Institut der beim Europäischen Patentamt zugelassenen Vertreter

Institute of Professional Representatives before the European Patent Office

Institut des mandataires agréés près l'Office européen des brevets
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In the past we have had Summer musings from Spain, from an erstwhile Editor. Your present Editorial Board seems chained to their desks rather than a deck-chair, but nevertheless are as prone to musing as anyone. Summer musings often lead to a contemplation of renewal (of the vocational kind) but it is but a short jump to patent renewals? Perhaps the sun has proved too strong, however, the debate on the cost of patenting in Europe seems to continue unabated - see the letter in this issue from our President to the Chairman of the Administrative Council.

Our musings make us wonder whether, despite the famous 50% "key" on renewal fees, renewal revenue to the EPO will not increase dramatically in the next few years. This is because of a number of applications in the pipe-line which will eventually mature into patents and, as they progress towards full term, give birth to generous income - all of which could help to keep application fees static, if not reduced?

Jean Brullé · Joachim Herzog · Terry Johnson
Das Wahlverfahren für die nächsten Wahlen zum EPI-Rat läuft in den ersten beiden Oktoberwochen mit dem Versand der Vorbereitungsunterlagen an. Sie betreffen die Kandidatenkennzeichnung und die Annahmeerklärung für den Fall, daß ein Kandidat gewählt wird.

Eine zweite Unterlage kommt Ende Dezember zum Versand. Sie enthält vor allem die Stimmzettel und die Erklärung, daß der Stimmzettel eigenhändig ausgefüllt wurde.

Alle Unterlagen sind überarbeitet worden, was das Ausfüllen erleichtern sollte.


Zur Information unserer Leser drucken wir die Regeln für die Wahlen zum Rat nachstehend ab.

The forthcoming EPI Council election procedure will start during the first two weeks of October with the mailing of the preparatory document concerning the nomination of candidates and the declaration of acceptance of a possible election.

Another document will be mailed at the end of December. It mainly contains the ballot paper and the declaration that the ballot paper has been completed personally.

All documents have been revised which should facilitate their completion.

The election results will be published in EPI Information 1/1995 which will be mailed not later than 15 March 1995.

For the information of our readers we publish the Rules for Election of Council hereafter.


Un autre document sera envoyé à la fin du mois de décembre. Il contient principalement le bulletin de vote et la déclaration que le bulletin de vote a été rempli personnellement.

Tous les documents ont été revus ce qui devrait les rendre plus faciles à remplir.

Les résultats des élections seront publiés dans EPI Information 1/1995 qui sera envoyé le 15 mars 1995 au plus tard.

Pour l’information de nos lecteurs nous publions ci-après les règles pour les élections au Conseil.
Regeln für Wahlen zum Rat

Regel 1: Wahlen

Die Wahlen zum Rat des Instituts der zugelassenen Vertreter werden gemäß den Vorschriften über die Errichtung des Instituts, wie sie im Amstblatt des Europäischen Patentamtes, Jahrgang 1, Ausgabe 2/1978, veröffentlicht sind, und in der nachstehend festgelegten Weise von diesem Institut durchgeführt.

Regel 2: Wähler

2.1 Alle Personen, die in der beim Europäischen Patentamt vorliegenden Liste der zugelassenen Vertreter bei Geschäftsschluß des EPA München am letzten Arbeitstag im September desjenigen Jahres eingetragen sind, das dem Jahr vorangeht, in welchem der nachfolgende Rat sein Amt antritt (»Vorjahr der Wahl«), haben das Recht, bei den nächsten normalen Wahlen zu wählen und gewählt zu werden; andere Personen sind nicht wahlberechtigt.

2.2 Die Anzahl der Institutsmitglieder, die bei Geschäfts schluß des EPA München am letzten Arbeitstag im September des Vorjahres der Wahl in der Liste der zugelassenen Vertreter eingetragen sind, ist für die Festlegung der Anzahl der aus jedem Wahlbezirk zu wählenden Ratsmitglieder maßgebend.

Rules for Election of Council

Rule 1: Elections

Elections to the Council of the Institute of Professional Representatives are carried out by this Institute, in accordance with the Regulation on the Establishment of the Institute published in the Official Journal of the European Patent Office, Year 1, Issue Number 2/1978, and in the manner laid down below.

Rule 2: Electors

2.1 All persons entered in the list of Professional Representatives held by the European Patent Office at the closing time of the EPO Munich on the last working day of September of the year preceding the one in which the succeeding Council will take office (»pre-election year«) shall be electors having the right to vote and to be elected in the next normal election for this succeeding Council, and no other persons.

2.2 The number of members of the Institute entered in the list of Professional Representatives at the closing time of the EPO Munich on the last working day of September of the pre-election year shall be decisive for determining the number of delegates to be elected from each constituency.

Regles pour les Elections au Conseil

Règle 1: Elections


Règle 2: Electeurs

2.1 Toute personne qui est inscrite sur la liste des Mandataires Agréés, tenue par l'Office Européen des Brevets, à l'heure de fermeture de l'OEB à Munich, le dernier jour ouvrable du mois de septembre de l'année précédant celle au cours de laquelle le nouveau Conseil entrera en exercice (»année pré-électorale«), aura la qualité d'électeur ayant le droit de voter et d'être élu au cours des prochaines élections normales au nouveau Conseil, et ce à l'exclusion de toute autre personne.

2.2 Le nombre des membres à l'Institut inscrits sur la liste des Mandataires Agréés à l'heure de fermeture de l'OEB à Munich, le dernier jour ouvrable du mois de septembre de l'année pré-électorale sera décisive pour fixer le nombre de délégués qui seront élus dans chaque circonscription.
Regel 3: Wahldurchführung

3.1 Jeder Wahlbezirk, dessen Wahlerschaft in der direkt vorausgegangenen normalen Wahl zum Rat einheitlich oder nicht-einheitlich gewählt hat, wird in der gleichen Weise wie zum vorhergehenden Rat wählen, es sei denn, ein Wahlbezirk hat vor dem 1. Oktober des Vorjahres der Wahl dem Institut gegenüber erklärt, daß er sich nach der in Artikel 7, Absatz 6 der obengenannten Vorschriften niedergelegten Weise dafür ausgesprochen habe, anders zu wählen.

3.2 Jeder Wahlbezirk, der während der laufenden Amtszeit des Rates geschaffen wurde, wird gemäß Artikel 7, Absatz 4 und 5 der genannten Vorschriften in der Weise wählen, die bei seiner Schaffung zutreffend war, es sei denn, er hat vor dem 1. Oktober des Vorjahres der Wahl dem Institut gegenüber erklärt, daß er sich nach der in Artikel 7, Absatz 6 der obengenannten Vorschriften niedergelegten Weise dafür ausgesprochen habe, die andere Art der Wahl anzuwenden.

3.3 In jedem Wahlbezirk, der zwischen dem 1. Oktober des Vorjahres der Wahl und dem 1. April des folgenden Jahres (»Wahl-jahr«) geschaffen wurde, wird das Institut so bald wie möglich eine Zusatzwahl durchführen. Die Amtszeit der so gewählten Personen läuft zur selben Zeit wie die des Rates ab, zu dem sie gewählt wurden. Die Regeln zur Durchführung der Zusatzwahl werden soweit wie möglich die gleichen sein wie solche zu normalen Ratswahlen; soweit solche Regeln nicht anwendbar sind, werden vom Vorstand des Instituts geeignete Regeln aufgestellt werden.

Rule 3: Voting

3.1 Every constituency which voted unitarily or non-unitarily in the immediately preceding normal election to the Council and not having indicated before 1 October of pre-election year to the Institute that it has decided, in the manner envisaged by Article 7, paragraph 6, of the above-mentioned Regulation, to vote otherwise, will vote in the same manner in the election of the succeeding Council.

3.2 Every constituency created during the current term of office of the Council and not having indicated before 1 October of pre-election year to the Institute that it has decided, in the manner envisaged by Article 7, paragraph 6, of the above-mentioned Regulation, to adopt the other manner of voting, will vote in the manner that was appropriate at its creation, pursuant to Article 7, paragraphs 4 and 5, of that Regulation.

3.3 In every constituency created between 1 October of pre-election year and 1 April of the year thereafter (»Election Year«), the Institute shall as soon as possible carry out an additional election. The term of office of those so elected shall expire at the same time as that of the Council to which they were elected. The rules governing the additional election will as far as possible be the same as those governing normal election of the Council and where those rules are not applicable rules will be set by the Board of the Institute.

Règle 3: Vote

3.1 Toute circonscription ayant voté suivant le système à collège unique ou à double collège lors des élections normales immédiatement précédentes au Conseil et n'ayant pas indiqué à l'Institut avant le 1er octobre de l'année pré-électorale que, en vertu de l'article 7, paragraphe 6 du Règlement précité, elle a décidé de voter suivant l'autre système, devra voter suivant le précédent système aux élections du nouveau Conseil.

3.2 Toute circonscription créée pendant la durée de l'exercice du Conseil élu lors des élections normales immédiatement précédentes et n'ayant pas indiqué à l'Institut avant le 1er octobre de l'année pré-électorale que, en vertu de l'article 7, paragraphe 6 du Règlement précité, elle a décidé d'adopter l'autre système, devra voter suivant le système applicable à la date de sa création en vertu de l'article 7, paragraphes 4 et 5, dudit Règlement.

3.3 Dans toute circonscription créée entre le 1er octobre de l'année pré-électorale et le 1er avril de l'année suivante («année des élections»), l'Institut devra organiser dans les meilleurs délais des élections complémentaires. Le mandat des personnes ainsi élues expirera en même temps que celui du Conseil auquel elles ont été élues. Les Règles régissant les élections complémentaires seront, dans toute la mesure du possible, identiques à celles en vigueur pour les élections normales du Conseil, tandis que dans les cas où ces Règles ne seront pas applicables, le Bureau de l'Institut fixera des Règles à cet effet.
Regel 4: Erklärung: Allgemein

4.1 So bald wie möglich nach dem 1. Oktober und spätestens am 15. Oktober des Vorjahres der Wahl wird das Institut jedem Wähler an seine Adresse gemäß der in Regel 2 genannten Liste eine Erklärung übersenden, worin er ersucht wird, seinen Namen, Wahlbezirk und Geschäftssitz oder Arbeitsplatz anzugeben oder derartige Informationen zu überprüfen und gegebenenfalls zu berichtigen, falls sie bereits vom Institut auf dem Erklärungsformular vermerkt worden sind.

4.2 Die Erklärung gemäß Regel 4.1 enthält Teile A und B (vgl. die Regeln 5 und 6).

4.3 Die ausgefüllte Erklärung kann dem Generalsekretariat mittels Telefax zugesandt werden.

Rule 4: Declaration: General

4.1 As soon as possible after 1 October and not later than 15 October of pre-election year, the Institute will send to each elector at his address as in the list referred to in Rule 2 a declaration in which he is requested to state his name, constituency and place of business or employment or to check and eventually correct such information if already indicated on the declaration form by the Institute.

4.2 The declaration referred to in Rule 4.1, shall include parts A and B (Rules 5 and 6 refer).

4.3 The completed declaration may be returned to the General Secretariat by telefax.

Règle 4: Déclaration: Généralités

4.1 Dès que possible, après le 1er octobre de l’année précédente de l’élection, les électeurs recevront de l’institut une déclaration sur laquelle l’électeur sera prié d’indiquer son nom, sa circonscription et son domicile professionnel ou lieu d’emploi, ou de vérifier et de corriger éventuellement ces informations si elles sont déjà indiquées sur la fiche de déclaration de l’Institut.

4.2 La déclaration mentionnée à la Règle 4.1 comprendra des parties A et B (voir Règles 5 et 6).

4.3 La déclaration remplie peut être retournée au Secrétariat Général par télecopie.
### Regel 5: Erklärung: Teil A

5.1 Teil A der Erklärung ist auszufüllen, wenn der Wähler sich selbst und/oder einen oder mehrere andere zugelassene Vertreter, die genau mit Name und Geschäftssitz oder Arbeitsplatz anzugeben sind, als Kandidaten vorschlagen möchte.


5.3 Ein Wähler darf nicht mehr als sechzehn Kandidaten vorschlagen. Wenn ein Wähler mehr als sechzehn Kandidaten vorschlägt, werden die über sechzehn hinaus aufgeführten Personen nicht berücksichtigt. Die Gültigkeit des VorschLAGS der ersten sechzehn Kandidaten bleibt unberührt.


