question 106)

Our work in this area is just commencing. An informal group of experts will meet on the question in October in Zurich. AIPPI has been invited to attend that informal working group in an observer capacity. Meetings of an expanded working group will be held during the next biennium.

Developing Countries

I should not like to conclude without mentioning, albeit very briefly, our extensive development cooperation activities. Over the past 12 months, more than 5,000 men and women from about 108 developing countries have received training at workshops, training courses and seminars organized by WIPO. Over the same period some 80 developing countries received WIPO missions and over 100 experts were sent to give specialized on-the-spot training. The International Bureau also continued, in cooperation with donor industrial property offices, technical information services for developing countries, pursuant to which over 500 search reports and copies of some 3,000 patent documents were furnished to developing countries.

Ladies and gentlemen, allow me to finish by reaffirming our conviction that the activities of WIPO that I have briefly described are vitally dependent on the support, interest, enthusiasm, knowledge and experience of the industrial, commercial and professional sectors throughout the world and, in partic-

ular, of specialized organizations bringing together expert practitioners in the field of intellectual property of which AIPPI is a preeminent example."

Resolutions Adopted by the Council of Presidents

QUESTION 62

International Protection of Appellations of Origin and Indications of Source

RESOLUTION

The International Association for the Protection of Industrial Property (AIPPI) wishes to solemnly protest against the Draft EC Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs (SEC (90) 2415 Final Brussels, January 21, 1991).

AIPPI is an international association with more than 6,500 members coming from more than 90 countries among which all member countries of the Community. Such members are owners or interested parties with respect to industrial property rights, which comprise among others trademarks and geographical indications (appellations of origin and indications of source).

AIPPI notes that this Draft Regulation does not take into consideration the existence, in all countries of the world, of legally acquired industrial property rights which are regularly used within the European Common Market and which could be expropriated in a manner which is all the more intolerable in that this could occur without compensation and for no legitimate reason.

The protection of such rights is guaranteed by international conventions which have been ratified many years ago by all or some of the Community member countries, in particular, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement on the Repression of False or Deceptive Indications of Source on Goods and the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration.

AIPPI recalls that the Treaty of Rome in Article 234 respects the obligations of member countries arising from international conventions which they have ratified.

AIPPI observes that the Draft Regulation is in obvious contradiction with the principle of free choice by enterprises for their distinctive signs, especially trademarks, including collective marks, and geographical indications and also in contradiction with the principle of free use of such signs without any preliminary control or authorization by government authorities, principles which are the basis of international conventions concerning industrial property and which represent a fundamental element of each free market economy.

Also, the Draft Regulation takes no account of the international discussions which have for many years taken place in the World Intellectual Property Organization (WIPO), supported by AIPPI, directed to the adoption of a treaty for the protection of geographical indications and which is to be applicable without exception to all products, agricultural and industrial.

Consequently, AIPPI asks that the Draft Regulation be abandoned or at least fundamentally changed.

QUESTION 89

Harmonization of Patent Laws

RESOLUTION

AIPPI

- *reaffirms* the importance which it attributes to the project of a treaty for the harmonization of patent laws;
- *expresses* with emphasis the wish that the Diplomatic Conference lead to the signature of the Treaty.

QUESTION 92D

Harmonization of Formal Requirements for Trademark Applications, Registrations and Amendments Thereof

RESOLUTION

1. AIPPI

(a) *notes* the extreme diversity among countries concerning the formalities for filing, transfer of trademarks and any later modification thereof, in particular, change of name and address;

(b) *notes* that this diversity constitutes a serious obstacle for the acquisition, the maintaining and even the exercise of the trademark right;

(c) *notes* that practitioners of industrialized and developing countries agree that a solution to this problem should be found by the international harmonization and standardization of certain formalities and documents;

(d) *expresses* the wish that trademark offices should be obliged to accept a universal and standard form both for the application of a trademark and the power of attorney without being excluded, however, from accepting the applications and powers of attorney in a different form;

(e) *considers* that an international agreement could be possible on the following points:

- goods and services (where applicable) should be classified in accordance with the Nice International Classification;

- the application should be filed by using a standard form;

- the application should be signed by the applicant or the duly authorized representative (at his option);

- foreign applicants should be represented by a person permitted to practice before the office or have an address for service in the territory of the contracting party;

- no authentication of signature (by a notary public or even signature before a notary public or legalization with a consulate, etc.) should be required;

- no certificate or extract from a Register of Commerce should be required;

- no evidence should be required that the trademark applied for is registered in another country;

- the office can be informed about a change of name or address by simple written communication of the owner, signed by him or his duly authorized representative;

- the information about change of name or address can be made by the owner in one single communication for all trademarks which are registered in his name at the office;

- the assignee can ask for registration of the assigned marks in his name submitting written evidence of the

assignment, duly signed by the assignor or his legal representative;

– the demand of the assignee must be signed by himself or his representative.

2. For these reasons, AIPPI *strongly recommends* that the member States of the Paris Convention for the Protection of Industrial Property initiate appropriate procedures to arrive as soon as practicable at the international harmonization of formalities in the field of trademarks.

It considers that this harmonization of formalities might constitute the first part of the trademark harmonization project presently studied by WIPO.

3. AIPPI *decides* to continue its studies concerning the harmonization of formalities concerning the following points:

– goods and services belonging to any number of classes of the International Classification may be covered by one and the same application and shall be covered by one and the same registration on such an application;

– the carrying on of an industrial or commercial activity by the applicant should be no requirement for trademark registration;

– the carrying on of an activity by the applicant corresponding to the goods or services listed in the application should be no requirement for registration;

– assignments can be made without goodwill and without transferring a business to which the trademarks are related;

– the assignment must be made in writing;

– no authentication of any of the documents of assignment is required;

– no certificate or extract from a Register of Commerce should be required;

– the carrying on of an industrial or commercial activity by the assignee should be no requirement for his registration as the new owner of the registered trademark;

– the carrying on of an activity by the assignee corresponding to the goods or services listed in the registrations should be no requirement for registration of the assignee as the new owner of the registered trademark.

QUESTION 93

Biotechnology (Relationship Between Patent Protection and Biotechnological Inventions and Plant Variety Protection; Patentability of Animal Breedings)

RESOLUTION

The Council of Presidents decides that the study of Question 93 on biotechnology and plant varieties will include in particular the following matters:

1. the total removal of the ban on double protection of plant varieties in national laws on plant breeders' rights;

2. the removal of all provisions relating to the unpatentability of plant and animal varieties in the patent laws;

3. the scope of patent protection for biotechnological product and process inventions concerning self-replicable material encompasses subsequent generations and material wherein the inventive characteristics are expressed, except when the reproduction is an inevitable consequence of the intended use of a material marketed by the patentee;

4. an invention should not be considered a discovery or lacking in novelty merely because it forms part of a preexisting material.

QUESTION 108

Improvements of International Protection of Designs and Models

RESOLUTION

1. The Council of Presidents *gives* to the Working Committee the additional assignment to study the modification of the Hague Agreement Concerning the International Deposit of Industrial Designs, with a view to the discussion to take place at the Tokyo Congress.

2. It *mandates* the Bureau to constitute a Special Committee to study the Regulation on the Community Design and Model prepared by the Commission of the European Communities in order to inform the competent Community authorities of the position of AIPPI on this matter in accordance with the appropriate procedures.

QUESTION 112

Restoration of Patent Rights

RESOLUTION

1. The Council of Presidents *declares* itself in favor of the principle of the restoration of patent rights, in the event of the omission of a formality or of the payment of a fee within the prescribed time limit, on conditions to be determined.

2. It *has also given* favorable consideration to the principle of the restoration of the priority right, but on rigorous conditions to be determined.

WIPO Meetings

Governing Bodies of WIPO and the Unions Administered by WIPO

Twenty-Second Series of Meetings
(Geneva, September 23 to October 2, 1991)

NOTE*

From September 23 to October 2, 1991, the Governing Bodies of WIPO and the Unions administered by WIPO held their twenty-second series of meetings in Geneva. Delegations from 93 States, 12 intergovernmental organizations and six non-governmental international organizations participated in the meetings.

The following 23 Governing Bodies met:

WIPO General Assembly, thirteenth session (10th ordinary);
WIPO Conference, eleventh session (10th ordinary);
WIPO Coordination Committee, twenty-eighth session (22nd ordinary);
Paris Union Assembly, eighteenth session (10th ordinary);
Paris Union Conference of Representatives, nineteenth session (10th ordinary);
Paris Union Executive Committee, twenty-seventh session (27th ordinary);
Berne Union Assembly, twelfth session (10th ordinary);
Berne Union Conference of Representatives, twelfth session (10th ordinary);
Berne Union Executive Committee, thirty-third session (22nd ordinary);
Madrid Union Assembly, twenty-third session (9th ordinary);
Hague Union Assembly, twelfth session (8th ordinary);
Hague Union Conference of Representatives, twelfth session (8th ordinary);
Nice Union Assembly, twelfth session (10th ordinary);
Nice Union Conference of Representatives, eleventh session (10th ordinary);
Lisbon Union Assembly, ninth session (9th ordinary);

Lisbon Union Council, sixteenth session (16th ordinary);
Locarno Union Assembly, twelfth session (9th ordinary);
IPC [International Patent Classification] Union Assembly, eleventh session (8th ordinary);
PCT [Patent Cooperation Treaty] Union Assembly, nineteenth session (8th ordinary);
TRT [Trademark Registration Treaty] Union Assembly, seventh session (6th ordinary);
Budapest Union Assembly, ninth session (6th ordinary);
Vienna Union Assembly, fifth session (4th ordinary);
FRT [Film Register Treaty] Union Assembly, second session (1st ordinary).

The main agenda items and the main decisions covered the following points:

Appointment of the Director General. On the basis of the nomination made by the WIPO Coordination Committee in 1990, the WIPO General Assembly appointed Dr. Arpad Bogsch, unanimously and by acclamation, as the Director General of WIPO for a further period ending November 30, 1995.

Activities from July 1, 1989, to July 15, 1991. The delegations expressed their entire satisfaction with the format and substance of the reports submitted by the Director General and, in particular, praised the comprehensiveness and clarity of those reports which made possible a full review of the activities undertaken by the International Bureau. In their view, those activities were impressive both in terms of quality, volume and variety, and they conformed to the plans laid down for the 1990-91 biennium and achieved the objectives set out therein. The delegations paid special tribute to the professionalism, competence and dedication of the staff of the International Bureau led by the Director General.

* Prepared by the International Bureau.

Most of the delegations singled out for special mention the development cooperation activities for the benefit of developing countries and, in particular, in the areas of human resource development or training, advice and assistance in legislative and legal drafting, the upgrading of administrative procedures and office management, computerization, patent information services (including the introduction of CD-ROM technology) and the teaching of intellectual property law in universities.

The delegations of the developing countries considered such activities as being of prime importance in WIPO's work program, and expressed their great satisfaction with the assistance that their countries had received from WIPO and also, through WIPO, from other countries, both developing and industrialized, as well as from certain organizations. Most of the delegations of the industrialized countries stressed the importance which their governments attached to WIPO's development cooperation program. They pledged to continue their participation in those activities and, whenever feasible, also to increase their share in such participation.

Many delegations expressed their satisfaction with the work the International Bureau had undertaken or was undertaking in the area of norm-setting, such as the progress achieved in the preparations for a Patent Law Treaty and in discussions on the settlement of intellectual property disputes between States. In addition, they noted with satisfaction the continuing growth in the international registration activities relating to patents, marks and industrial designs.

Program and Budget for the 1992-93 Biennium. The program and budget were adopted. The Assemblies of the PCT, Madrid and the Hague Unions approved the proposal of the Director General to have these three fee-financed Unions participate (for the first time), with an amount of 4.3 million Swiss francs, in the financing of certain activities (primarily development cooperation activities) in which they had not previously participated. The total of the contributions by the member States to the Paris and the Berne Unions will be the same for the 1992-93 biennium as it was for the 1990-91 biennium.

In the 1992-93 biennium, more emphasis will be placed on activities in the following areas:

(a) development cooperation, where a greater volume of activities is foreseen, particularly for encouraging adherence by developing countries to WIPO administered treaties, for facilitating the participation, by representatives of developing countries, in WIPO-organized meetings, for the computerization of the services of industrial property offices

of developing countries, and for the development of teaching of intellectual property law in developing countries;

(b) norm-setting, where it is envisaged to conclude the Treaty Supplementing the Paris Convention as Far as Patents Are Concerned (the first part of the Diplomatic Conference which has to adopt that Treaty took place in June 1991) and a treaty on the settlement of intellectual property disputes between States, as well as to continue preparations on a possible Protocol to the Berne Convention and a proposed treaty on the harmonization of the formalities and other aspects of the protection of trademarks;

(c) international registration services, where it is planned to continue the computerization of the operations of the PCT, the international registration of trademarks under the Madrid Agreement and the international deposit of industrial designs under the Hague Agreement with a view to providing ever better services to users.

Contribution System; Arrears of Contributions of the Least Developed Countries. Two new contribution classes representing one-half and one-quarter, respectively, of contribution class VII or class C, were created as from January 1, 1992. Forty-nine developing countries with low assessments in the United Nations system of contributions will benefit from these two new contribution classes which will reduce their present contributions by 50% or 75%, respectively.

The amount of the arrears of contributions of any least developed country (LDC) relating to years preceding 1990 are placed in a special account; their payment will not be claimed although some payments will be expected and encouraged ("frozen account").

Treaty Supplementing the Paris Convention as Far as Patents Are Concerned. The Assembly of the Paris Union decided that it would take a decision on the date of the second part of the Diplomatic Conference in an extraordinary session to be convened at the latest by September 1992. The Director General would convene the extraordinary session either at the request of member States or on his own initiative when he believed the time was ripe for making a decision.

Fee Increases. The Assemblies of the Madrid and the Hague Unions decided to increase their respective fees by 10%, effective from April 1, 1992. The Assembly of the PCT Union decided to increase the PCT fees by 8%, effective from January 1, 1992.

LIST OF PARTICIPANTS**

I. States

Algeria^{1, 2, 3, 4, 6, 10, 13, 15}: A. Semichi; F. Bouzid; H. Yahia-Cherif.

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Chile^{1, 2, 3, 4, 7, 9}: M. Artaza; M. Porzio; P. Romero.

** A list containing the titles and functions of the participants may be obtained from the International Bureau.

¹ WIPO General Assembly.

² WIPO Conference.

³ WIPO Coordination Committee.

⁴ Paris Union Assembly.

⁵ Paris Union Conference of Representatives.

⁶ Paris Union Executive Committee.

⁷ Berne Union Assembly.

⁸ Berne Union Conference of Representatives.

⁹ Berne Union Executive Committee.

¹⁰ Madrid Union Assembly.

¹¹ Hague Union Assembly.

¹² Hague Union Conference of Representatives.

¹³ Nice Union Assembly.

¹⁴ Nice Union Conference of Representatives.

¹⁵ Lisbon Union Assembly.

¹⁶ Lisbon Union Council.

¹⁷ Locarno Union Assembly.

¹⁸ IPC [International Patent Classification] Union Assembly.

¹⁹ PCT [Patent Cooperation Treaty] Union Assembly.

²⁰ TRT [Trademark Registration Treaty] Union Assembly.

²¹ Budapest Union Assembly.

²² Vienna Union Assembly.

²³ FRT [Film Register Treaty] Union Assembly.

China^{1, 2, 3, 4, 6, 10}: Gao Lulin; Bian Yaowu; Wu Xiangwen; Qin Xiaomei; Gao Hang; Wu Qun; Wu Zhengxiang; Lui Gao; Qiu Anman.

Colombia^{1, 2, 3, 7, 9}: J.M. Cano.

Costa Rica^{1, 2, 7}: R. Barzuna Sauma; R. Saborio Soto; H. Krygier de Przedborski; U. Alfú de Reyes.

Côte d'Ivoire^{1, 2, 3, 4, 7, 9, 19}: K. Koffi; N'C. N'Takpe.

Cuba^{1, 2, 3, 4, 6, 10, 15}: M. Fernández Finale; M. Jiménez Aday.

Czechoslovakia^{1, 2, 3, 4, 7, 9, 10, 13, 15, 17, 18, 19, 21, 23}: L. Jakl; P. Vrba; J. Kordač.

Democratic People's Republic of Korea^{1, 2, 3, 4, 6, 10, 19}: Ryu Song Gwang; Pak Chang Rim; Pak Chun Il.

Denmark^{1, 2, 4, 7, 13, 17, 18, 19, 21}: P.L. Thoft.

Ecuador^{1, 2, 7}: M.A. Guerrero Murgueytio.

Egypt^{1, 2, 3, 4, 6, 7, 10, 12, 18}: M. Zahran; N. Gabr; A.G.M. Fouad.

El Salvador²: C.E. Mendoza; B.F. Menjivar.

Finland^{1, 2, 3, 4, 6, 7, 13, 17, 18, 19, 21}: M. Enäjärvi; R. Paaermaa; J. Liedes; J. Rainesalo; M. Aalto-Setälä; S. Ruokola.

France^{1, 2, 3, 4, 6, 7, 10, 11, 13, 15, 17, 18, 19, 21, 22, 23}: B. Miyet; J.-C. Combaldieu; A. Chapard; J. Manent; H. de Montluc; S. Catta; M.-F. Carbon; P. Delacroix; B. Vidaud.

Gabon^{1, 2, 4, 7, 15, 19, 20}: R. Tchibota-Souamy; M. Nziengu.

Germany^{1, 2, 3, 4, 7, 9, 10, 11, 13, 17, 18, 19, 21}: A. Schäfers; A. von Mühlendahl; P. Voss; W. Milzow; M.H. Flügger; R. Osenberg.

Ghana^{1, 2, 3, 4, 6, 7}: K. Amoo-Gottfried; H.O. Blavo; F.W.Y. Ekar.

Greece^{1, 2, 4, 7, 19}: G. Koumantos; A. Cambitsis.

Guatemala²: F. Urruela Prado.

Holy See^{1, 2, 4, 7, 12}: O.J. Roulet.

Honduras^{1, 2, 7}: M. Fortin Midence; M.G. Carias.

Hungary^{1, 2, 3, 4, 6, 7, 10, 11, 13, 15, 17, 19, 21}: I. Iványi; G. Boytha; P. Gyertyánfy; E. Lontai; M.Z. Ficsor.

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Indonesia^{1, 2, 3, 4, 6, 12}: R.R. Siahaan; H.K. Priyo; E.D. Husin.

Iran (Islamic Republic of)⁵: S.R. Zavareie; K. Tabatabaee; M.-H. Bokaeian; M.-H. Moayedoddin; M. Zargar-Elahi; M. Mokhtari-Amin.

Iraq^{1, 2, 4}: A. Khalil.

Ireland^{1, 2, 3, 4, 7, 9, 13, 17, 18}: S. Fitzpatrick.

Israel^{1, 2, 4, 7, 13, 15, 18}: M. Ophir; R. Walden.

Italy^{1, 2, 3, 4, 7, 9, 10, 11, 13, 15, 17, 18, 19, 21}: M.G. Fortini; P. Iannantuono; M.G. Del Gallo Rossoni; G. Aversa; S. Abati.

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Kenya^{1, 2, 3, 4, 6}: T.A. Ogada; N.C. Cheluget.

Lebanon^{1, 2, 4, 8, 14}: A. El Khazen; H. Chaar; N. Owejdat.

Lesotho^{1, 2, 4, 7}: E.L. Motsamai; N.J. Khitsane.

Liberia^{1, 2, 7}: H.D. Williamson.

Libya^{1, 2, 4, 7}: S. Shaheen.

Luxembourg^{1, 2, 4, 7, 10, 11, 13, 18, 19, 22}: F. Schlessler.

Madagascar^{1, 2, 4, 8, 19}: P. Verdoux.

Malaysia^{1, 2, 4, 7}: M. Yusof Hitam; A.K. Zulkafli; V. Sudha Devi.

Malawi^{1, 2, 4, 7, 19}: J.B. Villiera; G.K. Chibesakunda; S.W.D. Chavula.

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Monaco^{1, 2, 4, 7, 10, 11, 13, 18, 19}: J.-P. Campana.

Mongolia^{1, 2, 4, 10, 19}: J. Batsuuri; D. Demberel.

Morocco^{1, 2, 4, 7, 10, 12, 13}: E.G. Benhima; M. Laghmari; H. Abbar; F. Baroudi.

Namibia: B.C. Schutte; P. Shipoke.

Netherlands^{1, 2, 3, 4, 7, 9, 10, 11, 13, 17, 18, 19, 21, 22}: M.A.J. Engels; J. Nicaise; T.J.A.M. De Bruijn.

New Zealand^{1, 2, 4, 8}: H. Burton; D.J. Walker.

Nicaragua^{2, 3}: J. Alaniz Pinel; M. Moncada-Fonseca.

Nigeria⁵: E.A. Azikiwe.

Norway^{1, 2, 4, 7, 13, 17, 18, 19, 21}: J. Smith; K.A. Avjen.

Pakistan^{1, 2, 3, 7, 9}: F. Abbas; I. Baloch.

Panama^{2, 3}: R.-L. Ameglio.

Peru^{1, 2, 7}: J. Stiglich; R. Saif de Preperier.

Philippines^{1, 2, 4, 7, 21}: N.L. Escaler; D. Menez-Rosal; C.V. Espejo.

Poland^{1, 2, 3, 4, 7, 9, 10, 19}: W. Kotarba; B. Rokicki; A. Kowalski; A. Skrybant.

Portugal^{1, 2, 3, 4, 7, 9, 10, 13, 15, 18}: L.O. Roma de Albuquerque; J. Mota Maia; R.A. Costa Morais Serrão; P.J. da Costa Cordeiro; J. Mauricio; A. Queiros Ferreira.

Republic of Korea^{1, 2, 3, 4, 6, 19, 21}: S.H. Kim; J.-K. Kim.

Romania^{1, 2, 4, 7, 10, 19}: M. Rădulescu; V. Erhan; C. Stan; G. Istode.

Saudi Arabia²: I.S. Musalam; A.S. Al Yousef; A. Al-Rasheed; S. Al-Mubarak.

Senegal^{1, 2, 3, 4, 6, 7, 11, 19}: A. Sène; G. Diop.

Soviet Union^{1, 2, 3, 4, 6, 10, 13, 17, 18, 19, 20, 21}: Y.A. Bespalov; V.N. Roslov; Y. Ustyugov; B.V. Smirnov; V. Matsarsky; K. Tihaze; P. Tchernikov.

Spain^{1, 2, 4, 7, 10, 12, 13, 17, 18, 19, 21}: F.M. Valenzuela; J. Delicado Montero-Ríos; P. Barrios; E. de la Puente; A. Casado Cerviño; F. Martínez Serrano; L. Martínez Garnica; J. Aljaro; M. Hidalgo Llamas.

Sri Lanka^{1, 2, 4, 7, 19}: W. Rasaputram; R.N. Abeyssekera.

Sudan^{1, 2, 4, 10, 19}: O. Alim; A.-R.I. El-Khalifa; A.A. Gubartalla; M.A. Elkarib.

Sweden^{1, 2, 3, 4, 7, 9, 13, 17, 18, 19, 21, 22}: B. Erngren; L. Björklund; U. Jansson; F. von Arnold.

Switzerland^{1, 2, 3, 4, 6, 7, 9, 10, 11, 13, 17, 18, 19, 21}: R. Grossenbacher; A. Bauty.

Syria^{3, 5, 6}: C. Kayali.

Thailand^{1, 2, 7}: T. Bunnag; S. Suntavaruk; S. Rattanasuwan; C. Sakolvari.

Trinidad and Tobago^{1, 2, 4, 7}: R. Permanand; A. Gonzales.

Tunisia^{1, 2, 4, 7, 12, 14, 15, 22}: M. Ennaceur; A. Azaiez; T. Ben Slama.

Turkey^{1, 2, 4, 8}: M. Onaner; E. Enç; E. Karaahmet; A. Karanfil.

Ukraine²: A.A. Ozadovski; S.V. Reva.

United Kingdom^{1, 2, 3, 4, 6, 7, 13, 18, 19, 21}: A. Sugden; P. Hartnack; J.S. Booth; E.C. Robson; H.M. Pickering.

United Republic of Tanzania^{1, 2, 4}: A.H. Jamal; M. Mangachi.

United States of America^{1, 2, 3, 4, 6, 7, 13, 18, 19, 21}: M.B. Abram; H.J. Winter; L.J. Schroeder; M.T. Barry; C.F. Rueben-saal.

Uruguay^{1, 2, 3, 4, 6, 7}: J.A. Lacarte-Muro; C. Amorin; M. Cassarino.

Venezuela^{1, 2, 3, 7, 9}: C.R. Pestana-Macedo.

Viet Nam^{1, 2, 4, 10}: Doan Phuong; Thanh Long Nguyen.

Yugoslavia^{1, 2, 4, 7, 10, 13, 17}: N. Calovski; M. Bijedić; B. Totić; O. Spasić.

Zaire^{1, 2, 4, 7}: K. Mutuale; M. Mutambula.

Zimbabwe^{1, 2, 4, 7}: N. Mvere.

II. Intergovernmental Organizations

United Nations Educational, Scientific and Cultural Organization (UNESCO): A. Amri. **United Nations Industrial Development Organization (UNIDO):** I. Lorenzo; D. Rakotopare. **General Agreement on Tariffs and Trade (GATT):** A. Otten; M.C. Geuze. **African Intellectual Property Organization (AIPO):** V. Efon; P.A. Thiam. **African Regional Industrial Property Organization (ARIPO):** A.R. Zikonda. **Agency for Cultural and Technical Cooperation (AGECOP):** C. Favart. **Benelux Designs Office (BBDM):** P. Rome. **Benelux Trademark Office (BBM):** P. Rome. **Commission of the European Communities (CEC):** B. Schwab; D. Franzone. **European Patent Organisation (EPO):** P. Braendli; R. Remandas; G.D. Kolle. **League of Arab States (LAS):** A. Harhuem; A. Ould Babakar; N. Chakroun. **Organization of African Unity (OAU):** N. Hached; M.H. Tunis.

III. International Non-Governmental Organizations

International Advertising Association (IAA): M. Ludwig. **International Association for the Protection of Industrial Property (AIPPI):** G.E. Kirker. **International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM):** N'D. Ndiaye. **International Chamber of Commerce (ICC):** J.H. Kraus. **International Confederation of Societies of Authors and Composers (CISAC):** N'D. Ndiaye. **International Literary and Artistic Association (ALAI):** E. Martin-Achard.

IV. Officers

WIPO General Assembly

Chairman: A. Semichi (Algeria). *Vice-Chairmen:* W. Kotarba (Poland); R. Grossenbacher (Switzerland).

WIPO Conference

Chairman: M. Porzio (Chile). *Vice-Chairmen:* O. Rafeiner (Austria); O. Alim (Sudan).

WIPO Coordination Committee

Chairman: M.A.J. Engels (Netherlands). *Vice-Chairmen:* I. Iványi (Hungary); F. Abbas (Pakistan).

Paris Union Assembly

Chairman: Gao Lulin (China). *Vice-Chairmen:* P.A.D. Smith (Australia); A.H. Jamal (United Republic of Tanzania).

Paris Union Conference of Representatives

Chairman: E.A. Azikiwe (Nigeria). *Vice-Chairmen:* S.R. Zavareie (Iran (Islamic Republic of)); C. Kayali (Syria).

Paris Union Executive Committee

Chairman: W. Fukasawa (Japan). *Vice-Chairmen:* K. Amoo-Gottfried (Ghana); Y.A. Bepalov (Soviet Union).

Berne Union Assembly

Chairman: G. Boytha (Hungary). *Vice-Chairmen:* J.H.A. Gariépy (Canada); C.R. Pestana-Macedo (Venezuela).

Berne Union Conference of Representatives

Chairman: C.A. El Khazen (Lebanon). *Vice-Chairmen:* P. Verdoux (Madagascar); M. Onaner (Turkey).

Berne Union Executive Committee

Chairman: F. Abbas (Pakistan). *Vice-Chairmen:* S. Fitzpatrick (Ireland); J.M. Morfin Patraca (Mexico).

Madrid Union Assembly

Chairman: J. Mota Maia (Portugal). *Vice-Chairmen:* M. Fernández Finale (Cuba); M. Radulescu (Romania).

Hague Union Assembly

Chairman: M.G. Del Gallo Rossoni (Italy). *Vice-Chairmen:* J.-P. Campana (Monaco); (Suriname).

Hague Union Conference of Representatives

Chairman: J. Delicado Montero-Ríos (Spain). *Vice-Chairmen:* M. Omar (Egypt); H. Abbar (Morocco).

Nice Union Assembly

Chairman: (Benin). *Vice-Chairmen:* P.L. Thoft (Denmark); Y.A. Bepalov (Soviet Union).

Nice Union Conference of Representatives

Chairman: A. Azaiez (Tunisia). *Vice-Chairman:* C.A. El Khazen (Lebanon).

Lisbon Union Assembly

Chairman: K. Iliev (Bulgaria). *Vice-Chairmen:* R. Tchibota-Souamy (Gabon); J. Mota Maia (Portugal).

Lisbon Union Council

Chairman: (Haiti). *Vice-Chairman:* D. Jiménez Hernández (Mexico).

Locarno Union Assembly

Chairman: L. Jakl (Czechoslovakia). *Vice-Chairmen:* J. Smith (Norway); B. Totić (Yugoslavia).

IPC [International Patent Classification] Union Assembly

Chairman: H.J. Winter (United States of America). *Vice-Chairmen:* P.S. Tarrago (Brazil); M. Enäjärvi (Finland).

PCT [Patent Cooperation Treaty] Union Assembly

Chairman: A. Schäfers (Germany). *Vice-Chairmen:* L. Wuyts (Belgium); W. Rasaputram (Sri Lanka).

TRT [Trademark Registration Treaty] Union Assembly

Chairman: Y.A. Bepalov (Soviet Union). *Vice-Chairmen:* A.R. Palenfo (Burkina Faso); (Congo).

Budapest Union Assembly

Chairman: A. Sugden (United Kingdom). *Vice-Chairmen:* (Liechtenstein); N.L. Escaler (Philippines).

Vienna Union Assembly

Chairman: B. Erngren (Sweden). *Vice-Chairmen:* F. Schlessler (Luxembourg); A. Azaiez (Tunisia).

FRT [Film Register Treaty] Union Assembly

Chairman: B. Miyet (France). *Vice-Chairmen:* A.R. Palenfo (Burkina Faso); L. Jakl (Czechoslovakia).

V. International Bureau of WIPO

A. Bogisch (*Director General*); L. Kostikov (*Deputy Director General*); S. Alikhan (*Deputy Director General*); L. Baeurner (*Director, Industrial Property Division*); P. Claus (*Director-Advisor*); F. Curchod (*Director of the Office of the Director General*); T.A.J. Keefer (*Controller and Director, Budget and Finance Division*); G. Ledakis (*Legal Counsel and Director, General Administrative Services*); H. Olsson (*Director, Copyright and Public Information Department*); I. Thiam (*Director, Development Cooperation and External Relations Bureau for Africa*); B. Bartels (*Director, PCT Legal Division*); R. Beltrán (*Director, Development Cooperation and External Relations Bureau for Latin America and the Caribbean*); D. Bouchez (*Director, PCT Administration Division*); B. Dondenne (*Director, Languages*

Division); C. Fernández-Ballesteros (*Director, Developing Countries (Copyright) Division*); M. Ficsor (*Director, Copyright Law Division*); K. Idris (*Director, Development Cooperation and External Relations Bureau for Arab Countries*); B. Machado (*Director, Personnel Division*); J. Quashie-Idun (*Director, Developing Countries (Industrial Property) Division*); K. Suedi (*Director, Bureau for Relations with International Organizations*); G. Yu (*Special Assistant, Office of the Director General*); F. Gurry (*Special Assistant, Office of the Director General*); B. Hansson (*Head, International Classification Division*); P. Higham (*Head, Computerization Division*); N. Sabharwal (*Senior Counsellor, Development Cooperation and External Relations Bureau for Asia and the Pacific*); R. Sateler (*Assistant Legal Counsel, Office of the Legal Counsel*); C. Claas (*Head, Meetings and Documents Service*).

WIPO Coordination Committee

Twenty-Ninth Session (7th Extraordinary)
(Geneva, November 21 and 22, 1991)

NOTE*

The WIPO Coordination Committee held its twenty-ninth session (7th extraordinary) at the headquarters of WIPO in Geneva on November 21 and 22, 1991. The session was opened and presided over by its Chairman, Mr. Max A.J. Engels (Netherlands).

Thirty-eight of the 52 member States of the Coordination Committee were represented at the session: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Czechoslovakia, Democratic People's Republic of Korea, Egypt, France, Germany, Ghana, Hungary, India, Italy, Japan, Libya, Mexico, Netherlands, Nicaragua, Norway, Pakistan, Poland, Portugal, Senegal, Soviet Union, Spain, Switzerland, Syria, United Kingdom, United States of America, Yugoslavia. Furthermore, the following 22 States were represented in an observer capacity: Ecuador, Finland, Gabon, Guatemala, Indonesia, Iran (Islamic Republic of), Jamaica, Madagascar, Malaysia, Mali, Mongolia, Morocco, Paraguay, Philippines, Romania, Rwanda, Sudan, Sweden, Thailand, Viet Nam, Yemen, Zaire. The list of participants follows this Note.

At its second session in November 1973, the WIPO General Assembly decided that there should be three posts of Deputy Director General of equal rank and equal remuneration, and that one should be occupied by a national of a developing country, one by a national of one of the other countries and one by a national of a socialist country.

In conformity with the proposals made by the Director General, the Coordination Committee approved

- the extension for a period of two years, that is, from December 1, 1991, to November 30, 1993, of the appointment of Mr. Shahid Alikhan as Deputy Director General, in the post of Deputy Director General to be occupied by a national of a developing country,

- the extension by three months (from December 1, 1991, to February 29, 1992) of the appointment of Mr. Lev Kostikov as Deputy Director General; the Committee came to the conclusion that that part of the 1973 decision of the WIPO General Assembly dealing with the post of Deputy Director General to be filled by a national of a socialist country should be referred to the General Assembly,

- the appointment of Mr. François Curchod to the post of Deputy Director General, to be occupied by a national of a country other than a developing country or a socialist country, for a period of four years (from December 1, 1991, to November 30, 1995).

* Prepared by the International Bureau.

LIST OF PARTICIPANTS**

I. States Members of the Committee

Algeria: A.H. Semichi; H. Yahia-Cherif. **Argentina:** A.G. Trombetta. **Australia:** P.A.D. Smith; J. Hannoush. **Austria:** H. Preglau; T.M. Baier. **Belgium:** M. Gedopt. **Brazil:** P. Tarrago. **Bulgaria:** P. Grozdanov. **Canada:** A. McCaskill. **Chile:** P. Romero. **China:** Ma Lianyuan; Li Jizhong; Liu Gushu; Wang Zhengfa; Wan Jiaqing; Wu Zhenxiang. **Colombia:** R. Salazar. **Côte d'Ivoire:** N.A. N'Takpe. **Czechoslovakia:** L. Jakl; V. Benisko. **Democratic People's Republic of Korea:** Ri Tcheul; Pak Chang Rim. **Egypt:** N. Gabr. **France:** P. Delacroix. **Germany:** A. Schäfers; P. Voss; M.H. Flügger. **Ghana:** H.O. Blavo; F.W.Y. Ekar. **Hungary:** E. Lontai. **India:** P. Shah; D. Chakravarty. **Italy:** M.G. Fortini. **Japan:** Y. Takagi. **Libya:** I.A. Omar; S. Shaheen. **Mexico:** M. Vargas Campos; D. Jiménez Hernández. **Netherlands:** M.A.J. Engels; W. Neervoort. **Nicaragua:** J. Gazol Salcedo. **Norway:** E. Liljegren. **Pakistan:** F. Abbas; I. Baloch. **Poland:** A. Skrybant. **Portugal:** J. Mota Maia; A. Queiros Ferreira. **Senegal:** B. Dia. **Soviet Union:** V.M. Oushakov; B. Smimov. **Spain:** P. Barrios, A. Casado Cerviño. **Switzerland:** R. Grossenbacher. **Syria:** C. Kayali. **United Kingdom:** A. Sugden; H.M. Pickering. **United States of America:** M. Kirk; M.T. Barry. **Yugoslavia:** O. Spasić.

** A list containing the titles and functions of the participants may be obtained from the International Bureau.

II. Observer States

Ecuador: M.A. Guerrero Murgueytio. **Finland:** S. Ruokola. **Gabon:** M. Nziengui. **Guatemala:** C. Rodriguez-Fankhauser. **Indonesia:** B. Kesowo; R.R. Siahaan; K.P. Handriyo; E.D. Husin; T. Maroef. **Iran (Islamic Republic of):** M. Mokhtari-Amin; M. Chitsaz. **Jamaica:** P. Coke. **Madagascar:** P. Verdoux. **Malaysia:** A.K. Zulkaffli. **Mali:** K.S. Diawara. **Mongolia:** G. Gongor. **Morocco:** F. Baroudi. **Paraguay:** R. Gauto. **Philippines:** D. Menez-Rosal. **Romania:** L. Bulgar; G. Istode. **Rwanda:** E. Nsabimana. **Sweden:** M. Lindstrom. **Sudan:** A.A. Gubartalla. **Thailand:** C. Sakolvari. **Viet Nam:** Luong Nguyen; Thanh Long Nguyen. **Yemen:** S. Mokbil. **Zaire:** M. Mutambula.

III. Officers

Chairman: M.A.J. Engels (Netherlands). *Secretary:* G. Ledakis (WIPO).

IV. International Bureau of WIPO

A. Bogsch (*Director General*); G. Ledakis (*Legal Counsel and Director, General Administrative Services*); F. Gurry (*Director-Counsellor, Office of the Director General*); B. Machado (*Director, Personnel Division*); G. Yu (*Director-Counsellor, Office of the Director General*).

WIPO Permanent Program for Development Cooperation Related to Industrial Property

Permanent Committee

Fourteenth Session
(Geneva, July 1 to 4, 1991)

NOTE*

The WIPO Permanent Committee for Development Cooperation Related to Industrial Property held its fourteenth session in Geneva from July 1 to 4, 1991. Sixty-eight member States of the Permanent Committee were represented at the session: Algeria, Argentina, Australia, Bangladesh, Benin, Brazil,

Burkina Faso, Burundi, Canada, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Cuba, Democratic People's Republic of Korea, El Salvador, Finland, France, Gambia, Germany, Ghana, Greece, Guinea, Guinea-Bissau, Honduras, India, Indonesia, Italy, Japan, Kenya, Lesotho, Liberia, Libya, Malawi, Malaysia, Mali, Mauritania, Mexico, Morocco, Netherlands, Niger, Norway, Pakistan, Peru, Philippines, Portugal, Republic of Korea, Romania, Rwanda, Senegal, Spain, Sri Lanka, Sudan, Swaziland, Sweden,

* Prepared by the International Bureau.

Switzerland, Tunisia, Uganda, United Kingdom, United States of America, Uruguay, Viet Nam, Yemen, Yugoslavia, Zaire. Two non-member States were also represented: Namibia, Nigeria. The following seven intergovernmental and four international non-governmental organizations were represented by observers: AIPPI, ARIPO, CEC, EPO, ESCWA, GATT, IAA, ICC, IFIA, SELA, UNCTAD. The list of participants follows this Note.

The Permanent Committee reviewed the development cooperation activities undertaken since its last session in May and June 1989. The scope and results of the said activities were noted with satisfaction. Many delegations praised the efficiency and effectiveness of the management of the Permanent Program for Development Cooperation Related to Industrial Property by the International Bureau. Numerous delegations expressed their gratitude to UNDP and the governments and organizations of the industrialized and developing countries that had cooperated in, and contributed to, the Permanent Program and for the assistance that their countries had received under the program. Delegations of the said countries and organizations expressed their willingness to continue and, in some cases, increase their contributions to such activities. As regards the development of human resources in the field of industrial property, all delegations emphasized the importance of training as a priority objective and expressed their satisfaction with the efforts of the International Bureau to meet the varying training needs of developing countries through a combination of training activities (national, subregional and regional courses, practical training attachments and on-the-job training) at the introductory, advanced and specialized levels. The organization of specialized training activities (with particular reference to licensing and other technology transfer arrangements, the industrial property implications of the protection of new technologies and the computerization of industrial property administrative procedures) were given special attention, as well as the promotion of teaching of intellectual property law at university level and the preparation of training material. With respect to strengthening the legal and administrative infrastructure in the field of industrial property, many delegations referred to the importance of the assistance provided by WIPO and requested that such assistance be continued, particularly in the framework of UNDP-financed country or regional projects. The importance of such projects for the automation of the operations of industrial property offices was particularly noted.