### Rule 5: Declaration: Part A

5.1 Part A of the declaration is to be duly completed if an elector wishes to nominate himself and/or one or more other professional representatives, duly identified by name and place of business or employment, as a candidate or candidates.

5.2 It is permissible for an elector to nominate himself or any other elector as a candidate for his own unitary constituency or for his own group of a non-unitary constituency but it is not permissible for an elector to nominate candidates for any constituency or group other than his own.

5.3 It is not permissible for an elector to nominate more than sixteen candidates. If an elector nominates more than sixteen candidates no account will be taken of those listed in excess of sixteen, without prejudice to the validity of the nomination of the first sixteen candidates.

5.4 An elector will forfeit his right to nominate candidates for election if his signed and dated declaration or a photocopy thereof with Part A duly completed is not in the hands of the Institute by 20 November of pre-election year at the latest. In the event of a dispute the date on the receiving stamp of the Institute will prevail.

### Règle 5: Déclaration: Partie A

5.1 La partie A de la déclaration doit être dûment remplie si l'électeur désire se proposer lui-même comme candidat et/ou proposer à cet effet un ou plusieurs autres Mandataires Agréés dûment identifiés par leur nom et leur domicile professionnel ou lieu d'emploi.

5.2 Il est permis à un électeur de se proposer lui-même ou de proposer tout autre électeur, comme candidat pour sa propre circonscription si celle-ci est à collège unique, ou son propre collège si la circonscription est à double collège, mais il ne lui est pas permis de proposer des candidats pour une autre circonscription ou un autre collège que le sien.

5.3 Il n'est pas permis à un électeur de proposer plus de seize candidats. Si un électeur propose plus de seize candidats, il ne sera pas tenu compte de ceux inscrits au-delà de seize, sans pour cela porter préjudice à la validité des propositions concernant les seize premiers inscrits.

5.4 Un électeur perdra le droit de proposer des candidats aux élections si l'Institut n'est pas en possession, au plus tard le 20 novembre de l'année précédant les élections, de sa déclaration datée et signée, ou d'une photocopie de celle-ci, la partie A de cette déclaration étant dûment remplie. En cas de contestation, la date du cachet d'arrivée de l'Institut fera foi.
Regel 6: Erklärung: Teil B

6.1 Teil B der Erklärung ist auszufüllen, wenn ein Kandidat seine Wahl annehmen wird, und zwar entweder ausschließlich in seinem eigenen Wahlbezirk bzw. seiner eigenen oder aber in jedem Wahlbezirk bzw. jeder Gruppe, und entweder als ordentliches oder als stellvertretendes Mitglied oder nur als stellvertretendes Mitglied.


Rule 6: Declaration: Part B

6.1 Part B of the declaration is to be duly completed if an elector will accept election, in his own constituency or group exclusively, or alternatively in all constituencies or groups and either as representative or substitute or alternatively only as substitute.

6.2 A candidate who has been nominated forfeits his right to be put forward for election if his signed and dated declaration or a photocopy thereof in which he has clearly indicated which of the alternatives mentioned in Rule 6.1 apply to him, is not in the hands of the Institute by 20 November of pre-election year at the latest. In the event of a dispute the date on the receiving stamp of the Institute will prevail.

Regel 7: Kandidaten

7.1 Alle Kandidaten, die ordnungsgemäß vorgeschlagen worden sind und deren Einverständniserklärungen dem Institut bis zum Ablauf der Frist vorliegen, werden zur Wahl gestellt.

Rule 7: Candidates

7.1 All candidates who have been duly nominated and for whom the declaration of acceptance of election has been received by the Institute before expiry of the deadline will be put forward for election.

Règle 6: Déclaration: Partie B

6.1 La partie B de la déclaration doit être dûment remplie si l'électeur accepte d'être élu, et ceci que ce soit seulement dans sa propre circonscription ou son propre collège, ou dans n'importe quelle circonscription ou n'importe quel collège, et cela, soit indifféremment en tant que représentant titulaire ou suppléant, soit uniquement en tant que suppléant.

6.2 Un candidat qui a été proposé perd son droit d'être présenté aux élections si sa déclaration datée et signée, ou une photocopie de celle-ci ne parvient pas à l'institut au plus tard le 20 novembre de l'année préélectorale, en y ayant indiqué clairement quels termes des alternatives mentionnées à la Règle 6.1 lui sont applicables. En cas de contestation, la date du cachet d'arrivée de l'institut fera foi.

Règle 7: Candidats

7.1 Tous les candidats régulièrement proposés et dont la déclaration d'acceptation d'élection aura été reçue par l'institut avant l'expiration du délai de forclusion seront présentés aux élections.
7.2 If the number of candidates for becoming representatives or substitutes, as the case may be, has been inferior to that prescribed for a constituency or a group, the Institute shall - upon demand of at least one representative of the Council for which this election was held who belongs to this constituency or group or upon demand of this Council's Board - carry out a supplementary election. The term of office of those so elected shall expire at the same time as that of the Council to which they were elected. The rules governing that supplementary election will as far as possible be the same as those governing normal elections of the Council and where those rules are not applicable rules will be set by the Board of the Institute.

7.2 Si le nombre des candidats à élire en tant que représentants titulaires ou suppléants est inférieur au nombre prescrit pour la circonscription à collège unique ou pour le groupe de la circonscription à double collège, l'Institut procédera, sur présentation d'une motion, à une élection complémentaire. Tout membre titulaire régulièrement élu et faisant partie de la circonscription ou du collège concerné de même que le Bureau de ce Conseil sont autorisés à proposer une motion. La durée du mandat des personnes ainsi éluées expirera au même moment que celui du Conseil auquel elles ont été élues. Les Règles régissant ces élections complémentaires seront, dans toute la mesure du possible, identiques à celles des élections normales du Conseil, tandis que, dans les cas où ces Règles ne seront pas applicables, le Bureau de l'Institut fixera des Règles à cet effet.
Regel 8: Stimmzettel


8.2 In jedem einheitlichen Wahlbezirk erhält jeder Wähler einen einzigen, für diesen Wahlbezirk gültigen Stimmzettel. In jedem nicht-einheitlichen Wahlbezirk erhält jeder Wähler zwei Stimmzettel, die je für eine der zwei Gruppen dieses Wahlbezirkes gültig sind und von denen er nur den für seine eigene Gruppe auszufüllen hat.

Rule 8: Ballot Papers

8.1 The election of the Council of the Institute is carried out by post or deposit. The ballot papers will be posted to the electors by the Institute by 31 December of the pre-Election year at the latest. Each ballot paper will identify the unitary constituency or the group of a non-unitary constituency to which it applies and will state the total number of representatives and substitutes taken together for whom the electors in that constituency or group are entitled to vote. It will identify all candidates put forward for that constituency or group and will indicate for each candidate whether he is a representative or a substitute in the current Council, and also whether he accepts election as either a representative or a substitute or only as a substitute.

8.2 In each unitary constituency each elector will receive a single ballot paper applicable to that constituency. In each non-unitary constituency each elector will receive two ballot papers applicable respectively to the two groups of that constituency, of which he will complete only the one applicable to his own group.

Règle 8: Bulletins de vote

8.1 Les élections au Conseil de l'Institut s'effectuent par correspondance postale ou dépôt direct. Au plus tard le 31 décembre de l'année précédant les élections, l'Institut adresse les bulletins de vote par voie postale aux électeurs. Chaque bulletin porte l'indication de la circonscription à collège unique ou du collège d'une circonscription à double collège pour lequel il est valable et du nombre total de l'ensemble des représentants titulaires et des suppléants pour lesquels les électeurs de cette circonscription ou de ce collège sont habilités à voter. Il indiquera en outre l'identité de tous les candidats présentés dans cette circonscription ou ce collège et, pour chacun d'eux, s'il est représentant titulaire ou représentant suppléant au Conseil précédent et s'il accepte d'être élu soit indifféremment en tant que représentant titulaire ou suppléant, soit uniquement en tant que suppléant.

8.2 Dans chaque circonscription à collège unique, chaque électeur recevra un seul bulletin de vote valable pour cette circonscription. Dans chaque circonscription à double collège, chaque électeur recevra deux bulletins de vote valables respectivement pour chacun des collèges de cette circonscription, et il ne devra remplir que le bulletin valable pour son propre collège.

Jeder Wähler erhält ferner mit jedem Stimmzettel zu dessen Rücksendung einen Umschlag, der die Identität des versendenden Wählers nicht erkennen läßt. Die zwei Umschläge, die ein Wähler in einem nicht-einheitlichen Wahlbezirk erhält, unterscheiden sich deutlich von einander und sind klar erkennbar zur Rücksendung des Stimmzettels jeweils nur einer Gruppe dieses Wahlbezirks bestimmt.

8.3 In addition each elector will receive with the ballot paper or papers a form for the elector to declare that he himself has completed his ballot paper and furthermore, where the elector's constituency is a non-unitary one (Article 7, paragraph 4, second possibility, and paragraph 7 of the Regulation referred to above) to declare that he is returning only the ballot paper applicable to his own group and indicating whether he is engaged in private practice or in any other capacity. If an elector is employed by one or more persons who themselves are engaged in private practice he is regarded as being in private practice himself. An elector is permitted to indicate only one field in practice. If he is engaged both in private practice and in another capacity he must indicate only the predominating one.

Each elector will also receive with each ballot paper an envelope for returning that ballot paper, suitable for concealing the returning elector's identity. The two envelopes received by an elector in a non-unitary constituency will be clearly distinguishable and each of them will be clearly intended for returning the ballot paper applicable to only one of the groups of that constituency.

8.3 En outre, chaque électeur recevra avec le ou les bulletins de vote, un formulaire lui permettant de déclarer qu'il a rempli lui-même son bulletin de vote et, en outre, si sa circonscription est une circonscription à double collège (Article 7, paragraphe 4, deuxième éventualité, et paragraphe 7 du Règlement précité) qu'il ne retourne que le bulletin de vote utilisable dans son propre collège, en indiquant s'il exerce son activité au titre de la profession libérale ou à tout autre titre. Si l'électeur est employé par une ou plusieurs personnes exerçant elle(s)-même(s) dans le cadre de la profession libérale, il est également censé exercer lui-même dans ce cadre. L'électeur n'est autorisé à indiquer qu'un seul titre d'exercice. S'il exerce à la fois dans le cadre de la profession libérale et à un autre titre, il ne doit indiquer que le titre prépondérant.

Finalement, chaque électeur recevra avec chaque bulletin de vote une enveloppe permettant de remettre le bulletin sans trahir l'identité de l'électeur. Les deux enveloppes reçues par un électeur appartenant à une circonscription à double collège devront se distinguer clairement et chaque devra clairement porter l'indication du fait qu'elle est destinée à remettre le bulletin de vote qui n'est utilisable que pour un collège de cette circonscription.
8.4 Ist der Wahlbezirk eines Wählers nicht-einheitlich, so wird seine Stimme nur gezählt, wenn er in seinem in Regel 8.3 genannten Vordruck angegeben hat, ob er freiberuflich oder anderweitig tätig ist, und wenn der Umenschlag, in dem er seinen Stimmzettel zurückgesandt hat, der gemäß Regel 8.3, zweiter Absatz für seine Gruppe zutreffende ist.

8.5 Der in Regel 8.3 genannte, ausgefüllte, datierte und unterschriebene Vordruck oder eine Kopie davon (vorausgesetzt, die Kopie trägt die Originalunterschrift des Wählers) und der ausgefüllte Stimmzettel müssen dem Institut spätestens am 31. Januar des Wahljahres vorliegen. Stimmzettel, die beim Institut nach diesem Datum eingehen, werden nicht gezählt. In Zweifelsfällen entscheidet der Eingangsstempel des Institutes.

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**Regel 9: Anzahl der Stimmen**

Kein Wähler darf auf seinem Stimmzettel mehr Kandidaten ankreuzen als er insgesamt ordentliche und stellvertretende Mitglieder des Rates wählen kann (Artikel 7, Absatz 1, 3, 4 und 5 der in Regel 1 genannten Vorschriften).

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**Rule 9: Number of votes**

No elector may put his mark on his ballot paper against a number of candidates exceeding the total number of representatives and substitutes taken together for whom he is permitted to vote (Article 7, paragraphs 1, 3, 4 and 5 of the Regulation mentioned in Rule 1).