Most delegations expressed their desire that the Permanent Program continue to provide assistance for the revision or drafting of national and regional legislation, as well as the implementation of new or revised laws, once enacted. They also requested WIPO's assistance in examining the advantages of

adherence to a number of WIPO-administered treaties. Several delegations provided information on developments occurring in their countries with respect to the enactment or revision of industrial property legislation, and of the accession to WIPO-administered treaties. The Delegation of China informed the Committee that its country was in the process of revising its Patent Law and that it was considering accession to the Patent Cooperation Treaty (PCT). The Delegation of Cuba informed the Committee that its country had adhered to the Madrid Agreement Concerning the International Registration of Marks and that it was examining the possibility of accession to the PCT and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. The Delegation of Guinea expressed its gratitude for the cooperation received under the Permanent Program, which had led to the accession of Guinea to the PCT and to OAPI. The Delegation of Mexico announced that a new industrial property law reflecting modern international standards had entered into force in Mexico on June 28, 1991, and expressed its gratitude to WIPO for its assistance in the drafting of that law. Continuous assistance was expected to be needed by Mexico in respect of the planned establishment of an autonomous industrial property institute as well as of the planned accession to the PCT, the Madrid Agreement Concerning the International Registration of Marks and the International Convention for the Protection of New Varieties of Plants (UPOV). The Delegation of Niger expressed its appreciation for the cooperation received under the Permanent Program and stated that its country was considering accession to the PCT. The Delegation of Peru referred to ongoing cooperation among Andean Pact Countries (Bolivia, Colombia, Ecuador, Peru, Venezuela) in relation to the revision of Decision 85 of the Cartagena Agreement and expressed its gratitude to WIPO for the assistance received in that respect as well as in the preparation of a note on the advantages for Peru to adhere to the Paris Convention for the Protection of Industrial Property. The Delegation also emphasized the importance of developing common strategies in the field of industrial property among developing countries.

With reference to patent information and documentation matters, several delegations expressed satisfaction with the promotion of the use of CD-ROM technology for the storage, retrieval and dissemination of patent information, especially in support of research and development activities in developing countries, and encouraged WIPO to continue its activities in this area. In this respect, particular appreciation was expressed for the preparation, by a joint WIPO-EPO Task Force, of guidelines on the advice to be given to developing countries on the collection and storage of patent docu-

mentation on CD-ROM. A demonstration on the utilization of CD-ROM technology for storage and retrieval of industrial property information was organized by the International Bureau of WIPO during the session of the Permanent Committee. Many delegations emphasized the major role of inventive and innovative activities in the process of technological, economic and social development, and expressed their satisfaction with the activities of WIPO in promoting inventive and innovative activities. Particular attention was paid to the WIPO award program and to the desirability of assisting developing countries in organizing exhibitions and competitions for inventions.

As decided at its eleventh session (May 1987), the Permanent Committee devoted part of its fourteenth session to a Symposium on the Promotion of Technological Innovation in Developing Countries. Presentations were made by specialist speakers from Brazil and France and by the President of IFIA. Following the discussions that took place at the Symposium, the Permanent Committee stressed the importance of the promotion of technological innovation for the economic and technological development of developing countries and supported the activities carried out under the Permanent Program in this area. Numerous delegations drew attention to the different modalities of technical cooperation among developing countries in the development cooperation activities under the Permanent Program, making special reference to the sharing of experience gained by other developing countries and the benefits of pooling resources through regional or subregional cooperation. In this respect, it was suggested that further modalities for promoting increased cooperation among developing countries in the field of industrial property be studied.

As regards orientations for the Permanent Program in 1992 and 1993, all those delegations that spoke expressed their full support of the proposals made by the International Bureau and stated that these responded to the needs of developing countries in the context of the present international economic situation. In this respect, special attention was paid, *inter alia*, to: the organization of regional evaluation and planning meetings; the involvement, in the activities of the Permanent Program, of officials from government departments which are becoming increasingly involved in industrial property operations; and the promotion of the teaching of industrial property law at university level, the training of trainers and the development of teaching material and curricula.

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** A list containing the titles and functions of participants may be obtained from the International Bureau.

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III. International Non-Governmental Organizations

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IV. Officers

Chairman: A. Azaiez (Tunisia). *Vice-Chairmen:* I.W. McCay (Australia); M. Nagel (Costa Rica). *Secretary:* C. Graffigna-Sperling (WIPO).

V. International Bureau of WIPO

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Studies

Renewal in the Public Sector— The Example of the Swedish Patent and Registration Office

S. NIKLASSON*

1. Introduction

The Swedish Patent and Registration Office (PRV) has been in existence for almost a hundred years, and this is the story of how, between 1985 and 1990, it developed from an old-fashioned, tradition-burdened civil-service department into an organization better fitted to meet today's rational public service requirements.

The story is told straightforwardly and without censure. All value judgments are attributable to the author, who—in the capacity of Director General—had the overall responsibility for the change process. Hopefully, the story may arouse interest—particularly at a time when the changing demands of the surrounding world are leading to a far-reaching transformation of the entire public sector. It might even provide inspiration for others who face the same challenge as PRV's management in the early eighties. Those looking for formulas, advice and recommendations, however, will be looking in vain.

Most of the figures and diagrams used to illustrate different sections were produced during the course of the change process and have not been amended in retrospect to fit this account.

2. PRV in Brief

In order to understand the following sections properly, one should know something about PRV's work and its distinctive features. PRV is an administrative authority with about 800 employees and a turnover of about 320 million Swedish krona. The Office's work is regulated in great detail by special legislation (the Patents Act, the Trademark Act, the Design Patent Act, the Names Act, the Company Names Act, the Companies Act and others). Large parts of this legislation are difficult to penetrate, for

individuals and companies alike. This applies not least to intellectual property legislation, which allows exclusive rights to be granted for the results of creative activities for a certain period of time, on the condition that they meet certain requirements such as novelty and distinctiveness. Since such exclusive rights imply a restriction on free competition, their granting is surrounded by regulations that are intended to protect the interests of third parties.

The rights granted by PRV with respect to names, company names, trademarks, logotypes, packaging, product design and technical solutions are very valuable in commercial terms. They constitute a reward for creative activities, a guarantee of a return on investments in research and development, and an incentive for future development.

Exclusive rights of the sort granted by PRV are the only meaningful way of protecting ideas and products against copying, counterfeiting and theft. In the long run, it is impossible to protect products and processes on the market by secrecy. It takes, for example, no more than two weeks and 50,000 US dollars to reveal the innermost secrets of a new integrated circuit whose development has perhaps taken five years and cost 500 million dollars. Extensive pirate manufacture is to be found all over the world. According to an estimate by the International Chamber of Commerce, trade in stolen technology amounts to 5-8% of total world trade. Every day, people die from counterfeit medicines and foods sold under well-known trademarks. Every day, injuries and damage are caused by the failure of pirate components in various technical systems.

All PRV's Activities Are Market-Dependent and Governed by Demand

The scope of PRV's activities depends completely upon the degree to which the Office's services are in demand. The operative goals are determined by the character of this demand, i.e., the requirements of the market. Customers could refrain completely from

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utilizing most of the services provided by PRV, except in the field of company law, where registration with PRV is a legal requirement.

Most of PRV's Civil Service Activities Are Subject to Competition

As can be seen from Figure 1,¹ PRV's activities in the field of patents account for over 40% of the organization's total income. Sweden's accession to the European Patent Convention in 1978 meant that the European Patent Organisation, which is based in Munich, was given the right to grant patents with the same validity in Sweden as patents issued by PRV. This means that inventors, researchers and companies have a choice between suppliers of patents. Since the fixed costs for reviewing patent applications are high (about 75% of the total cost volume), a declining demand for PRV's services means that the unit cost and thus the price becomes so high as to act as a deterrent. PRV is therefore subject to the same competitive pressure on costs, quality and delivery times as most companies.

Large Application Volumes

Certain of PRV's activities are characterized by large application volumes and complicated handling routines. The Patent Department has over 12,000 applications under consideration at about 30 different stages of a process that takes some years. The Company Department handles some 170,000 applications each year, and a large proportion of these call for decisions within a couple of days. Figure 2 shows what happens each hour in this Department.

The large application volumes and the demand from the market for fast decisions make great demands on processing routines. An efficient process flow requires detailed production control, rational stock and payment routines, backup systems for disruptions in production and quality control.

Financing

PRV's customers pay fees for the services provided. These fees—which are determined by the Government after consultation with the National Audit Bureau—are to cover all PRV's costs. PRV does not exercise its authority for profit, therefore, and is not required to yield any return in financial terms. None of the fees constitute hidden taxes; they reflect the actual cost of producing the service in question. No subsidies are received via the state budget.

Information as a Tool

PRV's operations require—and generate—large volumes of information. The Corporate Affairs Department, for instance, is the only place in the country where information can be obtained on all the 250,000 or so limited liability companies in Sweden in the form of registration data and annual reports.

In order to be able to determine whether a technical solution fulfills novelty and inventiveness requirements, the Patent Department needs access to material from the entire world showing the development of technology and the current state of the art. This has led to the establishment of what is probably the largest technical information bank in the world, consisting of about 50 million patents from a large number of countries—issued over a period of about 100 years. Each document describes in words, formulas and figures a unique technical idea in such a way that an expert can use it to reproduce the invention. The material of the Patent Department alone grows by 1,500 shelf-meters—or 60 tonnes—of paper per year.

Since a large proportion of PRV's information material is used frequently and actively, easy access, good order and integrity are essential. These requirements—combined with the difficulties associated with the physical handling of these enormous volumes of information—mean that PRV must be in the forefront of the development and utilization of modern information technology. PRV's EDP expenses amounted to 34.3 million Swedish krona for the 1989/90 budget year, representing 11% of turnover. PRV is one of Sweden's largest data base users and is one of the country's most computerized work places.

Commercial Services

For the past 30 years, PRV has been providing commercial services along businesslike lines. Such services can consist of the sale of information, monitoring of competitors of clients, provision of advance opinions and consultant services. These activities correspond to just over 15% of PRV's income. The prices are set by the Office in consultation with the National Audit Bureau. A large proportion of these services are sold for export.

3. A First Diagnosis

The author became head of PRV in the autumn of 1985, and the first task was to carry out a preliminary overall analysis of the organization. This yielded a number of positive and negative factors. It should be emphasized that the analysis was based mainly on personal observations. It proved, however, to be correct to all intents and purposes.

¹ The Figures are reproduced at the end of this study.

Positive Factors

The Will to Change. There was a definite feeling among principles, customers and staff that operations should be modernized and streamlined. A number of ideas about how this should be done had been put forward and partially compiled. However, there were differences of opinion about which ideas were worth developing. The organization that had been established for handling problem analysis and ideas was fragmented. In short, there was a strong will to change, but the ability to change was poor.

Sound Economy. Since PRV's operations were completely self-financed—albeit under an archaic budget system—and the fees in international terms were low, there was potential for sound economic development. Cost-effectiveness looked as though it could be further improved by changing the organization to increase the result-awareness of the staff.

Good Management Material. Middle management was characterized by a high level of specialist expertise. Most of those concerned seemed prepared to come to grips with far-reaching change.

High Level of Professional Expertise. The organization was considered by experts and customers to have a high level of professional expertise. The competence of employees was secured through extensive internal training.

Important and Interesting Tasks. PRV's activities were considered important by its customers. Increased international attention was being focused on a number of the areas where the Office was active.

International Status. PRV was one of the larger patent offices in the world, with a good reputation. It had a special status as one of five International Searching and Examining Authorities according to the Patent Cooperation Treaty (PCT). This status assumed that a number of requirements could be fulfilled in terms of resources and expertise.

Negative Factors

Outdated Organization. PRV's organization was a classic pyramid, in which the lack of clarity and breadth in the allocation of responsibility meant that a large number of decisions were taken at far too high a level. The Director General, for instance, received a binder full of decisions to sign every day, most of which were of a routine character—applications for holiday leave and the like from employees far down the line. Important decisions were subject to complicated preparatory routines, with formal presentations at different levels. Departments that produced services relied completely on a central administrative department for financial and staff administration, for instance. Commercial services

and civil service activities were carried out by the same departments.

Unclear Long-Term Strategy. There seemed to be no simple strategy that was intelligible to employees, principles and customers, i.e., no formulation of the organization's position on matters of long-term significance. Considering the rapid changes that had been going on in PRV's field, this was a real shortcoming.

Poor Market Contact. It was remarkable how little attention employees paid to the overall context in which patents, trademarks and the like were put to practical use. An application, for most examiners, appeared to be a bundle of papers which were to be handled according to a procedure laid down by law. What had happened before the papers were handed in and what would happen after the official decisions had been reached were obscure to many and were not considered to be PRV's business. The anonymity of the applicant entailed a lack of insight and understanding of the customer's situation. The units that worked on a commercial basis were an exception to this, and they had a more professional attitude in terms of customer relations.

The very word "market" in conjunction with public services seemed to be alien to many. Questions about PRV's market were often answered with reference to the "general public's need for legal services" or the like.

At certain departments there were extensive customer contacts, but these were mostly formal and in writing and exclusively in connection with individual applications.

Poorly-Utilized Management Resources. There were about 30 mid-level managers at PRV, and they were mainly responsible for production or limited specialist functions. Finance and staff questions were handled centrally. The participation of these managers in planning, budgeting and the follow-up of results was limited. This meant long, often indirect chains of decision, sluggish adaptation to changes in the outside world, low awareness of results and limited incentive to work. Since the responsibility for decisions was so strongly centralized, top management had a heavy work load while management resources at a lower level were underutilized. The limitations on management responsibility at lower levels had led to a lack of management culture, which meant that there was a risk that managers at lower levels identified more with the interests of their staff than with the decisions of the top management.

Inflexible Financing Model. The fees that customers paid for PRV's services were, with occasional exceptions, set in order to ensure that costs were fully covered. PRV was, however, not trusted to cover its expenses with its own income. This

income was forwarded to the treasury, and PRV had to request appropriations via the national budget in order to make ends meet. This had two important consequences: customers could not be sure that the fees they paid to PRV would be used in order to pay for the provision of the service in question, i.e., the connection between performance, cost and income was unclear; and for PRV the system meant that if resources were needed, they could at best be obtained 12 months later, on condition that the people working in the Cabinet Office felt that the Office's request for funds could be approved. Since the final budget decision of the *Riksdag* (the Swedish Parliament) was based on assessments—from PRV, amongst others—that were more than two years old, the system meant that the authority's forecasts were far removed from the reality they were supposed to predict. This in turn meant that PRV's resources were not correctly tailored to market requirements, which undermined PRV's competitive strength and market position.

Confidence Problems. The Swedish Government decided that representatives of the Agency for Administrative Development and the Ministry of Industry should participate in the internal PRV group which had started discussing modernization of the authority. This decision seemed to have been motivated by doubts that the authority would be able to handle the work itself. The result of this constellation, however, was conflict within the group.

The limited ability to meet customer requirements with good service had meant that PRV was regarded by its customers as an inflexible bureaucracy with inefficient routines. The lack of dynamism in the organization had also led to a certain lack of faith in the top management among employees.

Lack of Team Spirit. Poor familiarity with the organization's strategy and operative goals combined with criticism from principles and customers had eroded morale, resulting in rivalry among different departments. Employees were insecure and felt no pride in working for PRV.

Poor Routines for Planning and Follow-Up of Results. The organizational structure and financing model via the state budget meant that planning, budgeting and follow-up of results were primarily a central concern. The methods were poorly fitted to PRV's role and tasks.

Recruitment Problems. PRV found it difficult to recruit and retain qualified staff. In order to keep one graduate engineer in the Patent Department for at least three years, for instance, three had to be recruited. This depended to a large extent on the fact that the salaries were not competitive.

4. The Phases of the Change Process

After the first diagnosis, the planning and organization of what were obviously essential changes began.

The basic model was drawn from the field of product development. In the author's view, it could also be applied to organizational development after certain modifications. The advantages are that it clarifies certain stages of the decision-making process—from the analysis of tasks and market requirements to implementation—and provides a rough picture of the resources required for each stage.

Taking Stock of Conditions and Problems

Some of this work had already been done. However, the material needed to be filled out on a number of points. One important task was to create unity about which conditions and problems were relevant, and to organize the change process in such a way that this was quite clear both to the Office's employees and to others involved.

The Organization of Change

Information, Communication, Motivation

An agreement was reached with the Ministry of Industry that neither the Agency for Administrative Development nor the Ministry itself would be represented in the group that was to lead the change process. This meant that PRV itself would be responsible for analyses and proposals. This rather simple measure had the immediate effect of raising morale in the organization and strengthened the "we-feeling." Progress reports were submitted to external interests by the top management at pre-determined intervals.

A management group, led by the Director General and consisting of all heads of department plus the finance manager, was appointed in order to manage the work and discuss major on-going operative issues. This group was not formally to reach collective decisions, but in practice all important questions were approved by the group, and the actual decision-making was a pure formality. This constellation meant that all upper managers received the same information and discussed the same questions at the same time. In addition to providing a more comprehensive treatment of the material, this improved solidarity and reduced the rivalry between different interests. Initially, the meetings were held once a week, more often if necessary.

The union organizations naturally had an interest in following and, insofar as was possible, influencing the change process. In order to minimize the risk of

lack of confidence and disinformation, the representatives of these organizations were invited to participate in all the meetings of the management group. They had full right to express their opinions and submit proposals and to receive all the information that was discussed in the group. The Office's wish was, however, that the number of formal negotiations under the Swedish Co-determination at Work Act should be kept to a minimum and that the union representatives should respect confidentiality on certain questions. The union representatives accepted this, and the procedure proved to function without problems. Close cooperation in a spirit of mutual trust and confidence with the employees' representatives in conjunction with major changes of the type PRV was embarking on is to be regarded as an important precondition of success.

Change in an organization is often regarded as being more of a threat than a possibility. PRV was no exception. One important task, therefore, was to provide all staff with on-going information about the purpose, conditions for and consequences of different measures. This information was provided regularly by the Director General himself at meetings with all available staff. It was also provided at departmental level by the respective heads of department. Other channels were the union organizations, the staff magazine and notice boards. It was just as important for those responsible for the change process to be receptive to information from different levels of the organization as it was to provide information.

One difficulty was to ensure that information was the same, regardless of the channel by which it was spread. It is easy to say that this difficulty could be reduced through relevant, clear and frequent information. It is harder to achieve this in practice. In retrospect, it can be said that more energy should have been devoted to information and communication. This would have reduced a number of misunderstandings which took time and energy to straighten out.

Once a number of analyses of PRV's problems had been carried out, it was time to formulate concrete proposals regarding measures. In order to utilize the knowledge and imagination of the employees and to channel the pent-up energy in the organization, this work was arranged in the form of a number of project groups with clear directives and absolute deadlines.

In certain areas, the organization lacked expertise. With varying success, this was obtained via consultants. In a few controversial issues, consultants were engaged not so much because they possessed unique competence but because proposals from an impartial source gave the management more room for manoeuvre. This did not, of course, free the management from finally taking a standpoint, but it did lay the ground for a fairly unheated discussion about the proposal in question.

PRV's managers underwent training in conjunction with this phase, with the emphasis on the different roles of the manager. Many management seminars in this subject are characterized by considerable vagueness. With the help of consultants, however, PRV managed fairly well to isolate and communicate the message that a manager's natural loyalty to the staff must not affect his or her equally natural loyalty to decisions by the top management, once they had been reached. This message was of great importance in a situation of change with consequent anxiety among staff. A manager who was not prepared to defend what might be an unpopular decision with his staff could easily contribute to the outbreak of a guerilla war in the organization.

Analysis of Tasks and Markets

The analysis of PRV's tasks included a review of the duties given the authority by legislators and a survey of what PRV's customers felt PRV should be doing. The results of these two studies did not fully agree. The contacts with PRV's customers also provided valuable material for arranging priorities among different customer requirements. In certain of PRV's areas of operation, the analysis showed unanimous calls from customers for shorter processing times. In other areas, the results suggested that the quality of the Office's work was considered to be more important than fast throughput times. In no case did lower fees prove to be a primary requirement.

Knowledge of the market was important to PRV. Without this, it would have been difficult to predict the way demand would develop and to adapt services to the needs of different customers.

A closer study of PRV's customers revealed that in actual fact the organization worked on about 15 different markets. It was soon clear that these markets called for different marketing methods and that the Office's resources and routines would need to be adapted to a wide variety of market conditions.

One market, for example, consisted of large international companies with considerable resources of their own in the field of the protection of intellectual property rights. This group contained several sub-markets, such as the pharmaceuticals companies, which were extremely dependent upon patents, but which, because of extremely long development and market introduction times, could not use more than perhaps half of the total patent protection period of 20 years. The department in PRV which handled applications from industry also had contact with a large number of small companies and individual inventors whose financial situation and lack of familiarity with patent questions required a completely different level of involvement on the part of PRV.

The Corporate Affairs Department had—in addition to the companies themselves—law firms, account-

tants and banks among their customers, as well as the National Tax Board and the economic crime divisions of the police.

Even within one and the same small unit at PRV a number of different markets were revealed. Among those who sought the services of the Unit of Personal Names, for example, were a small but special group of people who wanted to change their name because they had changed their sex, and a further group that consisted of persons who had the same names as well-known criminals.

In conjunction with the market analysis, a number of other aspects of PRV's customer relations also came to light. PRV's obligation to keep certain types of application and assignment secret for, in some cases, extremely long periods of time meant that a much-needed review of security had to be carried out. At the same time, measures were taken to improve the access of the general public to the unique body of non-confidential information that PRV also administers.

The laws that govern the way PRV exercises its authority often contain provisions stating that the reactions of the authority to applications must be communicated to the applicant in the form of injunctions. The need for legal precision and the lack of customer orientation over the years had led to these injunctions being formulated in what for many people was an incomprehensible language. In many cases, the Office's communication with customers was characterized by a tone which many felt to be authoritarian and even supercilious. Efforts were therefore made to reformulate the orders in more comprehensible and customer-friendly terms. At the time of writing, it can be said that success has hitherto been limited. This applies particularly in the field of intellectual property, where stringent demands for verbal exactitude conflict with the ambition to communicate simply and comprehensibly.

Efficiency Analysis

In order to determine the efficiency of PRV's activities, a definition of the term efficiency was drawn up. Internal efficiency is the same as the classic measure of productivity, i.e., how much a certain resource produces per time unit. Cost-effectiveness is likewise a well-known concept which shows unit cost, contribution margin, etc. The third measure, external efficiency (sometimes referred to as market efficiency), proved to be more unusual in the public sector. It expresses the relationship between what the organization actually does and what the market wants it to do.

Since a figure does not say so much in itself, it was decided to measure the actual development of efficiency in all these three respects over a retrospective period of six years, and to relate the results to

the corresponding figure from comparable organizations. The latter assumed a study of authorities in other countries. Fortunately, the patent offices in other Nordic countries offered suitable comparisons. Legislation in the Nordic countries in terms of intellectual property law is in all important respects identical, and the authorities themselves are basically organized in the same way, although they differ in size. Comparisons were also carried out with the competitor EPO and with two major patent offices in Washington and Tokyo.

The analysis of internal efficiency showed that PRV's productivity was perfectly acceptable and was well above the international average. When it came to cost-effectiveness, it was naturally impossible to make any international comparisons. The measurements made indicated an acceptable unit price development in relation to the producer price index and the net price index. The result was not as encouraging when it came to external efficiency. PRV's activities proved not to correspond to customer requirements for short delivery times, good availability and high decision quality.

In the light of the results of the efficiency analyses, decisions were reached on a number of measures aimed at improving efficiency. The purpose of these measures was primarily to make it possible for PRV to improve its external efficiency, i.e., to meet customer requirements better. A short account of each one of these measures will be given in the following.

The Establishment of a Strategy and Operative Goals

According to the Swedish Academy dictionary, strategy means a course of action. A specific definition more suited to modern management theory might be: "The pattern or plan that integrates the fundamental goals, policy and behavior of the organization into a coherent whole." A well-formulated strategy helps to give priority to and allocate an organization's resources in order to create a unique and vital profile, based on its relative internal strengths and weaknesses, expected changes in its environment and the measures taken by intelligent opponents.

At PRV, the term came to mean the long-term vision of the organization and the important choice between alternative courses of action which were intended to realize this vision. The strategy was short and simple in order to be easily understandable, and its main points were as follows:

- PRV was to be a modern, efficient and competitive service organization, while maintaining its international role;
- activities were to be characterized by better planning and a more businesslike approach,

requiring greater independence in terms of financing, among other things;

- all the activities of the Office were to be retained within the same organization;
- commercial services were to be expanded as much as resources allowed;
- cooperation with organizations outside Sweden in terms of EDP and subcontracting arrangements were to be established in order to secure PRV's expertise and long-term vitality.

Unlike the strategy, the operative goals were detailed and quantified, consisting of short-term instructions for action. Management gurus talk of SMAC goals, i.e., Specific, Measurable, Achievable and Challenging. PRV's operative goals were formulated deliberately without any sort of reservation or qualification, in order to increase the degree of realism, and to enable detailed follow-up of their fulfillment.

Operative goals were laid down for all units in the organization which pursued independent activities. Where suitable and possible, quality goals were also formulated—for instance, with respect to service and the maximum number of incorrect decisions. Strategic considerations and operative goals were both incorporated as an important part of the operative plan which will be described.

Modified Organization

Apart from creating the management group described above, the most important organizational measure was to flatten out the pyramid by delegating responsibility for decisions—and the corresponding authority—to about 30 units arranged in five departments. This required a review of types and levels of decision and the establishment of a detailed order of decision. This might be regarded as an unnecessary exercise. In actual fact it was a comprehensive and time-consuming task which was essential in order to avoid chaos and anarchy in the decision-making process.

More than 60% of all decisions in economic and administrative questions were delegated down the line. In order not to risk uncertainty about where the responsibility for decision lay and, worst of all, create paralysis in the organization, a 20-page list of all these decisions was included in PRV's working instructions, stating their character, delineation, the person responsible, etc. The existence of this list made it impossible for individual employees to claim ignorance of who was to make the decision about what.

The purpose of delegating decision-making responsibility was to *achieve*

- shorter and more direct lines of decision and thus faster decisions;

- more efficient utilization of management resources at all levels, and thus better control;
- better result-orientation;
- greater motivation and incentive at all decision-making levels;
- more dynamic adjustment to the changes in PRV's environment.

At the same time, it was clear that delegation *demand*

- appropriate training of lower-level managers;
- clarity in the allocation of responsibility and procedures for reaching decisions;
- coherent, clear strategies and operative goals;
- improved methods for planning and follow-up.

Among other organizational changes, it is worth mentioning that the information secretariat was placed directly under the Director General. The purpose of this was to reflect the importance of the information function as a policy-creating tool.

The strengthening of the management function at PRV by establishing a number of staff functions directly under the Director General was also discussed. Considering the risk that such functions would develop into yet another decision-making level and screen off the top management from the work of the line, it was decided instead that the Administrative Department, the more important previous functions of which had been distributed along the line, would handle the top management's need of staff support. This Department was also to provide certain services which, for instance, for reasons of cost (purchasing of material and equipment, handling post and funds, etc.) or for policy reasons (pay policy) were best handled centrally. Finally, the Administrative Department was to assist other departments with advice as required.

The different roles of the Administrative Department and the difficulty of distinguishing between them led initially to some uncertainty in the organization. This was, however, transitory.

As a result of the fact that the financial responsibility was delegated to a large extent, and that new routines for planning, budgeting and accounting were introduced, the central financial function in the Administrative Department took on increased importance. A reasonable degree of harmony in PRV's financial system required clear instructions for account-coding, invoice routines, financial reporting, etc. The central finance unit also came to play an important role in connection with directives for operative plans and internal budgets, the provision of economic data to the units, consolidation of financial reports at different levels and the follow-up of results. The position of finance manager thus developed *de facto* into one of controller.

Organizational measures also included a number of measures intended to create identity, and the

psychological importance of these measures should not be underestimated. After an internal competition, a new and more modern logotype was adopted. To the horror of certain local residents, the front of the main PRV building in Stockholm was decorated with flags bearing the new logotype. Lapel badges and the like with the PRV emblem were distributed to employees. The reception area and the staff canteen were rebuilt. Club activities at PRV were encouraged by financial contributions. The annual staff party developed into a well-attended and festive evening at which a cabaret arranged by employees became a regular and much-appreciated feature. A systematic exchange of visits between PRV's departments in Sundsvall and Stockholm was organized.

Finally, the drain on the Office's expertise was halted through an agreement with the National Agency for Government Employees on a selective wage fund which played a large part in reducing the gap between PRV's salaries and market rates in general.

Increased Technical Support

Analyses showed quite clearly that PRV could achieve greater efficiency by improving its technical support. Such support would be important in two areas. First, the quite complicated handling of applications at certain departments would be considerably simplified by the replacement of time-consuming manual jobs by computerized systems. Secondly, the extensive information banks—mostly on paper—which were required as reference material in the consideration of certain applications could be handled and utilized more easily in digital form. PRV considered that EDP technology would, above all, help to improve external efficiency.

Naturally, PRV had to develop the administrative system itself. None of the standardized systems on the market met PRV's needs and, insofar as any such systems had been developed for the public sector at all, they were unsuitable for PRV.

Digitalization of the information banks was, particularly in the patent area, such a gigantic task that it would have been completely impossible for PRV. However, the Japanese, American and European patent authorities had embarked upon a joint project, the results of which would also be of use to Sweden as a member of the European Patent Organisation (EPO). In the light of future cooperation with the EPO, therefore, there was a great deal to be said for PRV choosing the same computer supplier as the EPO for its activities in Stockholm.

The Agency for Administrative Development, which purchased EDP equipment for government agencies, showed little understanding for PRV's views to begin with. Since they insisted that the profitability of the EDP investment should be

expressed solely in terms of staff savings and that an increase in external efficiency did not count, relations with PRV became somewhat strained. The problems were cleared up, however, and in this respect relations with the Agency for Administrative Development subsequently developed smoothly.

New Financing Model

After long discussions with the Ministries of Industry and Finance, PRV succeeded in securing permission to handle the income from fees itself, and thus eliminate the time-consuming detour via the State budget. During the following years, all PRV's main activities were to receive a symbolic 1,000 Swedish krona grant in the State budget. One reason for permission being granted was perhaps that the Cabinet Office then counted on not having to handle constant letters from PRV requesting permission to exceed the appropriations because of unforeseen increases in demand.

The new appropriation procedure did not mean that the Cabinet Office completely relinquished economic control of PRV. Since the Government still reserved the right to determine the fees, they could effectively regulate the flow of income and thus also the development of costs.

The advantage from PRV's point of view was, however, that the Office itself could decide what to invest money in, within a budgeted framework of income and outlay, and directly finance operations without the approval of the Government. This allowed a smoother adaptation of resources to fluctuations in demand, a more businesslike approach and a greater awareness of responsibility at different levels of the organization.

The Government finally reached the decision that Section 11 of the Accounting Ordinance was to be applicable to PRV. This meant that PRV was subjected to the same financial accounting requirements as public utilities which operate on a commercial basis.

Improved Routines for Operative Planning, Budgeting and Follow-Up of Results

PRV's new planning routines were based on a number of banal but important observations, i.e., that

- all planning is based on the assumption that the planner can influence events and that certain things can be predicted with reasonable certainty;
- planning of things that cannot be controlled or even predicted is meaningless;
- every intelligent plan must be based on assumptions and predictions;

- if the future were not created from the material of the past, all predictions would be mere speculation;
- in practice, predictions are usually judgments of the future importance of what has already happened;
- plans are often no better than the planner's knowledge of the past;
- if a plan is to be able to influence the future, it must include clear instructions for action;
- the plan must be sufficiently short term for such instructions to be concrete, and sufficiently long term to provide a perspective.

PRV therefore created a planning system. The plan for the first year during the four-year planning period contains detailed operative goals, expressed in figures in an internal budget.

Unlike a conventional appropriation request, which is a request for money via the State budget and is designed to suit the central budget process at the Cabinet Office, PRV's operative plan is an internal instrument of control. Both documents basically contain the same information, but the plan—which comes into force only a few weeks after approval—is based, unlike the appropriation request, on newer data and more realistic forecasts.

The superiority of the operative plan when it comes to breadth, depth and accuracy of information and assessments eventually gave rise to the idea among the top management that PRV—which according to its new financing system did not burden the State budget—could be freed from the requirement to submit an annual appropriation request. Instead, the Office's operative plan was to be the basis for a dialogue with the principle in the same way as for the public utilities. PRV would thus save resources and the principle would have better material upon which to base decisions. Discussions began with representatives of the Cabinet Office and the National Audit Bureau. This did not generate any understanding for PRV's idea. As far as substance is concerned, the arguments put up in opposition to the idea were poor.

The central State accounting system, known as System S, was primarily intended to bring order into the State finances and was completely inadequate for PRV's needs. In order to allow effective economic control, PRV was therefore forced to develop its own EDP systems both for production and for accounting. One example of this sort of production control system is the Patent Department's ARR. This system makes it possible for the managers concerned to take action when an application is not processed in time by an individual, group or unit. The accounting systems that PRV built for its own uses, such as the administrative accounting system ARE and the InterPat order and invoicing system IOF,

meet stringent requirements and allow on-going control of the economic situation.

5. Forecasts and Analysis of Consequences

After digging in the past to uncover PRV's strong and weak sides, and after decisions had been reached on a number of measures aimed at improving efficiency, the next phase in the change process was to look ahead. On the basis of available data about relevant factors in the surrounding world, markets and resources, etc., forecasts were made concerning the way demand would develop in the following five years. The difficulty was not to obtain material upon which to base the forecasts, but to pick out the important signals in the general information noise.

Such signals were, for instance, trends in research and development, the development of demand for other comparable European patent offices and trends in the number of patent applications of different origins in Sweden. In the corporate affairs area, the growth in the number of companies was compared with the number of liquidations, developments on the stock exchange, political and legal factors affecting the inclination to form companies, etc.

A study of the accuracy of earlier forecasts helped to improve the method. Figure 3 shows, for instance, the actual demand for PRV's patent services in 1977, a forecast for 1985 from the same year, and the actual outcome for that year. The comparison shows, among other things, that the demand for PCT applications had been sharply underestimated and the number of foreign patent applications had been overestimated.

With the help of the forecasts and different hypotheses regarding resources and other factors, analyses were carried out that showed the consequences in terms of efficiency according to different scenarios, and the sensitivity to changes in different variables. These scenarios provided the real basis for future strategic and operative decisions regarding objectives, the need and utilization of resources, etc.

6. Implementation Plan

A process of change as extensive as the one embarked upon by PRV required a large number of decisions at different levels within the Office itself, at other agencies and in the Government and the Parliament. The Office's instructions and working procedures had to be changed, operative plans, budgets and appropriation requests had to be drawn up, organizational changes had to be made to different departments, requirement specifications and purchasing documents for equipment had to be formulated, and much else. Sufficient time had to be reserved for preparatory work, reporting, negotia-

tions, presentations, etc., and dates had to be set for the implementation of each decision.

An implementation plan was essential. The plan contained details on the distribution of responsibilities, deadlines for proposals and decisions, and the various decision-making procedures, etc., relating to all projects and measures.

7. Management Training

The delegation of decision-making responsibility and the many new routines that the change process entailed meant that a number of managers at different levels faced new demands. Since uncertainty about one's own role and the ability to fulfill it often leads to a lack of loyalty towards the new task, it was important to supply these managers with knowledge and self-confidence. A systematic management development program was therefore organized. Initially, this program contained elements that were perceived by the participants as being far too general and abstract. In discussions with those responsible, the approach gradually turned to training in concrete methods for planning, budgeting, staff management, etc.

Despite these rather comprehensive measures, a lack of insight was noted among many managers regarding the scope of their responsibilities. This gave rise to a simple, but useful model which described a manager's most important functions at PRV. It was eventually also used as a matrix for the disposition of the operative plan.

8. Results

The overall cost of the change process as described above is difficult to calculate. The direct costs were modest and were mainly attributable to consultants' fees, rebuilding, information activities, courses for employees and investments in technical support. It can be assumed that the latter would have arisen regardless of the changes. The major expense was attributable to loss of production as a result of the working hours that a large number of employees devoted to different activities within the framework of the change project.

Certain of the positive results are likewise difficult to quantify. This applies, for instance, to the improvement in the working climate which the process produced. It also applies to the increased respect for PRV that the change brought about among customers and principles. Other effects are more tangible, and some examples are given in the following.

The turnover of graduate engineers, which was 18% in 1985, declined in two years to about 7%. This led to considerable net savings in terms of

direct recruitment costs and internal training, as well as to productivity gains.

At the Patent Department, the backlog of unsettled applications was reduced from 30,000 to 15,000 in three years. The latter figure corresponded to an acceptable balance of work in this area. The reduction meant that the processing time for most patent applications was reduced to the minimum allowed by law, i.e., three years. For the uninitiated, this may seem an extremely long minimum time for processing an application. PRV's actual work on a patent application really takes only a couple of days. The remainder of the time is in the form of deadlines prescribed by law for documents submitted by applicants and third parties.

The Patent Department also introduced the highest international processing quality in all new applications as of October 1988, as a step towards the improvement of external efficiency.

The Department's productivity has increased alongside the improvement in quality, despite the fact that staff cutbacks have left each examiner with a larger area to monitor, and that the material to be reviewed is growing by 1.5% per year.

The Corporate Affairs Department had faced criticism from its customers, particularly for its long processing times, and is a good example of what determined work to achieve change can produce.

9. The Future

The process that has been described here entailed a concerted effort and concentration of resources in order to solve, within a couple of years, a large number of problems that had accumulated over a long period of time. Most of the measures described have now been completed. This does not mean that the task of reforming PRV is over. Certain of the measures may need to be reconsidered in the light of new experience. New challenges are constantly arising. The process of change must therefore continue, albeit at a calmer pace and with more limited resources being devoted to it. Ongoing adjustment to a changing world is a natural—and essential—part of the life of every organization.

Among the projects that PRV is currently involved in, some are worthy of special mention.

In order to obtain better documentation for the work on staff policy, and reduce staff costs—which constitute 65% of PRV's total costs—work is being carried out to produce reports on staff economics.

Extensive work on streamlining the utilization of PRV's large information banks is under way with the aid of advanced scanning and storage technology. The objectives here are

- to protect confidential information from access by unauthorized persons;

- to improve the availability of non-confidential information for employees and outsiders alike;
- to reduce the long-term cost of handling large volumes of information

The speed of technological and commercial development has accentuated the need for effective protection of intellectual property. The high cost of achieving this protection country by country has prompted the creation of international protection systems. These systems mean, in principle, that protection can be obtained in several countries at the same time on the basis of *one* application. Considering the dependence of the Swedish economy on other countries, it is an important task for PRV to work actively to ensure that Swedish trade and industry are afforded such possibilities. At the same time, it is important that internationalization does not impair the service that individual Swedish inventors and small companies need at the national level and

in their own language. During the coming years, Swedish participation in international protection systems in the areas of trademarks and design patents will be brought to the fore.

Since, normally, only the State can create rights and duties for its citizens, public authorities often have a monopoly status. They have thus not had much cause to market their activities. In general, marketing activities have been restricted to the provision of general information. In PRV's case, the exposure of its activities to competition means that the organization must in certain areas carry out costly marketing in order to retain and, hopefully, increase its market shares. Work is currently under way on formulating a marketing plan for the coming two budget years. This is being combined with discussions with external parties inside and outside Sweden, aimed at creating strategic alliances and strengthening PRV as the frontiers of Europe are lifted.