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**Règle 9: Nombre de voix**

Aucun électeur n'a le droit de cocher sur son bulletin de vote un nombre de candidats supérieur au nombre total des représentants titulaires et des suppléants pris dans leur ensemble pour lequel il est autorisé à voter (Article 7, paragraphes 1, 3, 4 et 5 du Règlement mentionné sous la Règle 1).
Regel 10: Mängel der Stimmzettel

10.1 Ungültig sind alle Stimmzettel, auf denen eine größere als die zulässige Zahl von Namen angekreuzt ist oder die so verändert sind, daß der Will des Wählers nicht eindeutig erkennbar ist oder auf denen Namen hinzugefügt wurden, oder die sich (im Fall eines nicht einheitlichen Wahlbezirks) in den falschen Umschlägen befinden oder denen nicht der ausgefüllte, unterschriebene und datierte Vordruck gemäß Regel 8.3 oder eine Kopie davon mit Originalunterschrift beigefügt ist.

10.2 Kreuzt ein Wähler auf seinem Stimmzettel einen bestimmten Kandidaten mehr als einmal an, so werden zusätzliche Ankreuzungen nicht berücksichtigt; die Gültigkeit des Stimmzettels bleibt unbeachtet.

Rule 10: Ballot Deficiencies

10.1 Ballot papers on which are marked a number of names greater than is permitted, or which are changed in such a way that the intention of the elector is not clear, or on which names are added, or which (in the case of a non-unitary constituency) are in the wrong envelopes, or which are not accompanied by the completed, signed and dated form referred to in Rule 8.3 above or a photocopy thereof on which the signature is original, are null and void.

10.2 If an elector puts on his ballot paper more than one mark against a given candidate, no account will be taken of the excess marks for that candidate without prejudice to the validity of the ballot paper.

Règle 10: Bulletins nuls

10.1 Sont considérés comme nuls et sans valeur, les bulletins de vote sur lesquels est coché un nombre de noms supérieur à celui qui est autorisé, ceux qui sont changés de telle manière que l'intention de l'électeur n'est pas claire, ceux sur lesquels des noms ont été ajoutés, ceux qui (dans une circonscription à double collège) sont placés dans la mauvaise enveloppe, ou ceux qui ne sont pas accompagnés du formulaire mentionné à la Règle 8.3 dûment rempli, signé et daté, ou d'une photocopie de celui-ci comportant une signature originale.

10.2 Si un électeur coche, sur son bulletin de vote, un candidat plus d'une fois, il ne sera pas tenu compte pour ce candidat des croix en excédent, sans préjudice pour la validité du bulletin de vote.

Regel 11: Gewählte Kandidaten

11.1 Die Anzahl der Stimmen, die auf die Kandidaten entfallen, und die Einverständniserklärungen der Kandidaten gemäß Regel 6.1 bestimmen, ob und in welcher Reihenfolge die Kandidaten als ordentliche oder stellvertretende Mitglieder des Rates gewählt sind.

Rule 11: Elected Candidates

11.1 The number of votes received by the candidates and the candidates' declarations of acceptance according to Rule 6.1 determine whether those candidates are elected either as representatives or as substitutes to the Council, and in what order.

Règle 11: Candidats élus

11.1 Le nombre des voix recueillies par les candidats et les déclarations d'acceptation des candidats selon la Règle 6.1 déterminent si ceux-ci sont élus au Conseil en tant que représentants titulaires ou en tant que suppléants et dans quel ordre.
11.2 Haben zwei oder mehr Kandidaten eine gleiche Stimmenzahl erhalten, können sie jedoch wegen Überschreitung der Gesamtzahl von Vertretern ihres Wahlbezirkes nicht mehr alle als ordentliche oder stellvertretende Mitglieder gewählt werden, so wird die Frage, wer gewählt ist, von der in der Regel 12 genannten Wahlkommission durch das Los entschieden.

11.2 If an equal number of votes is received by two or more candidates who, given the total number of representatives in their constituency or group, cannot all be elected either as representatives or as substitutes as the case may be, the question of which of them is or are to be elected will be decided by lots drawn by the Electoral Committee referred to in Rule 12 below.

11.3 Erhält ein Kandidat in zwei oder mehr einheitlichen Wahlbezirken und/oder Gruppen nicht-einheitlicher Wahlbezirke eine Stimmenzahl, die ausreicht, als ordentliches und/oder stellvertretendes Mitglied in jedem dieser Wahlbezirke oder jeder dieser Gruppen gewählt zu sein, so wird das Institut ihn so bald wie möglich hierüber informieren. Der Kandidat muß dann dem Institut umgehend mitteilen, in welchem Wahlbezirk oder in welcher Gruppe er ordentliches bzw. stellvertretendes werden möchte. Versäumt er dies, wird die Frage von der in der Regel 12 genannten Wahlkommission durch das Los entschieden.

11.3 If a candidate receives in two or more unitary constituencies and/or groups of non-unitary constituencies a number of votes sufficient for being elected, as a representative and/or as a substitute, in each of those constituencies or groups, the institute shall inform him as soon as possible, and he must then promptly advise the institute in which one he chooses to become a representative or a substitute, as the case may be, failing which the question will be decided by lots drawn by the Electoral Committee referred to in Rule 12 below.

11.3 Si un nombre égal de votes a été recueilli par deux ou plus de deux candidats qui, étant donné le nombre total de représentants de leur circonscription ou de leur collège ne peuvent pas tous être élus en tant que représentants titulaires ou, le cas échéant, en tant que représentants suppléants, un tirage au sort effectué par le Comité Electoral prévu à la Règle 12 ci-après, déterminera lequel ou lesquels d’entre eux sera ou seront élus.

11.3 Si un candidat recueille, dans deux ou plus de deux circonscriptions à collège unique et/ou collèges de circonscriptions à double collège, un nombre de voix suffisant pour être élu dans chacun de ces circonscriptions ou collèges, en tant que représentant titulaire et/ou suppléant, l’institut devra l’en informer dès que possible. Le candidat devra alors indiquer à bref délai à l’institut dans quel circonscription ou collège il choisit de devenir représentant titulaire ou, le cas échéant, suppléant, faute de quoi la question sera tranchée par tirage au sort effectué par le Comité Electoral prévu à la Règle 12 ci-après.
Regel 12: Wahlkommission

Rule 12: Electoral Committee
In good time before each normal election of the Council the President of the Institute will designate an Electoral Committee consisting of three professional representatives who do not stand for election. For this election and for any other election held before the next normal election of the Council they will supervise conformity with the applicable rules and the opening and counting of the votes, will decide in cases of doubt, will draw lots whenever required by these Rules, and will prepare a written report to the President on that election.

Règle 12: Comité Electoral
Le Président de l'Institut devra, en temps convenable avant chaque élection normale du Conseil, désigner un Comité Electoral constitué de trois Mandataires Agréés qui ne se présentent pas aux élections. Pour cette élection et pour toute autre élection ayant lieu avant l'élection normale suivante, ces Mandataires contrôleront le respect des Règles en vigueur et le dépouillement du scrutin, trancheront en cas de doute, effectueront les tirages au sort prévus par les présentes Règles et établiront, à l'intention du Président, un procès-verbal sur cette élection.

Regel 13: Wahlergebnisse
13.1 Das Ergebnis der Wahl wird vom Institut bis spätestens 15. März des Wahljahres an die Mitglieder des Instituts versandt. Diese Mitteilung enthält auch die Angabe der Stimmenzahl, die die Kandidaten erhalten habe.

Rule 13: Election results
13.1 The result of the election will be posted by the Institute to its members by 15 March of election year at the latest, indicating the number of votes received by all candidates.

Règle 13: Résultats du scrutin
13.1 Au plus tard le 15 mars de l'année électorale, l'Institut communiquera les résultats des élections à tous ses membres par voie postale, en indiquant le nombre de voix recueillies par tous les candidats.

13.2 Members of the Institute wishing to object against the election results must submit their written objection to reach the Institute at the latest by a date which for a normal election is 29 March of election year and for any other election will be set by the Board of the Institute. Any objections reaching the Institute after that date will not be taken into consideration. In the event of a dispute the date on the receiving stamp of the Institute will prevail. The President of the Institute shall promptly designate an Objections Committee consisting of three professional representatives who were not candidates in the election and who were not members of the Electoral Committee. The Objections Committee shall examine the objections in the manner laid down in accordance with the By-laws of Council. If the nature of the objections requires a supplementary or new election, the rules governing that election shall as far as possible be the same as those governing normal elections of the Council and where those rules are not applicable rules will be set by the Board of the Institute.

13.2 Les membres de l'institut désirant contestez les résultats d'une élection devront soumettre leurs objections par écrit à l'institut de manière qu'elles lui parviennent à une date ultime qui, pour des élections normales, sera le 29 mars de l'année électorale, et pour toute autre élection sera fixée par le Bureau de l'institut. Toute objection parvenant à l'institut après cette date ne sera pas prise en considération. En cas de contestation, la date du cachet d'arrivée de l'institut fera foi. Le Président de l'institut devra désigner dans les plus brefs délais une Commission des Contestations constituée de trois Mandataires Agrées qui n'ayent pas été candidats dans cette élection et n'ayant pas été membres du Comité Electoral. Ladite Commission devra traiter les contestations conformément aux dispositions du Règlement Intérieur du Conseil. Si la nature des objections exige une élection complémentaire ou de nouvelles élections, les Règles régissant ces élections seront, dans toute la mesure du possible, identiques à celles des élections normales du Conseil tandis que, dans les cas où ces Règles ne seront pas applicables, le Bureau de l'institut fixera des Règles à cet effet.
Regel 14: Ergänzung des Rats

Die Regeln für die Nachwahl, von ordentlichen oder stellvertretenden Ratsmitgliedern, die für den Rest der Amtszeit nachrücken, wie sie in der Geschäftsordnung des Rates niedergelegt sind, werden soweit wie möglich die gleichen sein wie solche zu normalen Ratswahlen; soweit solche Regeln nicht anwendbar sind, werden vom Vorstand des Instituts geeignete Regeln aufgestellt werden.

Regel 15: Nichteinhaltung von Fristen und Höhere Gewalt

15.1 Wenn ein Wähler für die Wahlkommission zufriedenstellend nachweisen kann, daß er ein Schriftstück gemäß diesen Richtlinien zumindest fünf Werktage vor Ablauf einer Frist für den Eingang dieses Schriftstückes auf dem besten normalen Postweg, der zur Verfügung steht, an das Institut abgesandt hat, so wird dieses Schriftstück nach Eingang beim Institut als fristgerecht eingegangen angesehen, wenn zur Zeit des Eingangs andere Umstände eine Berücksichtigung dieses Schriftstückes noch erlauben.

Rule 14: Supplemeting Council

The rules governing by-elections for permanent replacement of representatives or substitutes for the remainder of a Council term as laid down in the By-laws of Council will as far as possible be the same as those governing normal elections of the Council and where those rules are not applicable rules will be set by the Board of the Institute.

Rule 15: Violation of Deadlines and Force Majeure

15.1 If an elector can prove to the satisfaction of the Electoral Committee that he posted any paper referred to in these Rules to the Institute by the best normal postal service available at least five working days before a deadline for receipt of that paper, the paper shall, after receipt by the Institute, be deemed to have been received by the deadline if at that time of receipt other circumstances still permit account to be taken of that paper.

Règle 14: Remplacement permanent des membres du Conseil

Les Règles régissant les élections complémentaires qui concernent le remplacement permanent des membres titulaires ou suppléants du Conseil pour le restant de l'exercice, telles que fixées dans le Règlement Intérieur du Conseil, seront autant que possible les mêmes que celles qui régissent les élections normales du Conseil et, dans les cas où de telles Règles ne sont pas applicables, le Bureau de l'Institut fixera lui-même des Règles.

Règle 15: Dépassement de délais et cas de force majeure

15.1 Si un électeur peut prouver de façon convaincante au Comité Electoral qu'il a effectué l'envoi d'un document quelconque prescrit par les présentes Règles par courrier postal à l'adresse de l'Institut dans les meilleures conditions normales possibles, au moins cinq jours ouvrables avant la date limite de réception de ce document, ce dernier sera considéré à sa réception par l'Institut comme ayant été reçu dans le délai fixé, si lors de sa réception aucune autre circonstance ne s'oppose à ce que l'on en tienne compte.
15.2 Wenn die fristgerechte Erfüllung irgendeiner Bestimmung dieser Richtlinien nach Meinung der Wahlkommission durch außerhalb der Macht des Wählers gelegene Umstände unmöglich wird, so kann die Wahlkommission anordnen, daß die Erfüllung zu einem anderen Termin angenommen werden wird.