Fig. 1

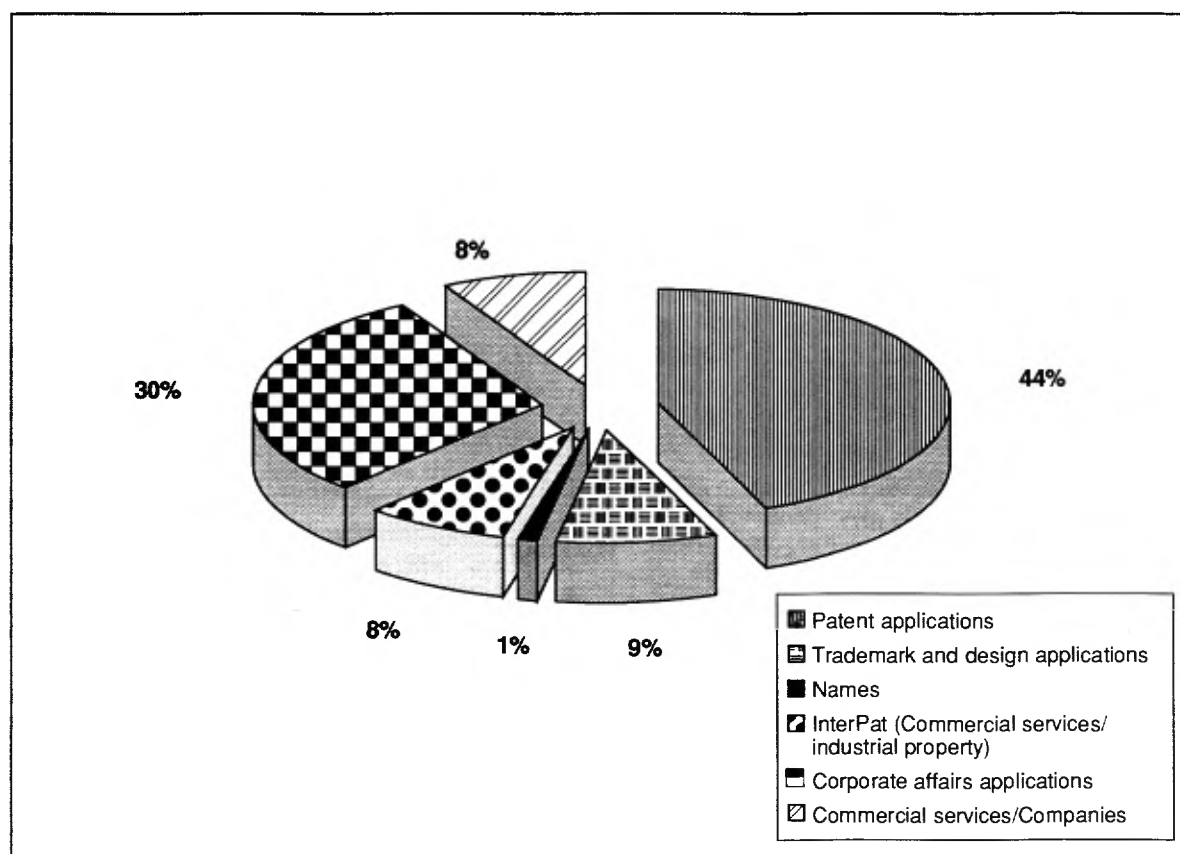


Fig. 2

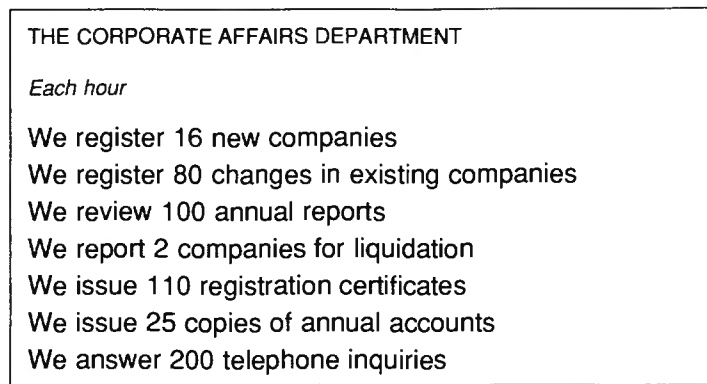
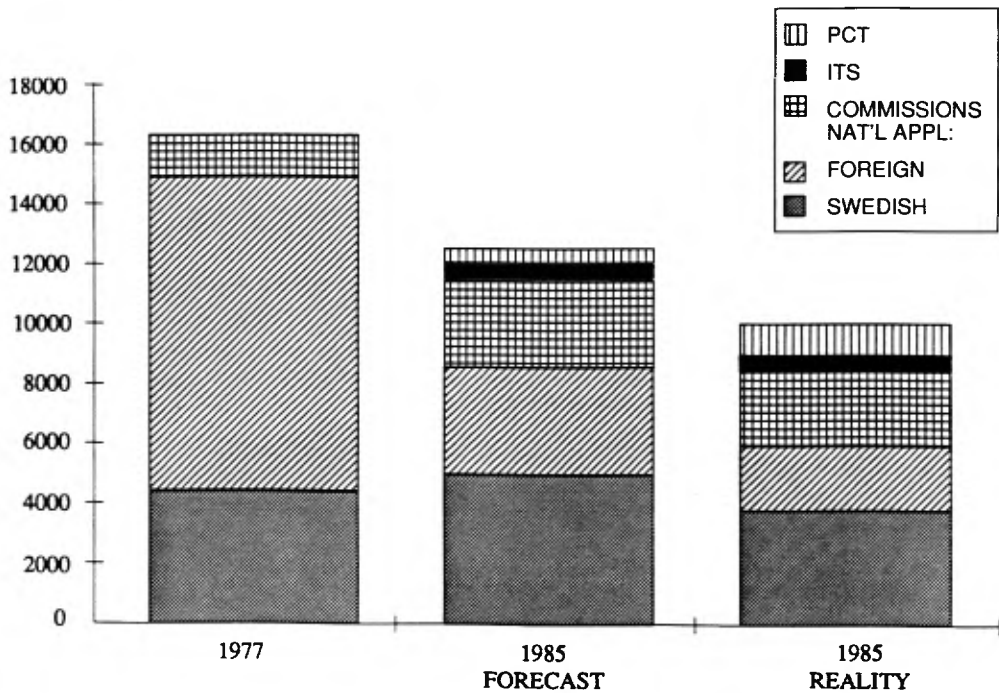


Fig. 3

FILINGS IN THE OFFICE PATENT DEPARTMENT



The New Austrian Design Law

O. RAFEINER, E. JAKADOFSKY, H. KNITTEL and G. KUCSKO*

I. The History of Protection for Designs in Austria

The Law for the Protection of Designs and Models for Industrial Products, promulgated on December 7, 1858, by Imperial Letters Patent, entered into force in Austria on March 1, 1859.¹ That instrument was to govern Austrian design law for more than a century. The basic elements of those provisions were still to be found in the 1970 Design Law, that was based on a repromulgation,² which constituted the basis of Austrian design law up to December 31, 1990. That Law required designs to be deposited with the Chamber of Commerce competent for the applicant's domicile. The maximum term of protection was three years. Decisions on nullity of a deposit, on infringements of design right and sanctions for infringement were taken by the local administrative authorities.

There had been many unsuccessful attempts to reform Austrian design law since the turn of the century. The existing Law was generally considered inadequate,³ particularly in view of the short term of protection, the decentralized nature of the arrangements and the lack of effectiveness in asserting rights. A number of attempts at reform were indeed made as time went on, but without achieving the necessary broad consensus for success.

It was not until 1985 that a draft design law was able to obtain enough support for it to then serve as a basis for further discussion on the reform of Austrian design law. It was nevertheless to be a number of years until the design law could be adopted by the National Council, following detailed debate and extensive accommodation of the observations made under the consultation procedure.

II. Main Aspects of the Design Law Reform

The Design Law of 1990⁴ that entered into force on January 1, 1991, is not a simple amendment to the previous law, but a completely new codification of Austrian design law in which the lawmaker has included the "*mutatis mutandis*" application of numerous well-proven provisions from the Patent Law 1970⁵ and has also extensively followed the provisions of that Law in other cases. The aim was to introduce up-to-date, contemporary rulings that would afford improved protection to an undertaking for the aesthetic design of its products and thereby add value to the creative activities of designers.

In that context, the following main features of the new design law may be highlighted:

1. extension of the term of protection for designs to a maximum of 15 years;
2. centralized registration of designs at the Austrian Patent Office, although the principle of filing designs with the Chambers of Commerce is maintained;
3. improved public information by the publication of registered designs in the Austrian Design Gazette and by setting up a central Design Register on the lines of the Patent Register;
4. extension of civil law remedies and more severe penal sanctions for design infringements by adopting the proven provisions of the Austrian Patent Law;
5. extension of secrecy of design applications from one year to 18 months to make the rapid copying of seasonal articles more difficult;
6. centralization of design dispute procedure in order to speed up the conduct of proceedings and to achieve uniformity of decisions:
 - nullity of designs—centralized at the Nullity Section of the Austrian Patent Office;
 - civil law infringement of designs—centralized at the Commercial Court of Vienna;
 - criminal law infringements of designs—centralized at the Vienna Provincial Court for Criminal Matters.

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¹ *Reichsgesetzblatt* (RGBl.) No. 237/1858.

² *Bundesgesetzblatt* (BGBl.) No. 261/1970.

³ For more detail, see G. Puchberger–E. Jakadofsky, *Musterrecht*, Verlag der Österreichische Staatsdruckerei, Vienna, 1991, pp. 7 *et seq.*, and H. Knittel–G. Kucsko, *Musterschutzgesetz*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 1991, Note 2 preceding Section 1.

⁴ BGBl. No. 497/1990; *Industrial Property Laws and Treaties*, AUSTRIA – Text 4-001.

⁵ BGBl. No. 259 in the version BGBl. No. 653/1987; *Industrial Property Laws and Treaties*, AUSTRIA – Text 2-001.

III. Subject of Design Protection

Under Section 1(1), a design within the meaning of this Federal Law refers to the pattern for the appearance of an industrial product. Thus, the subject matter of protection is not the industrial product itself nor its physical model, but the intellectual design that serves as a pattern for the appearance of the product. Nevertheless, in order to obtain protection for a design there is need of a physical manifestation. Consequently, the design must be disclosed on filing by means of a representation or copy of the design; a simple verbal description does not suffice.

Under the Design Law 1970, pattern referred to the "shape" of the product. The term "appearance" now used in the Design Law 1990 points more clearly to the fact that only the impression perceivable by the sense of sight is covered by design protection, but not properties that appeal to other senses (for instance, the sense of touch).

Nevertheless, protection can be obtained⁶—as hitherto—not only for the external appearance, but also for everything perceivable to the eye when the product is used for its intended purpose.

The characteristics therefore that determine the overall impression given by the design are those characteristics that condition its appearance. One may think particularly, in this context, of the shape of the design, its graphical form and its color. The appearance of a design, however, may also be determined by the shine, a reflected effect, or the iridescence of the surface or of the material.⁷

Protection may only be obtained for patterns for "industrial products." The word "pattern" means that the specimen must be applicable, at least in theory, to industrial products. It will continue to be sufficient if the pattern concerns only a part of the industrial product.⁸ The use of the term "industrial product" covers manufactured articles, but certainly excludes agricultural products from design protection.⁹

Discussion will surely take place on the question whether the appearance of a design that is determined exclusively by technical factors can obtain design protection. If this were to be accepted, the unavoidable consequence would be that a given technical design could not be used by anyone else where it necessarily resulted in a given appearance that would infringe design right. Since the Design Law

1990, however, does not exclude features determined exclusively by technical factors, it could conceivably be held—contrary to German case law¹⁰—that a design whose appearance was exclusively determined by technical factors could also obtain design right.

IV. Requirements for Protection

Design protection begins with publication (Section 17 of the Design Law; unless otherwise stated, references are to the Federal Law on the Protection of Designs) effected by the Austrian Patent Office as a result of the filing procedure (Sections 12 *et seq.*). However, protection only has legal force if the design is new, does not cause offense and is not contrary to public policy or the prohibition on double protection (Section 1(2)). These requirements call for the following observations:

(a) Novelty

Under Section 2(1), a design is not new if it is identical or confusingly similar to the appearance of an article that was available to the public before the priority date of the design and if it appears obvious that such appearance could be applied to the products mentioned in the list of goods of the design.

The term "public" is in no way restrictive. Therefore, the article that prevents novelty does not necessarily have to have been available within the country and it indeed suffices if it has been made available to the public before the priority date anywhere in the world. What is demanded is therefore the absolute, objective novelty of the design.

When assessing novelty, the priority date of the design is all important. That date is either the filing date of the design concerned or, where priority is claimed under the Paris Convention for the Protection of Industrial Property,¹¹ the filing date of the first foreign application.

The novelty of the design is not only lost if it is identical to the appearance of an article previously made available to the public, but it suffices already if the design is confusingly similar to that article. The Design Law 1990 has therefore adopted the concept of similarity from trademark law.¹²

Nevertheless, the fact that a design is identical or confusingly similar to the appearance of an article already known to the public is not in itself enough to exclude the design from protection. In

⁶ Cf. decision of the Federal Ministry for Trade and Reconstruction of October 2, 1958, *Österreichisches Patentblatt*, 1959, Part I, p. 132.

⁷ Cf. Knittel-Kucsko, *op. cit.*, Note 13 to Section 1.

⁸ Cf. decision by the Federal Ministry for Trade and Reconstruction of April 2, 1958, *Österreichisches Patentblatt*, 1958, Part I, p. 159.

⁹ Cf. Knittel-Kucsko, *op. cit.*, Note 17 to Section 1.

¹⁰ Cf. H. Eichmann-R. von Falkenstein, *Geschmacksmustergesetz*, C.H. Beck'sche Verlagsbuchhandlung, Munich, 1988, Note 37 on Section 1.

¹¹ BGBl. No. 399/1973.

¹² See Section 14 of the Trademark Law 1970, BGBl. No. 260; *Industrial Property Laws and Treaties*, AUSTRIA—Text 3-001.

addition, it must appear obvious to apply that appearance to the products mentioned in the list of goods of the design. Where such is not the case, the creative effort of the designer is to be found in his idea of applying the appearance of an article already known to the public to a specific industrial product, despite the fact that it was not obvious to do so. Whether or not such application appears obvious in a given case will have to be decided from the point of view of a person experienced in the creation of designs and not from that of the final consumer.

Under Section 2(2), however, disclosure does not affect novelty if it occurs no earlier than six months prior to the priority date of the design and is directly or indirectly due to evident abuse to the disadvantage of the applicant or his successor in title or may be ascribed to the fact that the applicant or his legal predecessor has displayed the design at official or officially recognized exhibitions within the meaning of the Convention on International Exhibitions.¹³

In order to assert these rights, the applicant must already state on filing his application that the design has been displayed at such exhibition and must submit, within four months of filing, confirmation from the organizers of the exhibition.

The filing procedure comprises no examination as to novelty (Section 16(1)). However, the design may be declared null and void by the Nullity Section of the Austrian Patent Office under Sections 23 and 24 if the design is not new.

(b) Offensive Designs and Designs Contrary to Public Policy

Designs are offensive within the meaning of Section 1(2), in particular, if their appearance or purpose is liable to conflict with the morals, principles, decency and religious convictions of a not unsubstantial section of the Austrian population. Assessment is based on the views of persons of average sensitivity.

Public policy is to be understood as the basic principles of the legal order.

Whether or not a design is offensive or contrary to public policy is examined already in the filing procedure.

(c) Prohibition of Double Protection

Under Section 3, a design is excluded from protection if it is identical or confusingly similar to another design already enjoying protection, although the design with earlier priority does not affect novelty if it has only been published after filing of an application for the design with later priority. However, the prohibition of double protection is only applicable if it appears obvious to transfer the design

with the earlier priority from the products contained in its list of goods to those contained in the list of goods of the design with later priority.

No examination with respect to double protection is carried out in the filing procedure (Section 16(1)). However, where the prohibition of double protection is applicable, the design may be declared null and void by the Nullity Section of the Austrian Patent Office under Sections 23 and 24.

V. Effects of Design Protection

Under Section 4, design protection entitles the owner of the design to prohibit others from manufacturing by way of business, putting on the market, offering for sale or utilizing products that are identical or confusingly similar to his design where it appears obvious, with regard to the products contained in the list of goods, to apply the design to them.

The "by way of business" criterion does not refer simply to manufacturing, but also to putting on the market, offering for sale or utilizing. Manufacturing, etc., is "by way of business" if it occurs as part of an economic activity of a certain duration carried out in accordance with a standardized plan and repeated, which—without necessarily being for profit—does not simply serve to satisfy personal needs.¹⁴

"Putting on the market" is to be understood as any act serving to bring the product to the consumer, not only by selling it, but any other type of commercial distribution.

"Offering for sale" is to be understood as a preparatory act for putting on the market, that is to say, an explicit or implied offering of the article.

The right of prohibition concerns identical and confusingly similar products, but only in those cases where it would appear obvious from the products contained in the list of goods that the design could be transferred to them.

However, design protection does not have effect, in accordance with Section 5(1), against any person who already at the time of filing has in good faith used a design identical or confusingly similar to the protected design in Austria on the priority date or who has made the necessary arrangements for doing so.

The prior user may continue to use the design for those products concerned by such use for the needs of his own business in his own workshops or in those of others. This right may be inherited or transferred only together with the business.

The prior user may require the owner of the design to give written recognition of his right. A

¹⁴ Cf. explanations to Section 4, reproduced in Puchberger—Jakodofsky, *op. cit.*, pp. 36 and 37, and in Knittel—Kucsko, Note 4 on Section 4.

¹³ BGBl. No. 445/1980.

recognized right will be entered in the Design Register (Section 21) at the request of the prior user.

If recognition is refused, a decision will be taken by the Nullity Section of the Austrian Patent Office and, where appropriate, entry of the right in the Design Register will be ordered.

It should be noted that the activities constituting prior use must have taken place at the latest on the priority date. Use of the design during the "priority period" or—in the case of a secret design (Section 14)—during the "secrecy period," on the other hand, does not generate any corresponding right.

VI. Term of Protection

Design protection begins, in accordance with Section 6, on the day of publication (Section 17) of the design in the Austrian Design Gazette (Section 33) and expires five years after the end of the month in which the design was filed. Protection can be extended, on prompt payment of a renewal fee, for two five-year periods, up to a total of 15 years. The new term of protection is calculated as from the end of the preceding term.

The renewal fee under Section 41(1) for an individual design is 900 schillings for the first extension and 1,200 schillings for the second extension. For designs in a multiple filing (Section 13), it is 300 schillings for the first extension and 400 schillings for the second extension, for each design. The fees can be paid one year at the earliest before the end of the term of protection and six months, at the latest, after the end of such term. Payments made after the end of the term are subject to a 20% surcharge on the renewal fee. Renewal fees may be paid by any person interested in the design.

VII. Right to Design Protection

1. Creator Principle

Section 7(1) states that the right to design protection belongs in principle to the creator of the design or to his successor in title. The creator is the person who has made the design. Since the making of a design necessitates a creative intellectual activity, only natural persons can be "creators," whether individuals or a number of persons together.

2. Employee Designs and Designs Created on Commission Outside an Employment Relationship

Where a design by an employee falls within the field of an activity of the enterprise in which he is employed and if the activity that has led to the design forms part of the duties of the employee or if the design has been created on commission outside an employment relationship, the right to design

protection belongs, where not otherwise agreed, under Section 7(2) to the employer or commissioner or to his successor in title.

3. Examination of the Right to Design Protection

The right to design protection is not examined under the filing procedure (Section 16(1)). However, the entitled person can request the Nullity Section of the Austrian Patent Office, under Section 25, for a declaration of lack of title and ask that the design be transferred to him.

4. Naming as Creator

The creator of a design is entitled under Section 8 to be named as such in the Design Register (Section 21), on publication (Section 17) of the design in the Austrian Design Gazette (Section 33) and in the priority documents issued by the Patent Office. This right can be neither assigned nor inherited. Renunciation has no legal effect.

The creator can assert his right in disputes before the Nullity Section of the Austrian Patent office.

VIII. Filing Procedure

(a) Filing Offices

Up to the entry into force of the Design Law 1990, designs could only be deposited with the Chamber of Commerce of the Federal Province in which the applicant had his place of residence or of business. Where the domicile was abroad, designs had to be deposited with the Vienna Chamber of Commerce. The new Design Law now leaves the choice of filing office to the applicants.

Filing offices are to be found at the Austrian Patent Office in Vienna and, in accordance with Section 1,¹⁵ the Chambers of Commerce of Carinthia, Lower Austria, Salzburg, Styria, Tirol and Vorarlberg. The Chambers of Commerce of Vienna, Upper Austria and Burgenland have not established design filing offices. Twice a month, applications are forwarded by the filing offices to the Austrian Patent Office, which has sole competence for the formal examination (Section 11(2)).

(b) Filing Documents

The application for a design must be filed in writing. The Austrian Patent Office provides forms and information leaflets for applicants, which can be obtained free of charge at both the Patent Office itself and also the other filing offices (Section 12 of the Patent Office Order).¹⁶

¹⁵ Design Filing Office Order, BGBl. No. 715/1990; *Industrial Property Laws and Treaties*, AUSTRIA – Text 4-002.

¹⁶ Patent Office Order, *Österreichisches Patentblatt*, 1990, Part I, p. 161.

(c) *Disclosure*

A design must be disclosed on filing by submission of a representation or a copy of the design.

Since a representation is needed for publication (Section 17) of the design in the Austrian Design Gazette (Section 33) and for the entry in the Design Register (Section 21), Section 13(1) of the Patent Office Order requires the filing of at least one presentation. The submission of a copy of a design, on the other hand, is left to the discretion of the applicants (Section 14(1) of the Patent Office Order).

In the event of differences between the representation and the copy, it may be noted that the scope of protection for the design will depend exclusively on the copy of the design.

(d) *Representation of the Design*

Section 13(1) of the Patent Office Order requires that at least one representation of the design (in two copies) be submitted on filing. However, up to 10 different representations (in two copies) can be submitted to illustrate the design. The representations should reproduce the design clearly and, if possible, without other matter and must be durable and reproducible.

Photographs or drawings in color or in black and white are to be used as representations of a design, whereby photographs may not exceed 21 cm x 14.8 cm and drawings may not exceed 29.7 cm x 21 cm.

Simultaneously with the registration (Section 18), a representation is published in black and white in the Austrian Design Gazette (Section 33), that is to say, the representation chosen for that purpose by the applicant. Where the applicant does not choose a representation or if the informational value of the representation he chooses is too low, the representation to be published will be chosen by the Patent Office (Section 13(2) of the Patent Office Order). If the representation chosen for publication exceeds 8 cm x 8 cm, a third copy of that representation must be submitted with dimensions not exceeding 8 cm x 8 cm.

(e) *Copy of the Design*

In addition to a representation, the applicant may also submit a copy of the design where he considers it necessary for the unambiguous disclosure of the design (Section 14(1) of the Patent Office Order). However, it is not compulsory to file a copy of the design.

The copy of the design may not weigh more than 10 kilos. The size of a three-dimensional design (for instance, a jug or a vase) may not exceed 50 x 40 x 40 cm. In the case of a two-dimensional design (e.g., material or wallpaper), the dimensions may not exceed 50 x 100 x 2.5 cm or 75 x 100 x 1.5 cm

and it must be possible to fold the copy down to 29.7 cm x 21 cm.

A storage fee of 500 schillings has to be paid on filing of a three-dimensional copy, in accordance with Section 40(1), item 4.

(f) *Description*

The application file may contain a description in order to explain the design (Section 12(3)). In view of its simple explanatory function, the description may not be taken into account to assess the scope of protection of the design.¹⁷ The copy of the design, or the representation if no copy has been filed, is exclusively used for this purpose, in conjunction in each case with the list of goods (Section 12(4)).

The description must be easily legible and may not contain more than 100 words.

(g) *List of Goods*

Section 12(4) requires products for which the design is intended to be stated in a list (list of goods) in the order of the sequence of classes and subclasses of the Locarno Agreement Establishing an International Classification for Industrial Designs.¹⁸

Section 15(1) of the Patent Office Order requires terms to be used to designate those products that will enable the scope of protection of the design to be assessed, preferably those contained in the list of goods of the above-mentioned Agreement. The simple statement of the classes or subclasses for which the design is intended is not sufficient.

(h) *Multiple Filing*

Under Section 13, designs belonging to the same class may be grouped together in a multiple filing. Such filing may not contain more than 50 designs.

The advantage of a multiple filing for the applicant is exclusively to be found in the reduction in filing and renewal fees (Sections 40(1), item 1, and 41(1)). Once filing is completed, the designs contained in a multiple filing are dealt with in the same way as individual filings, that is to say, they can be separately assigned or pledged. Separate renunciation is also possible.

(i) *Secret Filing*

Under Section 14, a design may be filed openly or secretly.

A secret filing will be chosen by the applicant where he is interested in keeping his design secret

¹⁷ Cf. Knittel-Kucsko, *op. cit.*, Note 15 to Section 12.

¹⁸ BGBl. No. 496/1990.

for as long as possible (for example, in the case of seasonal articles). In such cases, the representations of the design with a copy, where appropriate, together with the description have to be submitted in a sealed (firmly closed) envelope.

The envelope will be opened automatically after 18 months following the priority date of the design. It is opened at an earlier date only on request by the applicant or by some other person who can prove that the applicant has invoked the design against him, for instance, in a warning of alleged infringement of the design.

Since publication (Section 17) and registration (Section 18) of such a design cannot take place until the envelope has been opened and design protection begins with publication (Section 6), a secret filing always implies late commencement of protection. Furthermore, a 50% surcharge on the filing fee is to be paid for such an application (Section 40(1), item 2).

(j) *Representatives*

An applicant having neither domicile nor establishment in Austria is required by Section 32(4) to appoint a representative domiciled in Austria for the filing procedure and to appoint an Austrian attorney at law, patent attorney or notary public for proceedings before the Nullity Section, the Appeal Section or the Supreme Patent and Trademark Chamber.

Where a representative is appointed, powers of attorney, in the original or as a certified copy, must be submitted (Section 32(1)) or reference made to powers submitted with respect to another act concerning the design. An Austrian attorney at law, patent attorney or notary public may refer under Section 32(2) to the powers of attorney issued to him. Such professional representatives may refer to the powers issued to them in place of the documentary proof.

(k) *Fees to Be Paid on Filing*

The fees to be paid on filing, under Section 40(1), are a filing fee (single filing: 600 schillings; multiple filing: 750 schillings, plus 80 schillings for the eleventh and each further design comprised in the application), a contribution to printing costs (350 schillings) and a class fee for individual filings (150 schillings a class). A secret filing is subject to a 50% surcharge on the filing fee and the deposit of a three-dimensional copy of a design is subject to a storage fee (500 schillings).

All payments have to be made to post check account No. 05160000 Vienna of the Austrian Patent Office. The original or a certified copy of the payment slip or transfer slip is to be presented to prove payment of fees. The slips should bear the name and address of the applicant, the purpose of payment (type of fee) and, where appropriate, the

file number (Section 4(4) of the Patent, Design and Trademark Order).¹⁹

Submissions and annexes in design matters and the confirmation of registration to be issued following registration of a design (design certificates) shall additionally be subject to stamp duty.²⁰ A leaflet on fees may be obtained free of charge from the Austrian Patent Office and from all other filing offices (see VIII(a), above).

(l) *Effects of the Application*

As of the date of the application, the applicant acquires, in addition to his procedural status in the filing procedure, what is known as a "right in the design application" (Section 10), constituting an inheritable and assignable property right, together with the priority of the filing date (Section 19), i.e., precedence over all design applications filed after that date.

Article 4 of the Paris Convention additionally affords an applicant the possibility of seeking design protection in all other Union States within six months of filing of the first application in Austria. These subsequent applications are treated as if they had been filed on the same day as the initial Austrian application.

(m) *Examination for Compliance with the Law*

Under Section 16(1), the Patent Office is required to examine each application for compliance with the Law irrespective of whether the application has been filed with the Patent Office itself or with one of the Chambers of Commerce.

Examination concerns, in particular, whether the design in fact qualifies as such under Section 1(1), whether it is offensive or conflicts with public policy (Section 1(2)), whether the filing submission, the representation of the design, the copy of the design, the list of goods or the description satisfy the requirements (Sections 13 *et seq.* of the Patent Office Order), whether the representatives' powers of attorney are duly proven (Section 32) or whether the appropriate fees have been paid (Section 40(1)).

However, the filing procedure does not comprise an examination for novelty (Section 2), for double protection (Section 3) or to ascertain whether the applicant has a right to design protection (Section 7). Nevertheless, a lack of novelty or an infringement of the prohibition on double protection can lead to a declaration of nullity (Sections 23 and 24) and the fact that the applicant does not have a right to design protection can lead to a declaration of lack of title

¹⁹ Patent, Design and Trademark Order, BGBl. No. 98/1985, in the version of BGBl. No. 716/1990.

²⁰ RGBL. No. 113/1895, in the version of BGBl. No. 706/1990.

and transfer of the design (Section 25) by the Nullity Section of the Austrian Patent Office.

Should it emerge from the examination that there are objections to registration of the design, the applicant is invited under Section 16(2) to submit his comments within a reasonable period. If registration is found to be inadmissible after the applicant has submitted his comments in time or on expiry of the time limit, the application is rejected.

The rejection can be contested, just as any other decision by the Legal Section, by means of an appeal to the Appeals Section of the Austrian Patent Office (Section 28). The appeal must contain a petition and is to be lodged with the Patent Office within two months of service of the decision and reasons must be given within one month of expiry of that period at the latest. There is an appeal fee of 800 schillings (Section 42(1), item 1).

If there are no objections to registration, the Patent Office will publish the design (Section 17) in the Austrian Design Gazette (Section 33) and its registration (Section 18) in the Design Register (Section 21).

(n) Publication

Designs are published (Section 17) in the Austrian Design Gazette (Section 33) that appears on the 20th of each month. Design protection (Section 6) begins with publication of the design.

In accordance with Section 18 of the Patent Office Order, publication must contain the bibliographic data of the design, the representation chosen for the publication (Section 13(2) of the Patent Office Order) in black and white, the number of representations submitted, the list of goods (Section 12(4)) and, where appropriate, the person named as creator (Section 8). Where a copy of the design or a description has been submitted, a reference is entered in the Register as also a note of the fact if the published representation was submitted in color.

(o) Registration

The data published in the Austrian Design Gazette (Section 33), together with all representations of the design, are to be entered in the Design Register on registration (Section 18).

Since the Austrian Design Gazette only publishes the representation which the applicant or the Patent Office has chosen (Section 13(2) of the Patent Office Order), and also publication takes place in black and white, it is only by examining the Design Register that comprehensive information on the registered design can be obtained. It is also possible in such a case to view the copy of the design that belongs to the registered design and to have access to the description.

(p) Design Certificate

Once the design has been registered, the owner receives official confirmation of the entries in the Register (design certificate) in accordance with Section 18(2).

IX. Transfer

Under Section 10, the rights deriving from an application and the design right may be transferred with respect to all or single products in the list of goods as a whole or in conceptual shares. Such rights do not pass to the State. The transfer of rights in an application takes effect when the parties reach an agreement.

The transfer of the design right, on the other hand, does not take effect until it is entered in the Design Register (Section 22).

X. Design Register

The Design Register constitutes an official register which any person may inspect without having to prove a legal interest (Section 18(3)). In addition to the data that must be entered in the Register at the time of registration of a design, as mentioned above, the following particulars will also be found: end of design protection (Section 6), declaration of nullity (Sections 23 and 24), lack of title (Section 25) and transfer of design rights (Section 10), liens and other rights *in rem* relating to design rights, licenses, rights of prior user (Section 5), restoration of rights, decisions on requests for declarations (Section 39), disputes (Section 22(3)) and references to court decisions communicated to the Patent Office in which judgment has been passed on the validity or effect of a design (Section 36).

In most cases, entry in the Design Register has purely declaratory effect. The entry of transfers of design rights or the entry of liens and other rights *in rem*, on the other hand, has a constitutive effect, that is to say, the rights are only acquired when the entry is made in the Design Register. Licenses, for instance, are only effective with respect to third parties if they are entered in the Design Register. Finally, an entry relating to a legal dispute means that the decision in those proceedings also has full effectiveness against such persons who have obtained entries in the Design Register only after submission of the request for entry of a dispute to the Patent Office.

XI. Computer Assisted Administration of Designs

The new codification of design law gave the Austrian Patent Office the opportunity to develop

and utilize new technologies and methods that are extensively independent of conventional forms of organization. The newly set up administration of designs was therefore conceived, making use of the available technical resources, in such a way that the computer assumes the major part in the whole sequence of the filing and registration procedure. Maximum efficiency, facility for customers and reduced staffing were the aims. This meant that the share of manual work had to be minimized from the very start of the filing procedure right through to the administration of the fees. The new computerized administration of designs is based essentially on the following elements:

(i) *Data Acquisition.* The use of specially developed forms enables acquisition of all application data to be extensively automated by means of optical character recognition.

(ii) *Notification of Defects.* The letters notifying defects are produced and addressed on the basis of the stored data by means of corresponding text components.

(iii) *Austrian Design Gazette.* The monthly Design Gazette is produced automatically by the computer system in the form of a master copy which is then reproduced in the Austrian Patent Office.

(iv) *Design Register.* For the first time, the Austrian Patent Office keeps a register that is not in paper form, but entirely stored in the computer. The complete updating process and the information system are likewise fully computerized.

(v) *Design Representations.* The pictures submitted are scanned and then stored on optical disks. This enables not only speedy retrieval of the representations but also production of the appropriate copies.

(vi) *Administration of Fees.* The computerized administration of designs also covers payment of fees and a corresponding electronic system of reminders will be set up in the future.

The integration of design and design application data in the Austrian Patent Office's data banks makes it possible to provide information at the various terminals in the Austrian Patent Office. Data access will probably be extended in 1992, making it possible to obtain on-line access from outside the Office.

The interrogation parameters include the application number, the design number and the name of the owner or applicant. Interrogation of designs in a given field (classification) is also possible.

XII. Declaration of Nullity

(a) Ex Officio Nullity

Since the Design Law does not require an *ex officio* examination of novelty (Section 16(2)), it is

to be expected that a relatively high number of registered designs will not be legally reliable. Where it is obvious that the design lacks novelty (Section 2) or infringes the prohibition on double protection (Section 3), that is to say, it is clear from the file, such designs may be declared null and void under Section 23 by the Nullity Section of the Austrian Patent Office. Where such grounds concern only a part of the list of goods (Section 15 of the Patent Office Order), the list of goods will be correspondingly limited. A procedure may be instituted on a suitable request or also as a result of circumstances emerging during infringement or declaratory proceedings.

This procedure gives petitioners the possibility of obtaining a declaration of nullity of a design without paying a fee and without having to take the risk of paying legal costs.

However, the petitioner does not become a party to the proceedings before the Nullity Section and can therefore neither require the institution of such proceedings nor oppose a stay of proceedings.

(b) Declaration of Nullity on Request

Under Section 24, any person may request a declaration of nullity from the Nullity Section of the Austrian Patent Office if the design is not new (Section 2), conflicts with the prohibition of double protection (Section 3), is offensive or conflicts with public policy (Section 1(2)). In this type of proceedings, in which the parties are heard, the petitioner is also a party. Where the grounds for nullity concern only a part of the list of goods, the list is correspondingly limited (Section 15 of the Patent Office Order).

(c) Lack of Title

Section 25 protects a person entitled to obtain design protection from unauthorized applicants. The entitled person has the possibility of requesting the Nullity Section of the Austrian Patent Office to give a declaration of lack of title and to order transfer of the design to him if he is able to prove that the entitlement to design protection for the products contained in the list of goods belongs to him and not to the owner of the design (or his legal predecessor). Where this circumstance concerns only a part of the list of goods (Section 15 of the Patent Office Order), the declaration of lack of the title and the transfer will concern the design in part only. Any such claim becomes statute barred with respect to a design owner acting in good faith within three years of the date of his entry in the Design Register.

(d) Requests for Declaration

Any person who industrially manufactures, puts on the market, offers for sale or uses a product, or

who intends to carry out such acts, may apply to the Nullity Section of the Austrian Patent Office under Section 39(1) for a declaration against the owner of a protected design or of an exclusive license to the effect that his product is neither in whole nor in part subject to the design right (request for negative declaration).

Conversely, under Section 39(2), the owner of a protected design or of an exclusive license may also apply to the Nullity Section for a declaration against anyone who industrially manufactures, puts on the market, offers for sale or uses a product, or who intends to carry out such acts, to the effect that the product is subject in whole or in part to his design right (request for positive declaration).

However, requests for declaration will be refused under Section 39(3) if it is proved that infringement proceedings concerning the same design right and the same product, instituted prior to filing of the request for a declaration, are pending before a court or have already been the subject of a final decision.

(e) Recognition of Prior User Right and Naming as Creator

A prior user or a creator of a design may assert the rights afforded to him by Sections 5 and 8, where necessary, in proceedings before the Nullity Section of the Austrian Patent Office (Sections 5(5) and 8(4), respectively).

(f) Procedural Provisions

With the exception of an *ex officio* proceeding for declaration of nullity (Section 23), proceedings before the Nullity Section of the Austrian Patent Office are subject to court-type procedural provisions including the *mutatis mutandis* application of numerous provisions of the Austrian Code of Civil Procedure (Section 29). The proceedings are dominated by the principle of the initiative of the parties. That means that the petitions of the parties determine the progress of the proceedings. They are instituted by means of a reasoned petition in writing to be submitted in duplicate.

The petition file is communicated to the other party for his observations. If necessary, the proceedings can involve a further exchange of correspondence or the hearing of evidence in preliminary proceedings. On completion of the preliminary proceedings, oral proceedings will be held if deemed necessary by the Nullity Section or if requested by one of the parties.

A legally qualified member of the Austrian Patent Office, that is to say, one of the presidents of the Nullity Section, is appointed to hear the proceedings. Contrary to patent and trademark matters, the Nullity Section therefore does not act as a board when taking decisions in design matters.

(g) Procedural Fees

A fee of 2,600 schillings is to be paid for each request to be dealt with by the Nullity Section (Section 42(1), item 2).

XIII. Appeals

Final decisions by the Nullity Section can be appealed from to the Supreme Patent and Trademark Chamber under Section 30(1) within two months of service of the decision. The appeal must contain a reasoned petition. The procedural fee under Section 42(1), item 3, amounts to 4,000 schillings.

The Supreme Patent and Trademark Chamber deliberates and takes its decisions under the chairmanship of its president, or, if he is unable to attend, of the vice president, in boards consisting of three members comprising the chairman, a legally qualified member and a technically qualified member. The boards are put together by the chairman in such a way that they contain at least one judge.

The Supreme Patent and Trademark Chamber bases its decisions on the written submissions after conducting, as a rule, an oral hearing.

XIV. Infringement of Design Rights

Section 34 affords the victim of a design right infringement the possibility of applying for injunction, removal, publication of judgment, compensation, damages, surrender of profit and rendering of accounts. An owner who has reason to suspect infringement may also apply for an injunction (preventive action). The Design Law 1990 thus adopts the well-proven provisions on sanctions contained in the Austrian Patent Law.

Under those provisions, the person suffering the infringement has a claim to appropriate compensation even where the infringement was unintentional. In the case of an intentional infringement, the injured party may claim, in lieu of the appropriate compensation, either damages, including lost profit, or surrender of profit which the infringer has obtained by means of the design infringement. The injured party also has a claim to appropriate compensation for the disadvantages, not related to financial damages, which he has suffered due to an intentional infringement, where justified by the special circumstances of the case.

The Commercial Court of Vienna has exclusive jurisdiction for actions and injunctions under the Design Law (Section 38(1)).

Anyone who intentionally infringes a design right further commits a criminal offense, for which Section 38(2) gives jurisdiction to the Vienna Provincial Court for Criminal Matters, punishable by

a fine of 360 daily amounts (Section 35(1)).²¹ However, action will only be instituted at the request of the injured party.

XV. Transitional Provisions

The Design Law 1970, together with its implementing provisions, ceased to apply on the entry into force of the Design Law 1990. Nevertheless, the statutory instruments that have been repealed will continue to apply to designs deposited prior to January 1, 1991. The "old" and "new" design rights will therefore continue to coexist until such designs have expired.

XVI. Relationship to Other Intellectual Property Rights

In individual cases, there will continue to be possible overlapping between design rights, on the one hand, and patent, trademark or copyright protection, on the other hand, and therefore a hypothetical parallel effect of such rights in future. Likewise, protection under Section 1 of the Law Against Unfair Competition²² remains with respect to the repression of what is known as "immoral exploitation of the achievements of others" as a supplementary measure.

XVII. The Outlook

During the first six months following the entry into force of the new Law, 1,563 designs have been deposited. An extrapolation to the end of 1991 therefore gives us a total for deposits of some 3,000 or 4,000 designs.

The procedure, from deposit to registration, at present lasts for approximately three months. The aim is to further reduce this already short period of time. To date, that is to say, up to July 20, 1991, a total of 599 designs have been registered.

Unless we are quite mistaken, the protection of designs in Austria is likely to develop most positively in the short and medium term. This assumption is based in particular on the fact that the new Design Law, when compared with the previous statu-

tory provisions, is much more up to date and much easier for the applicant both as regards substantive aspects and administration. For instance, as already mentioned, important concerns of the interested circles have been introduced, such as the centralization of the application procedure, publication of registrations in a monthly official publication, creation of a central, public design register and extension of the term of protection to a maximum of 15 years. Optimum conditions therefore seem to have been created for the acceptance of these industrial property rights.

It is also to be assumed, as a result of the internationalization of industrial property, that any future development of Austrian design law will take into account the reform of foreign design laws and the relevant international developments. Particular attention will be paid to the efforts undertaken by the World Intellectual Property Organization (WIPO) in Geneva for the revision of the Hague Agreement Concerning the International Deposit of Industrial Designs²³ and the draft presented for discussion by the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law with respect to a European design law.²⁴

It would seem as yet premature to express specific wishes in respect of the gradually developing practice of the Austrian Patent Office. It is certain, in any event, that the Patent Office is applying the new provisions as favorably as possible for the applicant in an effort to achieve an industrial design system that will satisfy the requirements of industry. Whether this aim can in fact be achieved, however, will be shown by the future development of jurisprudence before the patent authorities and the competent courts.

XVIII. Literature on the New Legal Situation

H. Knittel-G. Kucsko, *Musterschutzgesetz*, Manzsche Verlags- und Universitätsbuchhandlung, Vienna, 1991; G. Puchberger-E. Jakadofsky, *Musterrecht*, Verlag der Österreichischen Staatsdruckerei, Vienna, 1991; F. Prunbauer, "Musterschutzgesetz 1990," *Medien und Recht*, Vol. 5, 1990, p. 166; G. Kucsko, "Neues Musterschutzrecht," *Ecolex*, Vol. 7, 1990, p. 424; G. Kucsko, "Das neue Musterschutzgesetz," *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht*, Vol. 2, 1986, p. 33.