15.2 If the compliance with any provision of these Rules by the date set is, in the opinion of the Electoral Committee, rendered impossible by circumstances outside the elector’s control the Electoral Committee may rule that compliance by another date will be accepted.

15.2 Si le Comité Electoral estime que des circonstances indépendantes de la volonté d’un électeur ont empêché ce dernier de respecter l’une quelconque des exigences des présentes Règles à une date fixée, il peut décider que le respect de cette exigence à une autre date devra être accepté.

EPO Procedural Fees
Letter from the EPI President, David Votier, to the Chairman of the Administrative Council, Mr. Per Lund Thoft

Dear Chairman,

The Council of the Institute brought into being in 1991, prompted largely by the EPO document »Horizon 2000«, a small group of four of its members to keep under review all aspects of the financial affairs and forward planning of the EPO having relevance for the level of fees. This small group was known initially as the EPO Fees Working Group but subsequently it has been upgraded and is now known as the Committee on EPO Finances.

It has been aided in its work by access, kindly facilitated by the EPO, to a wide range of papers, also by meetings with senior EPO officials which to date have taken place annually at the Committee’s request.

The stage has now been reached when my Council believes it would be right to draw the attention of the Administrative Council to the concern that not enough is being done to budget for zero increase, or even reduction, of the fee levels.

Despite the welcome decisions against increase in 1993, and again this year, there still stands the policy of an increase each year averaging 3%. Consequently, the decisions taken for 1993 and 1994 are described as »waivers« of an increase otherwise due.

My Council believes firmly that adherence, notwithstanding inflation, to a policy of increasing fees is wrong, the more so at a time when a substantial cumulative surplus is estimated running to more than DEM. 250M. (in terms of surplus on main budget) over the 5 year period to 1998. It should be the target, and would put a correct emphasis on proper objectives of the EPO, that fee levels should remain frozen indefinitely or that, whenever possible, they should be reduced.

Our Institute is naturally anxious that fee levels should not be higher than is absolutely necessary. It is for the benefit of the EPC system, dependent as it must be on its users, that this letter seeks to impress this anxiety on yourself and on the Administrative Council.

Yours sincerely,

S. D. VOTIER.
EPI-Stellungnahme zum Vorbenutzungsrecht in der Europäischen Gemeinschaft
Beitrag von F. A. Jenny,
EPI-Information 1993, 299 ff

R. Kockläuner (DE)


Die Ausführungen über die Grundlagen zur Anerkennung eines Vorbenutzungsrechts, die Beziehung zu dem Erfinder und der Erfindung und die geographischen Beschränkungen (Abschnitte 1 bis 3) teile ich vollkommen. Die Beispiele zu den Ausdehnungen und Beschränkungen der dem Vorbenutzer unter seinem Recht zugestandenen Handlungen bedürfen, sobald sie sich auf die Kategorien der Handlungsweisen beziehen, allerdings einiger Präzisierungen. So werden dort als Möglichkeit hingestellt:

- Importation may be extended to use or sale but not to manufacture (der Import kann auf den Gebrauch oder Verkauf, aber nicht auf die Herstellung beschränkt werden). Es ist durchaus der Fall denkbar, daß ein Produkt zum Gebrauch als Ausgangsmaterial für die Herstellung eines anderen Produkts importiert wird. Bei einem solchen Fall dürfte es nicht gerechtfertigt sein, das Vorbenutzungsrecht auch auf den Verkauf des importierten Produktes zu erstrecken. Dieser Sachlage würde auch dadurch Rechnung getragen, daß man vor »sale« die Worte - if it has been imported for sale, be extended to - einfügt. Bezüglich des Gebrauchs halte ich eine ähnliche Präzisierung für nicht notwendig; denn mit dem Kauf eines Produktes vor dem Prioritätstag hat der Käufer automatisch die Berechtigung zur Benutzung (Gebrauch) des Produktes erhalten.

Ob er gleichzeitig auch das Vorbenutzungsrecht für den Verkauf erworben hat, hängt eben davon ab, wie er mit dem gekauften Produkt verfahren ist.

Es heißt weiter:

- Manufacture may be extended to use and sale (even in another EC country) including export sales but, as a rule, not to importation from outside the EC. (Die Herstellung kann auf den Gebrauch und Verkauf (selbst in einem anderen EG-Land) einschließlich Exportverkäufe erstreckt werden, jedoch in der Regel nicht auf den Export aus Ländern außerhalb der EG).

- Auch hier ist sehr wohl denkbar, daß der Vorbenutzer das Produkt nur zum eigenen Gebrauch, z. B. als Vor- bzw. Zwischenprodukt in der Synthese eines anderen Stoffes hergestellt hat. Auch hier erscheint es nicht angemessen, ihm aus der vorherigen Herstellung nun ein Verkaufsrecht zuzubilligen. Auch in diesem Falle dürfte eine Ergänzung vor dem Wort »sale« analog der zuvor angegebenen Weise, also durch die Worte - if it has been manufactured for sale, be extended to - sacht gerecht sein. Bezüglich des Gebrauches gelten die gleichen Überlegungen wie zuvor; denn jemand, der das Produkt hergestellt hat, muß auch das Recht zum Gebrauch behalten, selbst dann, wenn es eigentlich zum Verkauf erzeugt hat, also zum Gebrauch durch Dritte. Das dritte Beispiel lautet:

- More prior preparation for sale extends to that but not to manufacture (die bloße frühere Herstellung zum Verkauf erstreckt sich auf diesen, aber nicht auf die Herstellung).


Bemerkungen zu dem vorstehenden Brief von
Dr. R. Kockläuner zur EPI-Stellungnahme zum Vorbenutzungsrecht in der Europäischen Gemeinschaft

Felix A. Jenny (CH)


Die folgenden Kommentare zu den einzelnen, von Herrn Kockläuner aufgeworfenen Fragen geben ausschließlich meine persönliche Meinung wieder.

Der Bemerkung von Herrn Kockläuner zum Satz »Importation may be extended to use or sale but not to manufacture« kann ich persönlich für den Spezialfall der Zwischenprodukte zustimmen, da ich zu einer möglichst engen Auslegung des Vorbenutzungsrechts neige. Für den Normalfall kann jedoch die Auffassung vertreten werden, daß bei jedem Import oder jeder Herstellung der Verkauf (insbesondere für den vorgesehenen Gebrauch) als wichtigstes Ziel im Vordergrund steht. Hier ging es jedoch vor allem darum, zu verhindern, daß jemand ein Vorbenutzungsrecht aufgrund des Imports eines Produktes erwirbt und nachher auf die Herstellung dieses Produktes umschlägt (vgl. auch die graphische Darstellung sechs Zeilen weiter unten).

Analoges gilt für das zweite Beispiel »Manufacture may be extended...«. Hier ging es vor allem darum, zu verhindern, daß jemand von der Herstellung eines geschützten Produktes auf dessen Import umstellt. Es muß immer vor Augen gehalten werden, daß das Vorbenutzungsrecht einen Schutz für in guthem Glauben vorgenommene Investitionen darstellt und keinen weiteren Schutz geben soll.


Die Übertragbarkeit des Vorbenutzungsrechts (insbesondere innerhalb eines Konzerns) wurde eingehend diskutiert. Das Papier widerspiegelt eine Meinung, die schließlich eine Mehrheit fand.

Dies gilt sinngemäß auch für das ganze Papier. Es kann deshalb in einem Einzelfall vorkommen, daß ein Detailaspekt fehlt, weil kein mehrheitsfähiger Vorschlag aus der Diskussion hervorging.

Was die Bemerkung zur EPI-Stellungnahme zu den Zwangslizenzen betrifft, stimme ich Herrn Kockläuner zu, daß es richtiger gewesen wäre, zu sagen: »Special attention has to be given to the compulsory licences of dependency, since...«. Dies würde klar auf den Abschnitt II. D. hinweisen, der von den Abhängigkeitslizenzen handelt, die hier gemeint sind.
Assessing Inventive Step in Examination and Opposition Proceedings in the EPO

G. Knesch (EPO)

1. Introduction
When the European Patent System was implemented in 1978, discussions had already taken place concerning the level of inventive step to be applied in the EPO. It was generally accepted that this level should correspond neither to the highest nor to the lowest level in Europe, but should be more or less in the middle. After a conference with patent experts from European industry and patent agents from the Contracting States in Munich in 1977 there was the opinion that this level would correspond to that applied by the German Patent Office and the German Patent Court. (Of course this does not mean that the EPO should simply adopt one particular national system; it is only the level of inventive step which was defined in this way."

It was then necessary to ensure that this goal is really achieved. Therefore the Boards of Appeal in the EPO have developed - in some of the very first decisions - a method for the assessment of inventive step which is now generally applied in examination and opposition proceedings as well as by the Boards of Appeal.

2. Definition of Inventive Step
The basis for all deliberations about inventive step is of course Article 56 of the EPC, first sentence, where it is defined that an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art.

Two important points have to be noted here:

a) There is no mention of anything which would be the basis for a requirement like »sufficiently inventive« or »high or low inventive level«; it is simply a question of yes or no.

b) The article clearly says that something is inventive if it is not obvious.

Nevertheless, a number of difficulties still remain to be solved, for example: what is the relevant prior art, who is the man skilled in the art who is to perform the assessment; the decision whether something is obvious or not is not necessarily less subjective than the decision »inventive or not«; and, finally, the question »is the invention obvious to a person skilled in the art?« is so general, that in most cases there could be no simple and straightforward answer which could be verified by another person. Such a general statement would be highly subjective and it would be very difficult to compare two different decisions on this point or to decide whether a judgement is correct or not.

Therefore it was advisable to develop an objective and transparent method for the assessment of inventive step, which is applied by all instances in the EPO - the method now known as the »Problem - Solution Approach«.

The basic consideration is that every invention is the solution to a technical problem. This is in fact what Rule 27 (1) c of the EPC states (and is widely accepted in literature and practice in many countries). The inventive step then corresponds to the step from the problem to the solution.

3. The structure of the problem-solution approach
The method has three basic elements or stages:

1) The prior art:
   - The most relevant prior art in that particular case has to be defined.
   - Then it has to be evaluated what are the differences between the subject-matter claimed and that most relevant prior art.

2) The objective Problem:
   - Now the objective problem has to be defined.
   - Furthermore it has to be clear that this problem is really solved by the invention as claimed.

3) Obvious or not?
   In the final stage, the following question has to be answered: Starting from the most relevant prior art, was it obvious to implement the differences identified in stage (1), in order to provide a solution to the objective problem (2)?

The principle of this approach was developed in decision T 24/81, OJ 1983, p. 133.

4. The prior art
a) The most relevant prior art is represented by a document or other evidence which relates to the same technical field as the invention or to a closely related technical area (T 254/86, OJ. 1989, p. 115). It is the hypothetical starting point of the inventor, the product, the process and so on, which he wants to improve or to develop further.

The problem or the properties which are relevant in this case must be the same or at least very similar in the application and in this prior art. An example will illustrate this point. An invention relates to a product with a certain structure and with certain properties. Two documents have been provided by the search: in the first one a very similar structure is disclosed, but with different properties; the second one shows a different structure, but with very similar properties. In such a case, the second document would normally
be considered as being the closest prior art.

It will now be understood why

this approach is called «problem-oriented», in contrast to a «structure-oriented» approach where the emphasis is on structural similarities or equivalencies.

It has to be emphasized that a

document which is most relevant

for assessing novelty under Article

54(2) is not necessarily the most

relevant prior art for assessing inventive step. It is not the highest number of common features which qualifies a document as the most relevant prior art; the crucial question is whether the man skilled in the art would really have chosen that document as the starting point.

If there are two or more documents which are equally relevant to the invention then it will normally be necessary to assess inventive step with respect to each of these.

b) The difference with respect to the closest prior art can be represented by additional features or by modified features or by the fact that features from the prior art are absent in the claimed subject-matter.

Normally these will be structural features, for example a chemical formula, the steps of a process, the layout of a printed circuit, the material and shape of a tool. If there is sufficient support in the description then also functional features may be used in a claim, for example «means for fastenings», «means for amplifying», a «Lewis acid» or «a stabilizer».