²¹ Under Section 19(2) of the Penal Code, BGBl. No. 60/1974, in the version of BGBl. No. 605/1987, a daily amount is to be determined in accordance with the personal circumstances and economic capabilities of the offender and amounts to 30 schillings at least and 4,500 schillings at most.

²² *Industrial Property Laws and Treaties*, AUSTRIA – Text 5-001.

²³ Cf. WIPO document H/CE/I/3, of April 10, 1991.

²⁴ Cf. "Auf dem Weg zu einem europäischen Musterrecht," *GRUR Int.*, Vol. No. 8, 1990, pp. 559 to 586.

Legal Unity in the Field of Industrial Property in the Federal Republic of Germany: The Draft Law on the Extension of Industrial Property Rights

A. SCHÄFERS*

With the accession of the German Democratic Republic (GDR) to the Federal Republic of Germany taking effect on October 3, 1990, all legislation in the field of intellectual property in force in the Federal Republic of Germany at that time was extended to the territory of the GDR. In the framework of the Treaty between the Federal Republic of Germany and the GDR on the Unification of Germany, signed on August 31, 1990 (Unification Treaty), it had been provided that industrial property rights with a filing date before the entry into force of the Treaty which occurred on October 3, 1990, would be maintained with territorially limited effect in the respective territories of the Contracting States and continue to be governed by the law applicable to them before the entry into force of the said Unification Treaty. The same principle would also apply with regard to rights acquired pursuant to an international treaty to which one or both of the Contracting States were parties. Those rights, if their filing date was before October 3, 1990, would be maintained for the individual territories of the Contracting States for which they were filed.

When informing about the contents of the Unification Treaty and its forthcoming entry into force, the Delegation of the Federal Republic of Germany, at the session of the Governing Bodies of WIPO in their twenty-first series of meetings (September 24 to October 2, 1990), stated that the maintaining of territorially limited rights was only an interim measure. It pointed out that in the end all rights existing at the relevant time in either part of Germany would be extended to that territory which they did not yet cover. The Delegation also stated that it expected to be able to present a draft law for the extension of rights the following year to the first all-German Parliament to be elected on December 2, 1990 (see WIPO document AB/XXI/7, paragraph 26, page 9).

On September 2, 1991, the Government of the Federal Republic of Germany approved a Draft Law on the Extension of Industrial Property Rights (hereafter referred to as "Draft Extension Law") following intensive preparations within the Federal Ministry of Justice and discussions with interested circles, the *Bundesländer* (Federal States, including the five new *Länder*: Brandenburg, Mecklenburg-Vorpommern,

Sachsen, Sachsen-Anhalt, Thüringen) newly established on the territory of the former GDR, with the other Federal Ministries and a Committee of Experts on Industrial Property as well as contacts with the Director General of WIPO, the President of the European Patent Office and other international organizations. After being signed by the Federal Chancellor, it was forwarded to the *Bundesrat* (Federal Council, representation of the 16 Federal States) which discussed and approved the draft in October 1991. It is now pending before the *Bundestag* (Federal Diet, composed of representatives of the population of united Germany), which is responsible for taking the final decision on the Draft Extension Law. Expeditious treatment in the Federal Diet can be expected as the completion of legal unity in this field is becoming more important every day. With the recovery of the economy in the new Federal States, with privatization of combines and "people-owned" enterprises progressing rapidly, and with new companies and medium-sized enterprises being founded, the abolition of internal borders for the old protective rights and applications for them is becoming increasingly urgent. Therefore, it can be expected that the Draft Extension Law will be given precedence over other pending legislation. Discussions in the Legal Committee of the Federal Diet will start very soon so that the law will enter into force in the near future. The Draft Extension Law being of particular importance also for foreign owners of protective titles applied for or obtained with effect for the old territory of the Federal Republic of Germany or the former GDR, its main provisions are outlined in this article.

General Principles

The very essence of the Draft Extension Law with regard to the final restoration and completion of national legal unity is that all protective titles of industrial property existing on the date of entry into force of the Law in the old territory of the Federal Republic of Germany (including West-Berlin) or in the territory of the former GDR and in the former Soviet Sector of Berlin (East-Berlin) will be extended to the other part of united Germany, where those protective titles or the applications for them have a filing date before October 3, 1990. Such

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extension applies by operation of the Law and does not require the filing of a special request by the applicant or owner of a protective right. The Law comprises, in particular, patents granted or applied for under the Patent Law of the Federal Republic of Germany, European patents granted or applied for under the European Patent Convention, international applications under the Patent Cooperation Treaty (the GDR was not a Contracting State to that Treaty), utility models registered under the Utility Model Law of the Federal Republic of Germany (the former GDR did not have such type of protection), economic patents and patents of exclusion granted or applied for under the Patent Law of the GDR, industrial designs, authors' certificates and patents for industrial designs (GDR only), international deposits of industrial designs and national and international registrations of trademarks and service marks (the Federal Republic of Germany and the GDR were both Contracting States to the Madrid Agreement for the International Registration of Marks and the Hague Agreement Concerning the International Deposit of Industrial Designs). The Draft Extension Law expressly states that the extension of existing old rights shall also apply to rights filed, granted or registered under international treaties and having effect for one or both parts of united Germany.

With regard to the extension of protective rights applied for or obtained under GDR law or under the participation of the GDR in international treaties and having a filing date of up to October 2, 1990, the Draft Extension Law takes account of the GDR reform legislation which was adopted or authorized, in spring and summer 1990, by the freely elected Parliament (*Volkshammer*) of the GDR. The said legislation was prepared in close cooperation with the Federal Ministry of Justice and the German Patent Office in Munich; it was designed to implement the Treaty between the Federal Republic of Germany and the GDR on the Establishment of a Currency, Economic and Social Union, signed on May 18, 1990, but quickly superseded by the rapid change of constellations in Central and Eastern Europe.

In addition, the Draft Extension Law has to be understood against the background of the "Special Provisions on Industrial Property" contained in an Annex to the Unification Treaty (hereafter referred to as "Special Provisions") and dealing with some basic aspects of the introduction of the industrial property law of the Federal Republic of Germany in the territory of the former GDR. Apart from the disappearance of the Patent Office of the GDR and the maintenance of protective rights applied for or obtained for the Federal Republic of Germany and the GDR separately until October 2, 1990, a central point of the said Special Provisions was the establishment of July 1, 1990, as the decisive date from which good faith with regard to acts falling within the scope of a

protective right acquired earlier in the respective other part of Germany cannot be invoked or prevail any more. July 1, 1990, was in fact the date of entry into force of the Treaty of the Currency, Economic and Social Union, and from then on it must have been clear to everybody that an extension of industrial property rights from one part of Germany to the other was foreseeable and imminent.

Another essential point for the proper understanding of the Draft Extension Law is the principle that what applies to protective rights applied for, granted or registered under national law of course also applies to applications filed or rights acquired under international treaties. From October 3, 1990, all international treaties concluded by the Federal Republic of Germany relating to industrial property are also applicable to the territories of the new Federal States. Where the GDR itself was a Contracting State to an international treaty, its obligations ceased to apply: with its accession to the Federal Republic of Germany, the GDR disappeared as a subject of international law. The international treaties concluded by the GDR thus expired, subject to certain aftereffects resulting from its membership. Individual rights established under such treaties are of course included in the protective titles maintained by the Unification Treaty and now to be extended by the Extension Law.

Regarding protective rights applied for or obtained in the former GDR, the Draft Extension Law states the principle that GDR law henceforth shall apply only with respect to the conditions of protection and the term of protection. For the rest, those rights shall be governed by the provisions of the law of the Federal Republic of Germany as amended by the Unification Treaty. In view of this principle, special emphasis is placed on describing the substance and scope of those rights in the context of the GDR law and their transformation into federal law.

Patent Law

The law of the former GDR¹ made provision for two forms of protective rights in respect of technical inventions, i.e., the exclusive patent and the economic patent, whereby the actual emphasis lay on economic patents. So, of the technical protective rights originating in the GDR and actually being administered by the German Patent Office on January 1, 1991, there were 97,000 economic patents as against only 14,000 exclusive patents. This dual system was introduced in the GDR during the occupation period in 1950 and was modelled on the

¹ Law on the Legal Protection of Inventions—Patent Law (of October 27, 1983), see *Industrial Property Laws and Treaties*, GERMAN DEMOCRATIC REPUBLIC – Text 2-001, p. 005.

inventor's certificate of Soviet law. The economic patent was the only admissible form of protective right for patentable technical inventions in the combines (industrial complexes), people-owned enterprises or State research institutions (so-called necessary economic patents). The essential difference between the economic patent and the classic exclusive right—as it existed in the GDR in the form of the exclusive patent (because of international interchange)—lay in the rights conferred by the patent. Under the economic patent, the inventor merely had a claim to moral and material recognition and to a reasonable remuneration; the enterprise of origin was entitled and obliged to file an application, but the use of the invention protected by an economic patent was open to all socialist enterprises and institutions.

After the SED (Socialist Unity Party) regime collapsed, there was no argument about the fact that the economic patent was not compatible with the system of a free social market economy. Consequently, it was already the subject of reform legislation in June 1990.² Pending applications for economic patents were converted by operation of law into applications for exclusive patents, the patent term was extended from 18 to 20 years, the privileged annual fee system was dropped, and holders of economic patents were given the opportunity of applying for conversion of their patents into exclusive patents within a limited period ending on December 31, 1990. At the expiry of this time limit 19,000 such conversion applications had been filed. Another important element of the internal GDR reform was that the free right of use, enjoyed by socialist enterprises and institutions in respect of economic patents, was replaced by a right of use for all third parties on condition that remuneration was to be paid to the patent owner, i.e., normally to the enterprise of origin, for the use of all those economic patents in respect of which the substantive requirements for protection had been examined.

In view of its historical background it was clear that—in contradistinction to the exclusive patents of GDR law—full equality between economic patents and patents granted under the Patent Law of the Federal Republic of Germany³ would not be feasible, and nobody suggested or called for such a step. Hence the Draft Extension Law makes provision for a special regime derived from the Patent Law (DE) itself and already having a specific function there. Subject to the requirements for protection and the period of protection, in respect of which the reformed Patent Law of the GDR still applies,

economic patents are to be treated like patents granted under the Patent Law (DE), for which a license of right has been given by the holder. The declaration of a license of right, made by a patent owner under Section 23 of the Patent Law (DE) and rewarding him with a reduction of 50% of the relevant sum payable in annual fees, gives everybody the right to use the protected invention after corresponding notification of the patent owner. Under Section 23(3) of the Patent Law (DE), the user is required, at the end of every calendar quarter, to give the patent owner particulars of use and to pay the remuneration owed. If the user fails to meet this obligation, the patent owner may grant him a reasonable extension of time and, if the said extension of time expires without result, may prohibit further use of the invention. Remuneration for use will be fixed by the Patent Office if one of the parties so requests.

Under the original conception in a discussion draft for the Extension Law the owner of a former GDR economic patent was supposed to be entitled to revoke the fictitious declaration of a license of right and correspondingly to improve his legal position vis-à-vis future users so as to have full compensation rights and a claim to an injunction against unauthorized third parties. At the suggestion of the interested circles, the Draft Extension Law however only allows revocation of the fictitious declaration of a license of right in those cases where the patent has been examined in respect of all requirements for protection—a condition at present only fulfilled by a fraction of the economic patents, i.e., about 20%.

GDR patent law made provision for a kind of deferred substantive examination as regards patents of both legal forms, i.e., economic and exclusive patents. However, this kind of examination is not comparable to the deferred examination under the Patent Law (DE). Inventions that were the subject of an application for a necessary-economic patent had already undergone a preliminary examination of their patent-worthiness, patentability and of their economic usefulness in the enterprise of origin, and a patent application had to contain an express statement relating to these points. To begin with, the Patent Office of the GDR subjected patent applications to an examination for fulfillment of formal requirements and for cases of exclusion of patentability. This stage of the procedure roughly corresponds to the examination for obvious deficiencies under Section 42 of the Patent Law (DE). In the GDR, this stage usually ended with the granting of a patent if the examination yielded a positive result, but the grant was therefore only of a preliminary nature. A full examination covering all substantive requirements for protection—in particular, novelty, inventive step, technical progress, and industrial applicability—was only carried out when the protected invention was actually being used or when there was indication of commencement of use by a

² Law of June 29, 1990, Amending the Patent Law and the Law on Distinctive Signs for Goods, Official Gazette of the GDR, 1990, p. 571.

³ See *Industrial Property Laws and Treaties*, GERMANY, FEDERAL REPUBLIC OF—Text 2-002, p. 001, with subsequent amendments, hereafter referred to as "Patent Law (DE)."

socialist enterprise (in relation to economic patents). The object of this system was to avoid having to keep up expensive examining capacities in the Patent Office where they would have been out of proportion to the practical exploitation of the protected inventions. Examination simply on the basis of a formal request had only been possible since the internal GDR reform legislation of 1990.

In view of this, when work began on the Draft Extension Law, consideration was given to recognizing only those patents to continue as granted patents that had been examined in respect of all requirements for protection, and to downgrading the other unexamined patents to mere published applications or to converting them into utility models representing a mere right by registration. In the memorandum attached to the Draft Extension Law those considerations are rejected for the sake of safeguarding acquired rights and of protecting confidence. So the Draft Extension Law expressly provides (in Section 6) that the grant of a patent under the law of the GDR shall have the same effect as a publication of the grant of a patent under Section 58(1) of the Patent Law (DE).

However, there was special concern in the interested circles that opportunities should be created both for augmenting the durability of patents originating in the GDR that had not yet been examined in respect of all requirements for protection, and for eliminating invalid patents as simply and cheaply as possible. Here the Draft Extension Law provides for two procedures, which are not available in this form under the Patent Law (DE). One procedure consists of a request for search for publications which are to be considered in connection with the determination of an invention's patentability—in other words, for a search report in respect of a patent that has already been granted. The application can be filed by the patent owner himself and by any third party. A search fee of DM 200 has to be paid.

The second procedure consists of a request for examination of a patent that has not been examined as to whether all requirements for protection have been fulfilled. This request for a full substantive examination can be filed by the patent owner and by any third party at any time. The substantive examination will be conducted under the same rules as the examination of an application under the Patent Law (DE). It is only the final determination of the Examining Section which differs. Instead of rejecting the application or refusing the patent—as otherwise provided under the procedure for granting a patent—the Patent Office will either revoke the patent or, if it finds that the requirements for protection have been fulfilled, it will determine that the patent be maintained. If the patent has been maintained, this decision may then be followed by the normal opposition procedure under Section 59 of the Patent Law (DE).

Unlike the Patent Law (DE), GDR law did not provide for compulsory publication of patent applications after the expiry of certain time limits. On January 1, 1991, there was still a total of 18,700 applications originating in the former GDR pending with the German Patent Office. At present, they only come to public attention when the German Patent Office grants an (exclusive) patent in compliance with GDR law. On the other hand, already pursuant to the Unification Treaty, applications filed with the Patent Office of the GDR before October 3, 1990, constitute "secret prior art" and can be used to destroy the novelty of an invention in respect of which a subsequent application was filed on or after October 3, 1990—so far as such inventions have been published afterwards and thus become part of the state of the art. But their publication is needed for this within a reasonable time. Hence the bill states that publication must be effected at the latest 18 months after October 3, 1990.

Special aspects relating to applications for protective rights and to the rights themselves originating in the GDR, ensue from the application of the Havana Agreement of 1976.⁴ With the disappearance of the GDR as a subject of international law, the Havana Agreement has also expired for it, and there is no question even of only a limited legal succession on the part of the Federal Republic of Germany. Applications for recognition of a title of protection—usually in the form of an economic patent—which were filed and pending under the Agreement's validity for the GDR will be treated as pending applications under the Patent Law (DE).

There is a problem here only insofar as by virtue of bilateral agreements with the Soviet Union applications for recognition were filed in the Russian language and patents backed up by specifications in Russian were granted or given recognition by the Patent Office of the GDR. The Draft Extension Law requires the submission of documents in the German language as regards pending applications for recognition in Russian. The priority of the application is maintained. As regards titles of protection recognized as a patent, it is a precondition for asserting rights conferred by the patent that a German translation of the patent specification should have been published by the German Patent Office at the request of the patent owner. If the translation is erroneous and afterwards corrected, the Draft Extension Law gives rights of further use to persons who, in good faith, are using or have made effective and serious preparations for using the invention the use of which would not constitute infringement of the patent in the original translation, after the corrected translation has been published by the Patent Office.

⁴ Agreement on the Mutual Recognition of Inventors' Certificates and Other Titles of Protection (Havana (Cuba), December 18, 1976), see *Industrial Property Laws and Treaties*, MULTILATERAL TREATIES – Text 2-002, p. 001.

Industrial Design Law

By analogy with the legal protection for inventions, the GDR law⁵ made provision, in the field of industrial designs, for a dual system. On the one hand there was the author's certificate, which may be compared with the economic patent in terms of its substance and legal significance, and on the other there was the patent for industrial designs as a full exclusive right. By comparison with the protection for inventions, designs and models already tended to be of lesser significance for the former GDR in terms of the numbers involved. On January 1, 1991, the number of pending applications amounted to roughly 5,200, and most of them had been registered with provisional effect. In connection with the GDR's membership in the Hague Agreement, there are about 600 international deposits in force for the GDR. Like the economic patent, the author's certificate merely gave the author of an industrial design the right to moral and material recognition vis-à-vis a right of use for all socialist enterprises and State institutions.

The internal GDR reform legislation had no further chance of "privatizing" and structuring in conformity with the needs of a market economy the author's certificate, a protective title which was very closely linked with the socialist economic and legal system. Thus, the Unification Treaty initially only converted all pending applications into patent applications for industrial designs.

It is here that the Draft Extension Law tacks on. Authors' certificates and patents for industrial designs, maintained by the Unification Treaty, will be converted by operation of law and without any individual request on the part of the holder of a protective right, into designs under the Designs Law of the Federal Republic of Germany.⁶ Rights of use established under previous GDR law are to remain in operation and will be extended throughout the territory of Germany, whereby there is also an express requirement that remuneration must be paid.

Applications originating in the GDR and still pending will be handled like design applications under federal law and will lead to substantiation of a protective right by virtue of their entry in the Register, centralized at the German Patent Office since July 1, 1988.

However, with regard to procedural provisions, significant differences had to be taken into account.

According to the applicable GDR law, the application was submitted to a sort of formality examination, after which it was entered in the Register of the Patent Office and then published. Publication conferred a provisional protection for the subject matter of the application. The owner of the protective right could apply for a limited or even unlimited deferral of publication. After publication of the application, any third party could file opposition against the registered and published industrial design, which—like a request for substantive examination filed by the applicant himself—led to a complete examination whether the substantive requirements for protection were fulfilled. All these procedural particularities, which are alien to the Designs Law (DE) and resemble more or less the procedure under the Patent Law, will be abolished. In principle, the procedural provisions of the Designs Law (DE) will apply. However, the Draft Extension Law protects against loss of rights those applicants who have trusted in the applicability of the law of the former GDR with the result that their applications do not fully comply with the procedural requirements of federal law. The Draft Law expressly provides that, by exception from Section 10(3), second sentence, of the Designs Law (DE), even in cases of belated correction of significant defects of the application, no loss of the filing date will occur.

Pursuant to the law of the former GDR, it was possible to defer publication of the application for a certain limited or even unlimited period of time. However, the Designs Law (DE) provides that publication of a photograph of the model or design can only be postponed for up to 18 months. In order to bring the procedure for the application filed under the GDR law in conformity with federal law, the Draft Extension Law provides that those applications have to be published within 18 months starting from October 3, 1990, provided that the time limit for the deferral has not expired earlier.

In contrast to the Patent Office of the GDR, the German Patent Office has no competence to examine the validity of the industrial design or compliance with the substantive requirements for protection. The issue of validity can be raised only in normal litigation before the ordinary courts of law. Therefore, any administrative procedure for the substantive examination of existing protective rights will cease with the entry into force of the Extension Law. Any examination fee paid by the applicant or a third party will be reimbursed in those cases.

Trademark Law

The transformation of marks maintained in the GDR (trademarks and service marks) gives rise to minor problems only compared with the provisions on technical protective rights under GDR law. The

⁵ Regulation of the Council of Ministers on the Protection of Designs and Models of Industrial Aesthetic Creation, of January 17, 1974, as amended in December 1988.