Two important consequences of

the concept «problem-solution»

have to be noted here:

- As the claims define the subject-matter for which protection is sought (Art. 84), only features contained in the claim can be taken into account when establishing the differences with respect to the prior art.

- As every invention is a solution to a problem (see above, chapter 2), features of a claim are disregarded if they do not contribute to the technical effect or the result of the invention.

5. The objective problem

The emphasis here is on the word «objective» (T 184/82, OJ. 1984, p. 2.25). It is not necessary that the inventor's subjective intention, his goal, which is relevant here. The problem has to be seen against the background of the most relevant prior art.

The Boards have given a definition for the problem. The problem results from an objective analysis of the differences or of the surplus of the results of the invention (the effects) with respect to the most relevant prior art.

Therefore the problem must be derivable from this state of the art. This is certainly not too theoretical, as an invention generally is an improvement or an advanced emboiment of a certain known technology.

A particular difficulty in assessing inventive step arises from the fact that one already knows the invention. This could lead to formulating the problem in such a way that it already contains elements of the solution. This would result in an ex-post-facto analysis which of course has to be avoided (T 229/85, OJ. 1987, p. 237).

It has been said before that the problem essentially depends on the most relevant prior art. As a consequence, it may be necessary to reformulate the problem if a more relevant piece of prior art turns up at a later stage, e.g. in opposition proceedings (T 13/84, OJ. 1986, p. 253). In doing this, care must be taken not to go beyond the original disclosure, be it explicit or implicit. There must be a basis for the reformulated problem in the application as filed, the problem must be foreshadowed by what is said in the application.

Once the problem has been established it must be ascertained that this problem is really solved by what is defined in the claim. If this is not the case then a less sophisticated problem has to be formulated, for example instead of «providing an improved process...» only «providing a further process...». This may have the consequence that the subject-matter of the claim is considered to be obvious (T 184/82, OJ. 1984, p. 2.61).

If an alleged invention cannot be presented in such a way that a technical problem and its solution can be understood, then it is clear that there is no invention in the sense of Article 52 EPC (T 20/81, OJ. 1982, p. 217).

It could be useful to mention that the German translation of «problem-solution» is «Aufgaben–Lösung», this shows that the term «problem» should not be understood - in this context - simply as «difficulty», but rather as comprising something like «task», «goal», and «purpose».

6. Was the invention obvious?

The steps performed up to this point are nothing less than a systematic preparatory work for the actual assessment of inventive step. Due to this preparation, the very general question according to Article 56: «Is the invention, having regard to the state of the art, obvious to a person skilled in the art?» can now be formulated in a much more concrete way, which takes into account the particular technical facts and details of the invention and the prior art. The question is now:

>Starting from the most relevant prior art, was it obvious for the man skilled in the art to implement the differences identified in stage (1), in order to provide a solution to the objective problem determined in stage (2)?

a) The man skilled in the art:

The man skilled in the art is normally the average expert in that particular technical field. Nevertheless, if the problem suggests to look for the solution in another technical field, then the expert in that latter field is the man skilled in the art, whose knowledge and abilities have to be taken into account when assessing inventive step (T 32/81, OJ. 1982, p. 225). Furthermore, it may be necessary to take into account the state of the art in a neighbouring field or in a more general field, if the same (or similar) technical problems as in the field of the in-
vention are important there (T 176/84, OJ. 1986, p. 50). In certain technical fields the skilled man may be represented by a team of experts (T 114/87, not published).

b) Sources of information to be used:

For the assessment of inventive step, in addition to the most relevant prior art, further evidence is used, e.g. common technical knowledge (T 426/88, OJ. 1992, p. 427; T 292/85, OJ. 1989, p. 275) or, more frequently, one or more additional documents. All these documents or evidence (e.g. prior use) must have been known before the priority date of the application under consideration. Documents within the meaning of Article 54(3) cannot be used here. Only such documents etc. can be taken into account in which the objective problem (or part of it) is disclosed, explicitly or implicitly. A simple example may explain this concept: An invention consists in adding a feature X to a known device, in order to achieve a certain property A (Problem A). If, in a different device, the same feature X is used, but in order to achieve a property B (Problem B), which is not related to A, then this disclosure (together with the most relevant prior art) would not render the invention obvious, as it contains no information about Problem A.

c) Obvious or not?

For the actual assessment «obvious or not» all the well-known, «classical» arguments and indicators are applied. Indicators in favour of inventive step are for example:
- a long felt need;
- an existing prejudice (which of course must be generally accepted; a statement in one patent document is not sufficient);
- there are many apparently equivalent alternatives, but only one particular embodiment is successful;
- a surprising technical effect, which has to be verified with respect to the closest prior art and must be linked to the features establishing the difference;
- a new property which has not yet been noticed about similar substances;
- omitting a process step which was considered necessary up to now, without detrimental effect the end product;
- the technical development in this field was directed in quite another direction.

Indicators for obviousness, in other words against an inventive step, are for example:
- the result obtained could be foreseen by the expert;
- the prior art directed the man skilled in the art inevitably to adopt a certain solution (the so-called «one-way street situation»);
- the only difference between the invention and the prior art is the implementation of well-known equivalents;
- the essence of the invention is the new use of a known substance by exploiting the known properties of this substance;
- the gist of the invention is to apply a known product or process in an analogous situation;
- the invention provides only an aggregation of the effects of known features, without any particular effect which would be due to a functional combination of the features.

In a very short form: the correct question cannot be «Could the expert have done it?», it must be «Would he have done it?».

7. Some special problems

a) Selection inventions

Normally there is quite a number of possible arguments or indications in favour of inventive step (see above, 6. c). For selection inventions it is more or less mandatory that there is a surprising technical effect (either a new effect or a better effect).

b) Intermediate products

They are chemical products which have no direct use or properties which could be the basis for acknowledging an inventive step. They are only used either for producing inventive end products or as an intermediate product in an inventive process.

In this latter case inventive step may be derived from the product's contribution to the process (T 22/82, OJ. 1992, p 341).

An intermediate product which is used in a standard process for producing a patentable end product can be considered as inventive only if it provides a structural contribution to the end product and if this structural contribution shows at least one of the features which constitute the difference between the end product and the known compounds (T 65/82, OJ. 1983, p. 327).

c) Surprising effect - Additional Bonus

A new property or a surprising effect, which was not derivable from the prior art, is normally taken as an indication in favour of inventive step. There may be cases where this is not valid.

If, in a particular case, the prior art would lead the man skilled in the art inevitably to a certain solution, in other words, if there is a real «one-way street situation», without reasonable alternatives to choose from, then a surprising effect is considered only as an additional bonus, with the consequence that the subject-matter of the claim is regarded as being obvious (T 192/82, OJ. 1984, p. 415).

8. Advantages of the problem-solution Approach

One could certainly ask: «Why a new method for assessing inventive step?» After all, patent systems have existed for more than 100 years and were successful without that method!

Of course this is not the only method for assessing inventive step; but even with the appropriate reserve one can say that this method has stood the test of time and has proven advantageous for a number of reasons, for the EPO as well as for the users of the European Patent System.
a) Since the method is structured and systematic it is easier to review the assessment of inventive step and to compare results.

It is this aspect which is very important for the EPO, whose examiners come from many countries, with certain legal traditions, and have different experience and practice in patent matters. Nevertheless they are expected to work along the same lines and to apply the same standards of judgment.

b) For the user of the European Patent System this method offers advantages as well, if he makes use of the possibilities offered by this method:

The applicant is able to check whether the arguments put forward by the examining division are correct, and he can present his own arguments in a more effective way.

The patentee is in a better position to defend his patent against documents and arguments which only at first sight are relevant to the invention, but on closer examination show quite different objectives and hence cannot be used for assessing inventive step.

For the opponent it is possible, by applying this method, to exclude, from the assessment of inventive step, those features of a claim which may constitute a difference with respect to the prior art, but do not contribute to the technical result and hence do not belong to the invention.

c) Finally, as this approach is used as the standard method for assessing inventive step in the EPO, it is certainly worthwhile studying and applying it.

The following three pages contain an outline of the «Problem-Solution-Approach» in the three official languages of the European Patent Convention.


Un aperçu de la méthode «Problème-Solution» est présenté sur les trois pages suivantes dans les trois langues officielles de la Convention sur le brevet européen.
OUTLINE OF THE "PROBLEM-SOLUTION APPROACH" FOR OBJECTIVE ASSESSMENT OF INVENTIVE STEP

<table>
<thead>
<tr>
<th>Three Stages</th>
<th>Definitions</th>
<th>Further Information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1) The Prior Art</strong></td>
<td>Technical field and/or problem (effects) of application and prior art must be comparable.</td>
<td>The most relevant prior art for assessing inventive step is not necessarily the same as the prior art most relevant for novelty. Only such features are considered which are cited in the claim as being essential. Moreover, features not contributing towards any relevant technical effect need not be considered.</td>
</tr>
<tr>
<td>- What is the most relevant prior art?</td>
<td>Differences in subject-matter relate to the technical features and to their explicitly and/or inherently defined functional interactions.</td>
<td></td>
</tr>
<tr>
<td>- What are the differences between the subject-matter as claimed and that of the most relevant prior art?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>2) The Objective Problem</strong></td>
<td>The problem is related to the technical results over the most relevant prior art; must not contain elements of the solution.</td>
<td>If there is a change in the most relevant prior art (e.g. during opposition or appeal proceedings), redefinition of the objective problem may be necessary.</td>
</tr>
<tr>
<td>- What is the objective problem?</td>
<td>The solution must be linked to the features constituting the difference.</td>
<td>If a specific problem (e.g. a &quot;better&quot; product or process) is not solved, then a more general problem has to be formulated (e.g. a &quot;further&quot; product or process).</td>
</tr>
<tr>
<td>- Is this problem really solved by the subject-matter of the claim?</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>3) Assessing Inventive Step</strong></td>
<td>It is not sufficient to prove that the man skilled in the art could have arrived at the specific solution by combining known features; the solution is obvious if an average practitioner would have applied the features in combination to arrive at the subject-matter claimed.</td>
<td>- There must be a continuous logical chain of arguments;</td>
</tr>
<tr>
<td>Starting from the most relevant prior art, assess whether it was obvious to implement the differences defined in (1), in order to provide a solution to the objective problem (2).</td>
<td></td>
<td>- &quot;Ex-post-facto&quot; analysis has to be avoided!</td>
</tr>
</tbody>
</table>
DIE METHODE »AUFGABE-LÖSUNG« FÜR DIE BEURTEILUNG DER ERFINDERISCHEN TÄTIGKEIT

<table>
<thead>
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<th>Drei Stufen</th>
<th>Definition</th>
<th>Informationen</th>
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</table>

1) Der Stand der Technik

- Welches ist der nächste Stand der Technik?
  Technisches Gebiet und/oder die Aufgabe (Effekte) bei Anmeldung und beim Stand der Technik müssen vergleichbar sein.

- Was sind die Unterschiede zwischen dem beanspruchten Gegenstand und diesem nächsten Stand der Technik?
  Unterschiede bestehen in technischen Merkmalen und in ihrem expliziert und/oder implizit definierten funktionellen Zusammenwirken.

Der nächste Stand der Technik für die Beurteilung der erfinderischen Tätigkeit ist nicht zwangsläufig derselbe wie der nächste Stand der Technik für die Neuheit.

- Nur solche Merkmale werden berücksichtigt, die im Anspruch als wesentlich genannt werden.
- Merkmale, die nicht zu einem erfindungswesentlichen technischen Effekt beitragen, werden nicht berücksichtigt.

2) Die objektive Aufgabe

- Welches ist die objektive Aufgabe?
  Die Aufgabe beruht auf dem technischen Erfolg gegenüber dem nächstliegenden St. d. T.;
  - darf nicht schon Elemente der Lösung enthalten.
  Die unterscheidenden Merkmale müssen für die Lösung verantwortlich sein.

Wenn sich der nächste Stand der Technik ändert (z.B. im Ein- und Beschwerdeverfahren), kann es erforderlich sein, die Aufgabe neu zu definieren.

Wird eine spezifische Aufgabe (z.B. ein »besseres« Produkt oder Verfahren) nicht gelöst, dann ist eine allgemeinere Aufgabe zu definieren (z.B. ein weiteres Produkt oder Verfahren).

- Wird diese Aufgabe durch den Gegenstand des Anspruchs gelöst?