⁶ Law Concerning Copyright in Industrial Designs (Designs Law), see *Industrial Property Laws and Treaties*, GERMANY, FEDERAL REPUBLIC OF—Text 4-001, p. 001, with subsequent amendments, cited as "Designs Law (DE)."

number of national marks in the GDR remained relatively small until the end. On January 1, 1991, it amounted to only 19,100 national registrations of marks, to which another 7,800 pending applications have to be added. A fair number of national registrations of marks in the GDR originated in the Federal Republic of Germany. On the other hand, international registrations of marks with effect in the GDR stood at roughly 105,000 on January 1, 1991; here again with a considerable share being owned by enterprises having their seat in the Federal Republic of Germany. International registrations are basically treated like national marks in respect of extension and withdrawal of protection, so that their peculiarities—which are of exceptional interest to WIPO in Geneva—need not be given closer attention here. The general legal situation as regards trademarks in the GDR⁷ did not substantially differ from the position as it is, and was, in the Federal Republic of Germany.⁸ Lack of competition, State monopoly of foreign trade, State-controlled organization of trade and frequent scarcity of goods did not allow full development of trademark law anyway. A special feature connected with the socialist system of a centrally planned economy was to be found in the general obligation for manufacturers, under the GDR Law on Distinctive Signs for Goods, to indicate the origin of their goods by a mandatory marking. This obligation was already eliminated in the internal GDR reform legislation of 1990⁹ and it plays no rule in the transformation of trademark law. As regards the requirements for protection there were certain differences, insofar as the GDR gave recognition going beyond the provisions of the Trademark Law (DE), to certain marks as being capable of registration and protection. Besides this, and in contradistinction to the Trademark Law (DE), there was no use requirement and transfer of the mark was permissible without the transfer of the enterprise.

In principle, the Draft Extension Law proceeds on the basis that GDR law should continue to apply to extended protective rights originating in the GDR as far as the substantive requirements of protection and the term of protection are concerned. Under trademark law, this would, however, in the long run lead to an undesirable and unnecessary continuation of GDR law for an unrestricted period of time. This is because trademark registrations are not restricted in time and they can be renewed at regular intervals. Consequently, the principle referred to has been modified in some respects for mark applications

originating in the GDR. So the invalidation of registered marks for absolute reasons is only possible if the relevant grounds are provided for both under GDR law and in the Trademark Law (DE).

In general, applications for the registration of marks will only be subjected to provisions of the Trademark Law (DE). This means that the *ex officio* examination for relative grounds of refusal of the GDR law is replaced by the publication of the application and the possibility of opposition against the registration of the mark. However, the Draft Extension Law provides for an important exception to this rule. The registration of the mark may not be refused on the ground that the sign which is the subject matter of the application is not registrable under federal law, for example, a three-dimensional sign serving as a trademark. In this respect, the law of the former GDR continues to apply as the sign under consideration was registrable when the application was filed and there is no need to refuse such registrations. The Draft Extension Law, in this context, follows international trends and the law of the European Communities which are aiming at a comprehensive notion of registrable signs. The said provision of the Draft Extension Law will also be applicable to international registrations under the Madrid Agreement indicating the GDR as a State in which the registration has effect to the extent that a refusal under Article 5 of the Madrid Agreement is still possible.

In accordance with the general rule that in future relative grounds for refusal of the registration may only be invoked in the course of opposition proceedings, conflicting prior rights will henceforth only be taken into account when an opposition is filed under the Trademark Law (DE). The rights meant here are first of all prior rights originating in the former GDR itself. In addition, an opposition may also be based on a mark filed or registered under the Trademark Law (DE) having an earlier priority date than the application for a registration filed under the GDR law, provided that the said application has been filed with the Patent Office of the GDR during the period between July 1 and October 2, 1990. This rule applies on a reciprocal basis as well, i.e., in the relationship between a trademark for which an application has been filed under the Trademark Law (DE) during the period referred to and the registration of a mark or an application filed under the GDR law and having an earlier priority. This is in consequence of the principle contained in the Special Provisions of the Unification Treaty that no acquisition of rights in good faith may be invoked in respect of any protective title filed for one part of Germany from July 1, 1990, onwards where such protective title is in conflict with a protective title filed for the other part of Germany having an earlier priority date.

The divergence between the GDR Law on Distinctive Signs for Goods and the Trademark Law

⁷ Law on Distinctive Signs for Goods of November 30, 1984, see *Industrial Property Laws and Treaties*, GERMAN DEMOCRATIC REPUBLIC – Text 3-001, p. 001.

⁸ Trademark Law (of January 2, 1968), with further amendments, see *Industrial Property Laws and Treaties*, GERMANY, FEDERAL REPUBLIC OF – Text 3-001, p. 001, as subsequently amended, cited as "Trademark Law (DE)."

⁹ See footnote 1, above.

(DE) as regards provisions on the use of a trademark has already been taken into account in Section 10 of the Special Provisions of the Unification Treaty. Thereunder, the period of grace concerning use, amounting to five years, begins for GDR marks on the day on which accession took effect, i.e., on October 3, 1990. The provisions concerning use in the Trademark Law (DE) apply correspondingly to marks originating in the GDR which were registered by the German Patent Office after this date on the basis of GDR law continuing to be in force. The Draft Extension Law therefore no longer needs to deal with this transitional problem.

Rights of Prior Use and of Further Use

Protective rights for technical inventions, i.e., patents for invention, under federal law and under GDR law as well as utility models may be limited by rights of prior use enjoyed by third parties under the law as it stands. Such rights of prior use are defined in the Patent Law (DE), in the Utility Model Law (DE) and in the Patent Law of the GDR. In line with the general principle that protective rights are to be extended in the manner in which they exist in their territory of origin, the said rights of prior use are also extended to the additional territory in each case. From this it follows that, for example, rights of prior use established by Section 12 of the Patent Law (DE) and by Section 13(3) of the Utility Model Law will remain in force and will be extended. This applies in the same way to rights of prior use established under GDR patent law.

In respect of technical protective rights, titles for industrial designs and semiconductor protective rights under the Law on the Protection of Semiconductor Products, of October 22, 1987,¹⁰ the Draft Extension Law deals with the question whether lawful acts of use in relation to the object of protection on the territory where no protection existed before can be continued once protective rights have been extended to that territory. It also deals with the question as to the legal scope such acts of use will have. This is of interest above all to the new Federal States and to industry there as the number of protective rights in the old territory of the Federal Republic of Germany is much higher than in the former GDR. The Draft Extension Law answers the question raised in the sense that the protective right's effects do not apply to whoever has lawfully begun to use the invention or other subject matter of protection on the territory to which the extension applies but where previously there had been no protection, such use having commenced after the priority date but before

July 1, 1990. The Draft Extension Law grants the user a right of further use, the content, scope and limits of which are laid down with reference to the provisions on the right to prior use in the Patent Law (DE). This right includes an entitlement to use the invention for an enterprise's own needs throughout the whole territory of Germany, i.e., also on the territory of the protective right's origin. However, provision is made that such use may not lead to a substantial impairment for the holder of the protective right or for his licensees of a kind that would be inequitable having due regard to all the circumstances of the case and on weighing up the legitimate interests of all parties involved.

Collision of Rights

When two separate and independent territories, each with their own protective rights, are brought together, it is logical that by virtue of extension the protective rights so extended are not only confronted with users of the subject matter of protection whose acts of use have previously been lawful. They also face owners of fully or partially identical protective rights which do not only have to be taken into account in the territory to which the extension applies but which themselves are also extended to the territory in which the other protective right originated. Collisions of this kind are already well known from earlier comparable events that took place under international and constitutional law. In the history of the Federal Republic of Germany they played a role when the Saarland was integrated into the federal territory on the basis of the Saar Treaty.

For such coincidences of technical protective rights covering the same area of protection the Draft Extension Law opts for the so-called coexistence principle. This means that the subject matter of the protective right may continue to be used by both owners throughout the territory of Germany. Both owners enjoy the full legal status established by each protective right—with all entitlements to obtain prohibitory injunctions and to claim compensation vis-à-vis third parties. However, the protective right cannot be enforced against the owner of the colliding protective right, and it also cannot be invoked against a licensee of the other protective right owner.

It is obvious that the principle of coexistence for colliding protective rights may lead, in individual cases, to inequitable results. Therefore, the Draft Extension Law contains also in this context an "equity clause," like in respect of rights of further use, but here with a more limited scope. It envisages important adverse repercussions for the owner of the colliding protective title or his licensees. Where such repercussions would be unjust under the circumstances of the individual case and taking into account all justified interests involved, the court dealing with

¹⁰ Federal Official Gazette, 1987, Part I, p. 2294; see also *Industrial Property Laws and Treaties, GERMANY, FEDERAL REPUBLIC OF* – Text 1-004.

a case of this type has the discretion to order limitations on, or a complete cessation of, the use of the subject matter of the protective title, based on a comprehensive evaluation of the situation. However, such limitations or cessation may only refer to that part of Germany to which the protective title has been extended. The full use and exploitation of the protected matter may not be called into question for that part of Germany for which the protective title was originally applied for and granted. On the contrary, the owner of the title could defend his territory of origin, based on the said equity clause, against any unjust impairment which would be caused by the owner of the other colliding protective right.

By contrast, the Draft Extension Law has a different solution for collisions between identical or confusingly similar marks. Coexistence of identical marks would decidedly weaken their essential function as a distinctive sign for goods and services and as an embodiment of an enterprise's goodwill. Consequently, for colliding marks there is provision to the effect that, in the territory to which the extension applies, they may only be used with the consent of the person who had acquired legally effective trademark protection before the extension came into force. Here the priority date of the colliding marks is not decisive. The priority principle only applies in relation to those trademarks filed as a subsequent right during the period from July 1 to October 2, 1990.

This solution will admittedly, in the case of colliding trademarks, lead to the maintenance of inner-German demarcation lines, as is expressly stated in the memorandum accompanying the Draft Extension Law. It is, however, assumed that such maintenance of old demarcation lines will not create major obstacles for trade and economic intercourse between the old territory of the Federal Republic of Germany and the new Federal States. The provisions of the Draft Extension Law should be understood as an offer and invitation to all enterprises concerned to agree on compromise solutions which are more likely to achieve adequate results than more or less abstract and general rules fixed by the Law itself. In addition, the Draft Extension Law also contains an "equity clause" for colliding trademarks. This clause provides that the owner of the mark does not need the consent of the owner of the colliding mark for its use in the territory of extension where, having regard to all circumstances of the case, the justified interests of the parties concerned and of the general public, a refusal expressed by the owner of the colliding mark to allow use in the territory of extension would lead to unjust results. In addition, the consent of the owner of the colliding mark is not required in those cases where the first mark is used in its territory of origin for the purposes of publicity and such publicity, in view of its inevitably "transregional"

effect, may also cover part of the territory of extension.

It is envisaged that the said "equity clause" would be applicable, in particular, in cases where a legal action for an injunction is based on a trademark which was never or very rarely used, where actual coexistence of the colliding trademarks was already accepted by the parties concerned or where the mark had been expropriated in the former GDR and is now used abusively. Should the competent court deny, in accordance with the said clause, the grant of an injunction for the territory of extension, the owner of the "loosing" mark may claim adequate compensation. Further limitations might be derived from the law against unfair competition and the general principles on the abuse of rights.

Appellations of Origin

The Draft Extension Law also contains a regime for the transformation of the special system of GDR law for the protection of appellations of origin which is part of the GDR Law on Distinctive Signs for Goods. According to that system, appellations of origin could be entered in a register kept by the Patent Office; the registration conferred a form of protection which was very similar to the rights conferred by a registered trademark in the sense of a truly exclusive right. The Unification Treaty has implicitly maintained those registrations and corresponding applications as they form part of industrial property rights. One hundred and twenty-nine appellations were so registered and 32 applications were pending on January 1, 1991. The federal law not containing a corresponding form of protection for appellations of origin or geographical indications, the general principle of automatic extension of existing rights from one part of Germany to the other was considered not to be appropriate in that case.

The Draft Extension Law provides that the said appellations of origin, while keeping their priority date, may be transformed into collective marks on request. A relatively generous time limit for such request—one year—is granted in view of present uncertainties concerning the entitlement to, and the ownership of, those registered appellations of origin and consequently the right to request conversion into a collective mark. Where the indications concerned were considered to be appellations of origin in the former GDR only, but not in the old territory of the Federal Republic of Germany, for the future the opinion and estimation of interested circles in the whole of Germany will be decisive. Finally, a right of further use is provided for in those cases where geographical indications were lawfully used in the old territory of the Federal Republic of Germany as generic notions. The time limit for such continuation of use is normally two years counted from the entry

into force of the Extension Law and 10 years where the geographical indication concerned was used by persons who had moved from certain localities of the former GDR and had continued the use of the name of such localities in the old territory of the Federal Republic of Germany for the sake of maintaining long-standing traditions in a different environment.

Board of Conciliation

Like at the time when the Saarland was reintegrated into the Federal Republic of Germany (1957), the Draft Extension Law provides for the establishment of a Board of Conciliation at the German Patent Office. The Board will be responsible for cases of civil litigation which are caused by the coincidence of extended industrial property rights or such rights and rights of further or prior use. Its task is to find an amicable solution for the issues under litigation. It may be invoked at any time by any party to the litigation, in particular before a legal action actually has become pending before the competent court. It is to be underlined, however, that such invocation of the Board is not a prerequisite for the commencement of the legal action. The intention behind that solution is to give ample room for compromise settlements without limiting the freedom of the parties concerned; it is meant to offer the parties to the litigation a procedure for a settlement of their conflict which should be as simple, effective and inexpensive as possible. The Board will be composed of a chairman, his deputy and two assessors; the Chairman and his deputy must have the full legal qualification to act as a judge and have experience in the field of industrial property. The other members of the Board may be selected from a pre-

established list or may be appointed by the parties to the proceedings.

Invocation of the Board requires a written request. The procedure of the Board is, to a certain extent, governed by the provisions of the Code of Civil Procedure for boards of arbitration. For the rest, the Board may establish its own rules of procedure; it may present a written proposal for a settlement to the parties which may be published only with the express consent of the parties and, therefore, in principle has to be treated as a confidential document. The Board may also conclude and certify settlements which may serve as a basis for enforcement, as in the case of a judgment rendered by a court of law.

Among other provisions, the Draft Extension Law also contains an amendment to the Trademark Law (DE) stating that the right conferred by an application for registration or a registration of a mark may be transferred independently of a transferral or transition of the enterprise. This in fact also means to preempt the future reform of the Trademark Law in view of the necessity to implement the EC Directive on the Approximation of Trademark Law which is due by the end of 1992, at the latest.

The Law on the Extension of Industrial Property Rights certainly will be considered a major event in the history of industrial property protection in Germany. However, it should also be considered as an essential contribution to the general trends prevailing in other Central and Eastern European countries to be characterized by the establishment of free democracy, the rule of law and of fundamental rights and freedoms of the individual, in particular his right to private ownership. Those trends will have an important impact on projects of regional and international harmonization of industrial property laws throughout Europe and on a worldwide scale.

News Items

ARGENTINA

Director of Technology, Quality and Industrial Property

We have been informed that Dr. Norma Félix de Sturla has been appointed Director of Technology, Quality and Industrial Property.

PAKISTAN

Controller, Patent Office

We have been informed that Mrs. Yasmeen Abbasi has been appointed Controller of the Patent Office.

SURINAME

Director, Bureau for Industrial Property

We have been informed that Mr. C.G. De Randamie has been appointed Director of the Bureau for Industrial Property.

Calendar of Meetings

WIPO Meetings

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

1992

February 10 to 18 (Geneva)

Committee of Experts on a Possible Protocol to the Berne Convention (Second Session)

The Committee will continue to examine whether the preparation of a protocol to the Berne Convention for the Protection of Literary and Artistic Works should start, and—if so—with what content.

Invitations: States members of the Berne Union, the Commission of the European Communities and, as observers, States members of WIPO not members of the Berne Union and certain organizations.

March 30 to April 3 (Geneva)

WIPO-IFIA Symposium on "Support to Inventors"

This Symposium, which is the fifth symposium organized jointly by WIPO and the International Federation of Inventors' Associations (IFIA) since 1984 on questions of topical interest to inventors, will examine the assistance and services offered to inventors (both individual and corporate) by industrial property offices, innovation centers and universities.

Invitations: States members of WIPO, inventors' associations and certain organizations (R&D institutions, innovation centers). The Symposium will be open to the public.

April 27 to 30 (Geneva)

N.B. New Dates

Committee of Experts on the Development of the Hague Agreement (Second Session)

The Committee will continue to consider possibilities for revising the Hague Agreement Concerning the International Deposit of Industrial Designs, or adding to it a protocol, in order to introduce in the Hague system provisions intended to encourage States not yet party to the Hague Agreement to adhere to it and to make it easier for applicants to use the system.

Invitations: States members of the Hague Union and, as observers, States members of the Paris Union not members of the Hague Union and certain organizations.

May 25 to 27 (Geneva)

Meeting of Non-Governmental Organizations on Arbitration and Other Mechanisms for the Resolution of Intellectual Property Disputes Between Private Parties

The Meeting will consider the desirability of establishing within WIPO a mechanism to provide services for the resolution of disputes between private parties concerning intellectual property rights, as well as the type of services that might be provided under such a mechanism.

Invitations: International non-governmental organizations having observer status with WIPO.

June 1 to 5 (Geneva)

N.B. New Dates

Committee of Experts on the Harmonization of Laws for the Protection of Marks (Third Session)

The Committee will continue to examine a draft trademark law treaty with particular emphasis on the harmonization of formalities with respect to trademark registration procedures.

Invitations: States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

June 15 to 19 (Geneva)

N.B. New Dates

Committee of Experts on a Model Law on the Protection of the Intellectual Property Rights of Producers of Sound Recordings

The Committee will consider a draft Model Law dealing with the protection of the rights of producers of sound recordings, which could be used by legislators at the national or regional levels.

Invitations: States members of the Berne Union or WIPO, or party to the Rome Convention or the Phonograms Convention, and, as observers, certain organizations.

September 21 to 29 (Geneva)

Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-Third Series of Meetings)

Some of the Governing Bodies will meet in ordinary session, others in extraordinary session.

Invitations: As members or observers (depending on the body), States members of WIPO or the Unions and, as observers, other States and certain organizations.

October 12 to 16 (Geneva)

Working Group on the Application of the Madrid Protocol of 1989 (Fifth Session)

The Working Group will continue to review joint Regulations for the implementation of the Madrid Agreement Concerning the International Registration of Marks and of the Madrid Protocol, as well as draft forms to be established under those Regulations.

Invitations: States members of the Madrid Union, States having signed or acceded to the Protocol, the European Communities and, as observers, other States members of the Paris Union expressing their interest in participating in the Working Group in such capacity and certain non-governmental organizations.

November 2 to 6 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights (Tenth Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Copyright and Neighboring Rights since the Committee's last session (April 1991) and make recommendations on the future orientation of the said Program.

Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 9 to 13 (Geneva)

WIPO Permanent Committee for Development Cooperation Related to Industrial Property (Fifteenth Session)

The Committee will review and evaluate the activities carried out under the WIPO Permanent Program for Development Cooperation Related to Industrial Property since the Committee's last session (July 1991) and make recommendations on the future orientation of the said Program.

Invitations: States members of the Committee and, as observers, States members of the United Nations not members of the Committee and certain organizations.

November 23 to 27 (Geneva)

Committee of Experts on a Possible Protocol to the Berne Convention (Third Session)

The Committee will continue to examine the question of the preparation of a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works.

Invitations: States members of the Berne Union, the Commission of the European Communities and, as observers, States members of WIPO not members of the Berne Union and certain organizations.

UPOV Meetings

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

1992

April 8 and 9 (Geneva)

Administrative and Legal Committee

Invitations: Member States of UPOV and, as observers, certain non-member States and inter-governmental organizations.

October 26 and 27 (Geneva)

Administrative and Legal Committee

Invitations: Member States of UPOV and, as observers, certain non-member States and inter-governmental organizations.

October 28 (Geneva)

Consultative Committee (Forty-Fifth Session)

Invitations: Member States of UPOV.

October 29 (Geneva)

Council (Twenty-Sixth Ordinary Session)

Invitations: Member States of UPOV and, as observers, certain non-member States and inter-governmental and non-governmental organizations.

October 30 (Geneva)

Meeting with International Organizations

Invitations: International non-governmental organizations, member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.

Other Meetings Concerned with Industrial Property

1992

March 16 to 20 (Innsbruck-Igls)	International Federation of Industrial Property Attorneys (FICPI): Executive Committee
May 11 to 15 (Marrakesh)	International Chamber of Commerce (ICC): Conference on "Development Dimensions in the '90s"
October 7 to 10 (Amsterdam)	International League of Competition Law (LIDC): Congress