3) Die Beurteilung der erfinderischen Tätigkeit

War es naheliegend, ausgehend vom nächsten Stand der Technik, die unterscheidenden Merk-male einzuführen (siehe unter 1)), um die in 2) definierte Aufgabe zu lösen?

Es genügt nicht, zu zeigen, daß der Fachmann durch Kombinieren von bekannten Merkmalen zur Lösung zu kommen könnte; die Lösung ist naheliegend, wenn er aus dem Stand der Technik gerade diese Kombination herausgreifen würde.

- Die Argumentation muß eine lückenlose logische Kette bilden.
- Eine ex post facto-Betrachtungsweise ist unbedingt zu vermeiden.
APERÇU DE LA METHODE «PROBLEME-SOLUTION» POUR L'EXAMEN DE L'AUTIVITE INVENTIVE

<table>
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<tr>
<th>Trois Stades</th>
<th>Définitions</th>
<th>Informations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1) L'état de la technique</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Quel est l'état de la technique le plus proche?</td>
<td>Le domaine technique et/ou le problème (les effets) de la demande doivent être comparables à ceux de l'état de la technique.</td>
<td>Pour l'examen de l'activité inventive l'état de la technique le plus proche n'est pas nécessairement le même que celui pour l'examen de la nouveauté.</td>
</tr>
<tr>
<td>- Quelles sont les différences entre l'objet revendiqué et cet état de la technique le plus proche?</td>
<td>Les caractéristiques techniques, ainsi que leurs interactions fonctionnelles définies explicitement et/ou implicitement, constituent les différences.</td>
<td>Uniquement les caractéristiques citées comme essentielles dans les revendications sont à considérer. Les caractéristiques qui ne contribuent pas à un effet technique essentiel pour l'invention ne sont pas à considérer.</td>
</tr>
</tbody>
</table>

| **2) Le problème objectif** | | |
| - Quel est le problème objectif? | Le problème - repose sur le résultat technique par rapport à l'état de la technique le plus proche; - ne doit pas contenir des éléments de la solution. | S'il y a un changement de l'état de la technique le plus proche (p.ex. durant une procédure d'opposition), il peut être nécessaire de définir le problème de nouveau. |
| - Le problème est-il effectivement résolu par l'objet de la revendication? | La solution doit être liée aux caractéristiques qui constituent la différence. | Si un problème spécifique (p.ex. un meilleur produit ou procédé) n'est pas résolu, alors un problème plus général est à définir (p.ex. un «autre» produit ou procédé). |

| **3) L'examen de l'activité inventive** | | |
| Partant de l'état de la technique le plus proche, fut-il évident d'introduire les caractéristiques distinctives (définies sous 1) pour résoudre le problème objectif (défini sous 2)? | Il ne suffit pas de montrer que l'homme du métier aurait pu aboutir à la solution en combinant des caractéristiques connues; la solution est évident, s'il choisissait expressément cette combinaison des caractéristiques de l'état de la technique. | - La chaîne des arguments doit être logique et sans lacune. |
| - Une analyse «ex post facto» est absolument à éviter. | | |
The Power of the EPO Boards of Appeal to Revoke European Patents:  
Is the EPO's Practice Compatible with Provisions of the TRIPS Agreement?

B. Cronin (GB)

This paper identifies problems relating to the revocation of European patents by Boards of Appeal of the EPO. The present EPO practice is based on a principle that decisions of the Boards are unchallengeable. Based on an analysis of provisions of the European Convention, reviewed in the light of the TRIPS Agreement, this principle is seriously questioned.

1. Introduction

For the patentee, a decision of a Board of Appeal revoking an opposed European patent marks the end of the road. The terminus of a trip through a system advertised as "simple, economic and reliable." However, in practice, this trip all too often turns out to be complex, expensive and, when the end of the road is reached, undesirable.

The Office has applied the principle of the right of parties to equal treatment in such a way as to create situations where, at the end of the procedure, a patentee whose patent is wrongly revoked suffers irreparable loss, whereas an opponent whose opposition/appeal is wrongly rejected has a further chance of challenge in national revocation proceedings.

Customers, lulled into a sense of security by propaganda about the "anmelderfreundlich" examination procedure, have been cruelly disappointed by the treatment they receive after grant, above all by the lack of recognition of the patentee's basic legal rights, specifically in the case of an unjustified revocation.

These problems are not all imputable to Office failures. In many cases the parties themselves are to blame, but the origin of the cause for complaint can often be traced to defects in the procedures themselves, these procedural defects leading to poor written proceedings, followed by poor oral proceedings, followed inevitably by poor decisions.

The second-instance appeal procedure, instead of functioning as a safeguard to ensure the upholding of valid patents and to stop invalid ones, has produced indiscriminate revocation of some valid (or potentially valid) patents, leaving the patentees faced with irreparable loss.

This paper sets out to examine the problem of the finality of these revocation decisions and to offer an explanation which could lead to better operation of the system.

2. The Official viewpoint

It is generally accepted as an universal truth that all decisions of a Board of Appeal disposing of a substantive issue in appeal proceedings must be final and that there is no recourse to alter the substance of such a decision.

The absence in the Convention of specific procedures for overturning a decision taken by a Board, together with application of the legal principle of Res Judicata, has resulted in a dogmatic belief that the legality of decisions by the Boards cannot be challenged before the Office, or before any other authority.

It is taken as self-evident that a decision of a Board of Appeal to revoke a European patent in appeal proceedings following an opposition is final and unappealable.

To the Office Administration, the absence of specific provisions in the Convention for procedures to challenge decisions of the Boards is taken to mean that, even for a decision which demonstrably has been taken in breach of provisions of the Convention, the Office has no jurisdiction and therefore cannot enter into a discussion of the matter, nor even consider the possibility that there could be a breach of the Convention.

Opening such a discussion could obviously lead to the embarrassing situation that the Office would have to admit that the system is dysfunctional, and feels powerless to offer any remedy.

Based on an analysis of provisions of the EPC reviewed in the light of the TRIPS Agreement, this paper questions the dogma that decisions of Boards of Appeal of the European Patent Office to revoke European patents are unappealable.

3. Relevant provisions of the TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights or "TRIPS" was concluded as part of the GATT Uruguay Round. Various provisions of the TRIPS Agreement will affect the national intellectual property legislation of many countries. Several of its provisions have a bearing on the revocation of European patents.

Part II of the Agreement deals with standards concerning the availability, scope and use of intellectual property rights. Patents are dealt with in Section 5 which includes an Article 32 entitled "Revocation/Forfeiture stipulating that an opportunity for judicial review of any decision to revoke or forfeit a patent shall be available".

TRIPS Article 62, paragraph 5 reflects the asymmetric nature of the patentee's and opponent's rights, namely that there shall be no obligation to provide an opportunity for review of decisions in cases of unsuccessful opposition or unsuccessful...
ful administrative revocation, provided that the grounds for such procedure can be the subject of invalidation procedures. This, of course, is the case for a European patent upheld by a Board of Appeal of the EPO.

The present EPO practice respects equality of rights of the parties in an opposition under appeal: neither the unsuccessful patentee nor the unsuccessful opponent has a right to judicial review of the Board of Appeal decision. For the losing opponent/appellant this is in accordance with TRIPS Article 62, paragraph 5 in view of the opportunities available for revocation before the national courts provided for in Article 138 EPC.

But what about the losing patentee?

4. Problem as regards revocation of European Patents by Boards of Appeal

The common provisions governing procedure in the EPC and the provisions of TRIPS seem to be in comfortable conformity, but this breaks down in relation to the practice of the EPO as regards the revocation of European patents, which raises a number of questions about EPO practice:

- Has consideration been given to the possibility that in certain cases the existing EPO Board of Appeal practice may not comply with TRIPS Article 32?
- Is it considered that the laws of the Contracting States and the EPC comply with the provision of TRIPS Article 32? Or would any changes in the national laws of the EPC Contracting States, the Convention or EPO practice be necessary in order for the member countries to fulfill their obligation to apply the provisions of the TRIPS Agreement?

5. Revocation of Opposed European Patents in Opposition/Appeal Proceedings and Opportunities for Review

Under the present practice, European patents can be »finally« revoked at the outcome of appeal proceedings following an opposition, by a decision of the Board of Appeal which may be one of two types:

»Type 1«:
An opposed European patent is revoked by the Opposition Division and an appeal against this decision is filed by the patentee. The Board upholds the revocation by pronouncing its decision in the format:
-The Appeal is dismissed.«

»Type 2«:
An opposed European patent is maintained by the Opposition Division and an appeal against this decision is filed by the opponent(s). The Board finds in favour of the appeal and pronounces its decision in the format:
-The decision under appeal is set aside.«
-The patent is revoked.«

What opportunities for legal review of these revocation decisions are available, as would be required to comply with TRIPS Article 32?

For the Type 1 situation, it is easy to see that the EPO appeal procedure does indeed provide an opportunity for judicial review of the Opposition Division’s decision to revoke the patent. So far, so good.

For the Type 2 situation, the EPO appeal procedure equally provides an opportunity for judicial review, as regards the Opposition Division’s decision to maintain the patent. Indeed, this opportunity is exercised by the Board setting aside the decision under appeal.

But what about the decision taken by the Board to revoke the patent?

Prior to the Board’s deliberation, there is no decision to revoke. Can there have been an opportunity for judicial review before the revocation decision was taken? This would suppose that a Board of Appeal has the power to judicially review its own decisions before they are made. As unlikely as this may seem, present practice seems to be based on this.

It seems equally unlikely that a Board could be considered to review its own decisions while they are being taken. This is nevertheless the basis for another possible interpretation which runs as follows.

The Opposition Division, in coming to its decision to maintain the patent, already considered the grounds of revocation argued in the opposition. Therefore, the decision to maintain (i.e. not to revoke) is legally equivalent to a decision to revoke. During the appeal proceedings, the Board has an opportunity to judicially review the grounds for revocation brought up in the opposition proceedings. Thus, the two-instance EPO procedure is designed for the first instance to decide on revocation or maintenance, with a single opportunity for judicial review of this decision at second instance, whether the first instance decision was to maintain the patent or to revoke it.

The latter interpretation also justifies current practice, on the hypothesis that the system provides for two levels of decision, a lower or first instance which examines and decides a first time, and an upper or second level which, in case of appeal, re-examines the matter and takes the final decision.

This perhaps sounds comforting to prospective customers of the EPO who would like to believe that the system provides for two levels of examination. But does it find support in the Convention?

And is the official way of equalizing opponents’ and patentees’ rights in conformity with the provisions of TRIPS?

It seems not. Under present EPO practice, in the Type 2 situation, the losing patentee obviously is deprived of any opportunity for judicial review of the decision to revoke the patent, in contravention of TRIPS Article 32. The Type 2 situation therefore seems to represent an anomaly.

One fact in particular points to an anomaly arising from the present practice. In an appeal filed by an opponent whose opposition failed, the status of the patentee as party to the appeal procedure is as re-
respondent, not as appellant. No appeal has been filed by the patentee, for the simple reason that no possibility of appeal was available to the patentee, because in the Type 2 situation the patentee has never been faced with an adverse decision prior to that taken by the Board to revoke the patent.

Under current EPO practice, once a patent has been revoked by a Board of Appeal in a Type 2 situation, the Office considers it no longer has jurisdiction and is "very sorry" nothing can be done to remedy the situation, for lack of legal basis in the Convention.

The official standpoint is based on the principle of finality of the Board's decisions in the two-instance EPC system. Once a Board has rendered its verdict, the principle of Res Judicata applies.

In the Type 2 situation, the application of Office policy however leads to a legal anomaly, in that the patentee is deprived of any possibility to appeal against the decision to revoke the patent, which is in contradiction of TRIPS Article 32, and possibly also in contradiction of the application of general principles of law in the EPC Contracting States.

To fulfill the requirement of TRIPS that the patentee is entitled to an opportunity for judicial review of the Board's decision to revoke the patent furthermore appears to be in contradiction with the dogmatic belief that all decisions taken by Boards of Appeal are unchallengeable.

6. Legal Basis in the EPC for Official Practice

The prospective coming into force of the TRIPS agreement provides a convenient opportunity to review the legal basis in the EPC for the present Office practice.

Analysis however shows that there is greater support in the EPC for a practice in agreement with TRIPS Article 32, namely that the Convention can be interpreted as providing an opportunity for judicial review of all Office decisions to revoke a European patent, including Type 2 decisions taken by a Board of Appeal. Following this analysis, no amendment of the EPC would be required to comply with TRIPS Article 32: It would simply be up to the Office to apply the existing provisions under the general principles of interpretation consistently applied by the Boards.

The analysis requires a consideration of several factors: the division of responsibility between the different departments of the Office; the mechanisms by which procedures before different departments are initiated and terminated; the suspensive effect of an appeal provided in Article 106 and what happens when the suspensive effect of an appeal comes to an end; the powers of a Board of Appeal in the appeal proceedings, and the shift which occurs when the Board exercises the power of the Opposition Division to revoke the patent.

7. Division of responsibility between different departments of the Office

The EPC carefully defines the responsibilities of the departments charged with the procedures, avoiding any overlap or shared responsibility.

The Opposition Divisions are responsible for the examination of oppositions. Article 102 EPC provides the Opposition Division with the power to revoke an opposed patent, or to maintain it in unamended or amended form. Opposition proceedings at first instance can only be terminated ex officio by a decision which lies within the exclusive jurisdiction of the Opposition Division.

The Boards of Appeal are responsible for the examination of appeals from the decisions of the departments of the first instance, including decisions of the Opposition Divisions.

Article 111 EPC provides the Board of Appeal with the power to decide on appeals. In an appeal against a decision of the Opposition Division, the Board's decision will be to uphold the contested decision or set it aside. It is only when the Board disposes of an appeal by setting aside the appealed decision, as in a Type 2 revocation decision, that the Board's status to proceed further with the matter comes into question.

Recent decisions have drawn distinctions between the responsibility of an Opposition Division in the examination of an opposition and the responsibility of a Board of Appeal in the examination of an appeal from a decision of an Opposition Division.

Note: The Convention provides for simultaneous activities before different departments, but never simultaneous responsibility in respect of the same matter. This underlying principle of the Convention seems to be defied in the Type 2 situation where the Boards appear to assume responsibility simultaneously in respect of appeal and opposition proceedings.

8. Mechanisms for initiating and terminating procedures before departments of the Office

An opposition is initiated by an opponent filing opposition under Article 99 EPC.

An appeal can be initiated by any party to proceedings adversely affected by a decision. Except in special cases for certain interim decisions, an appeal can only be filed against a final decision of a first instance department which terminates proceedings before the first instance department. Decisions which do not terminate proceedings are not open to appeal until a final decision has terminated proceedings before that department (Article 106(3) EPC). Thus, first instance proceedings must be terminated before second instance proceedings can begin.

Leaving aside withdrawals and automatic losses of rights by failure to comply with various provisions of the Convention, a procedure initiated by a party continues until terminated by a decision of the responsible department.

In the context of procedures before departments of the EPO, a "decision" can be regarded as the normative act by which the responsible department terminates the procedure before that department.
Once the department has decided the matter, the decision closes the proceedings on that matter before the department that took the decision, though various organs of the Office may continue to be responsible for other tasks provided by the Convention.

9. **The suspensie effect of an appeal provided in Article 106 and what happens when the suspensie effect comes to an end**

An appeal opens new and separate proceedings at the second instance, and Article 106 EPC provides that the appeal shall have a suspensie effect. As long as the appeal is pending, the appealed decision is suspended. The decision remains in place marking closure of the proceedings at first instance. Simply its execution is stalled.

The suspensie effect does not cancel the decision, but the proceedings at first instance remain closed (i.e. are not re-opened) while the suspensie effect is maintained during the pendency of the appeal.

The suspensie effect of an appeal against a decision to maintain or revoke an opposed patent is as follows: the Opposition Division's decision is suspended during the pendency of the appeal and the patent remains in force under the original decision to grant the patent.

If the Board upholds the decision of the Opposition Division by a decision »The appeal is dismissed«, the suspensie effect comes to an end and the appealed decision assumes its effect, to maintain or to revoke the patent, e.g. a Type 1 revocation. At this point, the appeal proceedings are terminated, and the decision taken by the Opposition Division becomes Res Judicata.

If the Board cancels the Opposition Division's decision by deciding »The decision under appeal is set aside«, the suspensie effect comes to an end by virtue of the appealed decision ceasing to have effect. At this point, the decision of the Board closes the appeal proceedings since the subject of the appeal has been decided upon. Simultaneously, the setting aside of the Opposition Division's decision re-opens the opposition proceedings. This is because the opposition proceedings have been terminated by the Opposition Division's decision; now that this decision has been set aside, the opposition proceedings are open and have to be terminated by a decision which is within the competence of the Opposition Division.

10. **The Board's power in appeal proceedings and the shift which occurs when the Board exercises the power of the Opposition Division to revoke the patent**

Article 111 EPC provides that the Board may exercise any power within the competence of the Opposition Division or remit the case to the Opposition Division for further prosecution.

When the Board chooses to exercise a power within the competence of the Opposition Division (such as revoking the patent, which is the responsibility of the Opposition Division), the Board is exercising a power of the first instance and a power of the second instance.

This »bifunctional« power of the Board is the point in question which gives rise to ambiguity.

Under present Office philosophy, this »bifunctional« power of the Board is considered to be the exercise of a power of the first instance department at second and final instance. For a Type 2 revocation, the Board's decision is regarded as terminating second instance proceedings.

It would follow from this that the decision is not open to appeal under Article 106, because the only decisions subject to appeal are those of the relevant first instance departments.

There being no provision in the Convention for appeal against a decision of a Board of Appeal, the presently accepted philosophy inevitably (but, it is submitted, erroneously) leads to the conclusion that all decisions taken by the Boards of Appeal are regarded as final and Res Judicata.

This conventional philosophy however leads to the above-discussed anomaly that a patentee who has suffered revocation of his patent in a Type 2 situation is deprived of any opportunity for judicial review.

An alternative explanation of the Board's »bifunctional« power is as follows.

When the appeal proceedings at second instance are terminated by the Board's decision to set aside the decision under appeal, as pointed out above the opposition proceedings at first instance are automatically reopened, because the decision which had terminated these proceedings has been set aside and ceased to have any effect.

At the moment when the first instance opposition proceedings are reopened, the matter is still in the hands of the Board and, under Article 111(1), the Board has the prerogative to exercise any power within the competence of the Opposition Division.

When a Board of Appeal, having set aside the Opposition Division's decision to maintain the patent, exercises the power of the Opposition Division to issue a decision terminating the opposition proceedings by revoking the patent, the Board is carrying out a function of the second instance in a procedure at first instance, because the second instance procedure is closed and the first instance procedure is open.

In short, the Board has substituted itself for the first instance department and the decision is one of the Opposition Division, but taken by the Board under the power of substitution conferred to it by Article 111(1) EPC.

Under this alternative approach a Type 2 decision can thus be dissected into two parts:
- a first part »The decision under appeal is set aside«, which is a decision of the Board terminating the appeal proceedings;
- a second part »The patent is revoked«, which in effect is a decision of the Opposition Division taken by the Board under its power of substitution.
From Article 106, this second part of the decision should be open to appeal because it is a decision of the Opposition Division at first instance.

11. Conclusions

If, following this analysis, EPO practice would allow the examination of appeals against a Type 2 revocation, this would provide the patentee with an opportunity for legal review, as required by TRIPS Article 32.

For this, no changes in the law of the European Patent Convention and no changes in the well-tried principles of interpretation established by the Boards of Appeal are necessary.

What is suggested is a way of looking at the Convention to exploit overlooked principles so Office procedures and practice can be re-aligned to guarantee the basic rights of the patentee as owner of a private property right. And to ensure that the Convention is operated in accordance with the principles for safeguarding these rights laid down in the TRIPS Agreement.

This new viewpoint can be formulated as a set of ‘rules’:

a) The European Office has a single level instance for taking decisions in procedures prescribed by the Convention, called the first instance, with exclusive jurisdiction.

b) The European Office has a single level instance for reviewing decisions taken by the departments of the first instance, called the second instance, with exclusive jurisdiction (Technical and Legal Boards of Appeal).

c) Any decision taken at first or second instance is a final decision in the sense that it terminates proceedings before the department in respect of the matter decided. It follows that:

- Decisions taken by the competent departments of the first instance terminate proceedings before the department in respect of the matter decided.
- Decisions taken by the department of the second instance are final decisions in the sense that they terminate the second instance proceedings.

d) When a decision of first instance is reviewed by the second instance the power of the Board is to uphold the decision or to set it aside.

e) The Convention, as a legal entity, becomes Res Judicata if no review takes place before the second instance, or if the second instance reviews and upholds the decision.

f) If the second instance sets aside (cancels) the decision, the effect of the second instance decision is to close proceedings at the second instance and re-open proceedings before the department of first instance.

g) When a Board acts in substitution of a department of first instance, the power it exerts cannot exceed the power of the department of first instance.

h) Decisions taken by a Board in substitution of a department of first instance are decisions of the first instance department and are subject to appeal under Article 106 EPC.

Revocation of a European patent by a Board of Appeal of the EPO in a Type 2 situation therefore does not necessarily have to be the end of the road for the patentee, since the Convention contains the necessary mechanisms to permit a judicial review by Appeal.

12. Closing remarks

The TRIPS Agreement has provided an opportunity to analyse an anomaly that has seriously undermined the users’ confidence in the European patent system namely the lack of recognition of the patentee’s basic rights compared with the competing national patent systems.

A solution to this problem is available without any change in the Convention itself. Does the Office have the foresight to recognize that a step now to reinforce the users’ confidence in the system may be enough to stop the exodus of applications towards the national Offices?
Citizens' Europe: The influence of interested circles on the development of the European Patent System

D. Bernecker (EPO)

1. Introduction

This article is based on a speech given by the author at the conference celebrating 30 years German Association of Patent Engineers and Patent Representatives seminars, held on Friday, 10 June, 1994, in Erfurt, Germany. At the request of the editors of EPI information, who find the subject of particular interest as a detailed chronological account, an English version has been prepared.

2. 1945-1965

The creation of the European patent system has been divided up into seven phases by the now legendary - but, thank goodness, still active - Kurt Haertel, the system's founding father. The time span covers the 33 years from the end of World War II to the entry into force of the European Patent Convention in October 1977. Following the phases of the International Patent Institute (from 1945), the Council of Europe (from 1949), and the Scandinavians (from 1950), the work took on a new quality with the entry into force of the EEC Treaty on 1 January 1958. During the first phase, which then followed, the EEC Working group »Patents« was made up of delegations from the then six EEC member states: Germany, France, Italy and the three BENELUX countries. The European Union of today was in its infancy - this was still the small Western Europe of Konrad Adenauer and Charles de Gaulle.

Within a short time the Working group »Patents« had drawn up the »preliminary draft of an agreement on a European patent law«, published in 1962. This preliminary draft covered the procedure from the filing of an application to the expiry of a patent including revocation proceedings, compulsory licensing and infringement proceedings, i.e. the contents of the EPC and the CPC. The six government experts who were responsible for improving the draft by Autumn 1964 met in secret. Although they intended to consult the interested circles in Spring 1964, this was never done. The work on a European patent law which had begun so enthusiastically came to an end in June 1965 for political reasons. The Dutch wanted the British to be included, which displeased the French. Charles de Gaulle's government did not want the British getting into the six's EEC workshop through the backdoor of patents. The net-result of this from the point of view of our study was that the interested circles had no influence on the fundamental work of the Haertel working party.

3. 1965 to 1968

The presto was by no means the finale to the piece. The opening bars of the largo introduced a new melody. The PCT plan promoted by the USA since 1966 was the subject of a conference of experts at the League of Nations headquarters in Geneva in December 1968 attended not only by one hundred and fifty government experts, but also by representatives of both state and influential non-governmental international organisations. This may well have been influential in setting the style for the European work soon to be resumed. It is perhaps not insignificant that this first participation of the interested circles should come at the end of 1968, a year marked by extra-parliamentary opposition - the name Rudi Dutschke springs immediately to mind.

Parallel to the PCT phase there was the EFTA phase, in the old style with government experts only. Between 1965 and 1967 an EFTA working party performed a very skillful operation on the Haertel Agreement, dividing the agreement into two parts: Part 1 covered an application from filing to grant, Part 2 the life and death of the granted patent.

4. 1969 to 1972

This phase saw the arrival of the handsome prince - as Prof. Beier so imaginatively puts it - in the guise of the then French foreign minister, Michel Debré, who awakened the Sleeping Beauty of our European Patent Office project with a kiss. The events that led up to this need not interest us here - what is important is how intensively the interested circles participated in the further progress of the work from now on.

The forum that led to what we know today as the European Patent Convention was the Luxembourg Inter-Governmental Conference which met between 1969 and 1972 and was attended by 21 European states. As early as its third meeting in April 1970 the conference held a hearing of the views of interested circles on twelve fundamental issues. These hearings there were initially attended by 9, later 14, international non-governmental organisations of which I shall mention only those to which I will be referring later:

- CEIF Council of European Industrial Federations
- COPRICE Committee for the Protection of Industrial Property in the European Economic Community
- UNICE Union of Industrial and Employers’ Confederations of Europe
and the four organisations, representing patent practitioners:

- FICPI an international federation of patent representatives engaged in private practice
- UNION a European organisation of patent representatives in private practice and industrial patent engineers
- CNIPA a European federation of six national institutes of patent agents, three of which represent those in private practice (FRG, F, A) the other three also representing patent engineers in industry (GB, IR, NL).
- FEMIPI a European organisation of patent engineers in industry.

Each of these international non-governmental organisations has its own regional associations, making them a broad forum where the ideas and concerns, in short, the views of the patent profession can be aired.

To begin with these interested circles were given the opportunity to present their views on twelve specially chosen issues. By way of illustration, here are five of the fundamental questions under discussion in April 1970:

1. Should the revocation of a European patent be a matter solely for national law (the minimum solution) or solely for European law (the maximum solution)?
2. Should the term of a European patent be decided by national laws or by European law?
3. Should anyone have the right to file a European patent application from anywhere in the world (free accessibility)?
4. What form should the procedure for deferred examination - a possibility still envisaged at that time - take?
5. Should the opposition procedure take place before or after the granting of a patent?

The vast majority of the interested circles took a forward-looking, European view:

- favouring the maximum solution with regard to the grounds for revocation (cf. Art. 138 EPC),
- favouring a single term for patents (cf. Art. 63 EPC),
- coming out in favour of free accessibility, i.e. anyone can file (cf. Art. 58 EPC, although opinion was by all means divided,
- rejecting deferred examination, those organisations favouring it insisting on as short a deadline for requesting it as possible (cf. Art. 94, 95 EPC),
- preferring the post-grant solution for the opposition procedure (cf. Art. 99 EPC).

At the end of this hearing in April 1970 the Conference invited the interested circles to submit any further comments they might have concerning the first preliminary draft of the European Patent Convention. The ice had been broken. One might say that discussion had now reached shop-floor level. This unleashed a flood of countless written suggestions to the Inter-Governmental Conference secretariat in Brussels. There were many clever, and many controversial, ideas from long-established practitioners, all put forward with an passioned determination to help make the European Patent Office project a success.

I would like to take a closer look at one particular specialised area - representation before the EPO (cf. Art. 133, 134, 163 EPC). This concerned five main issues: the list of professional representatives, compulsory representation, group representation, unity of the profession, and joint professional organisation.

1. Concerning the list of professional representatives FICPI, CNIPA and UNION ventured the bold suggestion that the EPC should differentiate between a transitional period (national solution, cf. Art. 163 EPC) and a final phase (European solution, cf. Art. 134 EPC). Up to that point the draft had only envisaged a national solution.¹ For the final phase the group recommended that the passing of a European examination should be a prerequisite for inclusion in the list. The suggestion, however, had one snag: the guidelines for the examination should lay down, to what extent the examination requirement could be waived if the candidate has passed a national examination. This would mean that if the national examination is of an appropriate standard, an EPO qualifying examination could be foregone completely. This was of course impractical at international level.

2. On the subject of compulsory representation, the three organisations suggested that legal persons having their principal place of business in a Contracting State should also be subject to this requirement. An employee of such a legal person should only be able to act as a representative if on the professional representatives' list. This came to nothing. Instead a more liberal solution was decided upon: legal persons with their principal place of business in a Contracting State may be represented by their own bodies or by their employee holding power of at-

¹ It is interesting to note that Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trademark, which establishes the Office for Harmonisation in the Internal Market (trademarks and designs) in Alicante copies Art. 163 EPC (= Art. 89 Regulation No. 40/94), but keep silent about Art. 134 EPC. Thus the EPC, 20 years older than the Council Regulation, is definitely more European minded!
torney (cf. Art. 133 (1), (3) first sentence EPC).

3. Closely related to this was the problem of group representation. This produced a confrontation between two seemingly irreconcilable positions: On the one hand CIFE, supported among others by UNICE and FEMIPI, advocated very extensive group representation. Legal persons with their principal place of business in a Contracting State should be able to act for other legal persons, with or without their principal place of business in a Contracting State, with whom they have business connections or with whom they have concluded a technical or research cooperation agreement. FICIP, CNIPA, and UNION, on the other hand, did not agree with group representation at all. Since the organisations were unable to reach a compromise, the subject was decided in their absence in Brussels in mid-May 1972. The Coordinating Committee of the Luxembourg Inter-Governmental Conference charged with this issue gave majority support to the suggestion made by its chairman Haertel which then became law - cf. Art. 133 (3) 2nd sentence EPC. As the Administrative Council has, to date, made no provision for group representation in the Implementing Regulations to the EPC, the conflict has ultimately been decided against the organisations representing industry.

4. Surprisingly, the question of the unity of the profession was not raised only until the second hearing in January 1972. Should inclusion in the list of professional representatives only be open to representatives in private practice, or to the employees of patent departments in industry as well? Up to this point the draft had assumed that the former would be the case, since it required that anyone requesting to be entered in the list indicate a place of business and not, as an alternative, a place of employment. The issue was not a contentious one at governmental level. It is likely that the international organisations reached agreement on the unity of the profession at a meeting with Haertel in Munich at the beginning of March 1972, since, in a paper written by Haertel in mid-April 1972, one of the primary principles was: »Persons entitled to act as representatives before the EPO may do so regardless of whether they occupy a private practice or an employee position.« This principle was accepted by the Coordinating Committee almost in passing when it added the alternative of a place of employment to the requirement of a place of business. The ease with which this consensus was achieved is very gratifying in retrospect when one calls to mind the heated argument in France and Germany 20 years later surrounding the creation of a unified profession.

5. The first call for a in the field of patent law joint professional organisation came from COPRICE, which, in the course of discussions on the unity of the profession, noticed »how important it would be for the EPO to have a business partner in the form of a professional organisation made up of representatives in the field of patent law drawn from both the independent profession and industry«. Haertel took up this call and, in his April 1972 paper, made provision for the Administrative Council to draw up provisions for the establishment or recognition of an institute which incorporates all persons entitled to represent before the EPO (cf. Art. 134 (8)b) EPC). The EPI was born.

5. 1973

All 14 non-governmental organisations were invited to the Munich Diplomatic Conference held at the Bavarian parliament building in Munich in Autumn 1973 which ended in the signing of the EPC. The organisations sent a total of 80 representatives of whom 41 came from the four professional representatives' organisations. They were a busy, but culturally very pleasant, four weeks, with numerous receptions, excursions and musical events, and ample opportunity for lobbying. By way of example I might cite the case of European patent representatives working in German industry and the extent of the authority granted to the persons included in the list.

The 1972 draft contained a provision taken from the first set of articles proposed by Chairman Haertel of the EEC Working Party Patents: restrictions applying to the extent of representation under national law were also to apply before the EPO. When it became clear from the hearing in January 1972 that the list of professional representatives would be open to employees working in patent departments in industry, FEMIPI promptly proposed an alteration which struck out the provisions concerning the extent of representation without comment. But the proposal was not discussed at the hearing. FEMIPI - possibly quite contrary to expectation - achieved its objective at the Munich Diplomatic Conference in three stages. The German delegation began by suggesting that a representative with restricted authority should be freed of these restrictions when they ended under national law after expiry of the transitional period, a case in point being a patent attorney employed in industry leaving to set up or join a firm of patent agents. A number of delegations supported this suggestion. FEMIPI then asked the Main Committee whether it would not endorse the UNICE suggestion that persons in the list during the transitional period should remain on the list without the authority granted to them being restricted after the transitional period ended. The Italian, French, and Swedish delegations endorsed this proposal. Somewhat to its surprise, the German delegation realised that, although they had not proposed this type of solution, they were able to agree to it. The Swiss delegation
then proposed an even more radical
solution removing the provisions
linking the extent of representative
power to national law (Art. 162 (6),
(2) second sentence, draft 1972) al-
together. These were specific to na-
tional law and it saw no reason why
the Contracting States should not
provide for more favourable con-
tions within the framework of the
Convention. The Dutch delegation
agreed, and the proposal was
adopted by the Committee. This
can only be described as a lobbying
masterpiece which, incidentally,
achieved a very sensible result. In
the 15-year history of the EPO the
lack of restriction on the represen-
tative power of European patent
representatives employed in industry
has to my knowledge never led to
any problems whatsoever for the
Office.

In the closing speeches of the con-
ference CIFE expressed its thanks
on behalf of the industry organisations.
Among other things the CIFE rep-
resentative emphasised that:
throughout the negotiations, the
Conference had shown considerable
good will to European industrial cir-
cles by involving them closely in its
discussions, a great degree of ob-
jectivity by giving its closest atten-
tion to each of their remarks,
suggestions and observations, many
of which had been followed, in
other words an open mind in allow-
ing European industrial circles to
voice their opinions whenever they
so wished, even when this involved
criticism. The continuous dialogue
between the States and the repre-
sentatives of their industries had
undoubtedly been one of the vital
factors which had contributed to
the success of the Conference."

6. 1974 to 1977

In the following four years leading
up to the opening of the EPO work
on the project was led by the
Interim Committee, a precursor to
the Administrative Council of the
EPO. The opening of the EPO was
prepared in great detail by seven
working parties and a host of sub-
groups meeting 165 times in 450
days and producing more than
1450 documents. Needless to say,
the non-governmental international
organisations were also involved in
this work, most particularly in Work
Party VI (Legal Matters) on the
subject of professional represen-
tation. The objectives here
were to work out the prerequisites
for the European qualifying
examination, the EPI, and juris-
diction in disciplinary matters.
Within
the Work Party (Legal Matters)
the French delegation was put in
charge of handling the qualifying
examination, the United Kingdom
delegation of the EPI, and the
German of disciplinary matters.
All three delegations lightened their
burden by asking the four rep-
resentatives’ organisations to submit
a memorandum outlining general
principles and concrete suggestions
for draft articles. The Work Party
then gave them barely five months
in which to do it - very little time
when one considers that:

- the «creation of the first Euro-
  pean professional body» was
  uncharted territory and very
  controversial within the profes-
  sion,

- the various traditions in Western
  Europe differed quite markedly
  (and still do),

- the four international organisa-
  tions arrived at their views from
  a plethora of regional associa-
  tions, and all of which required
  coordination,

- the interests of the four inter-
  national organisations differed
  significantly in certain areas.

All credit, therefore, to the four or-
organisations, whose spokespersons
combined to form the «Group of
Four», and punctually submitted
basic proposals which the Work Par-
ty (Legal Matters) broadly adopted
in the intensive discussions in
the following two years. The memoran-
dum was even submitted in three
languages. Looking back, this mem-
orandum can rightly be described
as the Magna Carta of the Euro-
pean patent representatives’ pro-

7. 1977 to 1994

The European patent system did not
stop developing with the opening of
the EPO on 1 November 1977. Nor
will it ever end, because we must
keep adapting to the ever-changing
technical, economic and political
environment, as well as to the re-
quirements of our applicants. The
necessary stimulus comes from
many sources, of which the interest-
ed circles continue to be a very sig-
nificant one. Their mouthpiece
before the EPO are the EPI and
SACEPO.

EPI members are active on vari-
ous EPO bodies in the field of the
European qualifying examination, in
the Examination Board and three
examination committees, as well as
on the Disciplinary Committee in
matters of disciplinary jurisdiction
and on the Disciplinary Board of
Appeal in disciplinary matters. The
EPI also has a series of committees
which, with their recommendations,
exert a constant influence on the
development of the European paten-
t system. By way of example I
might mention the Committees for
Professional Qualification, for Bio-
technological Inventions and above
all the EPPC (European Patent
Practice Committee), to which we
are grateful for a host of sensible
suggestions. The EPI has full observ-
er status on the Administrative
Council. SACEPO (Standing Advi-
sory Committee before the EPO) is
made up of representatives of EPI,
UNICE and independent persons.
In 23 meetings to date it has advised
EPO management. Since 1991 there
have been special SACEPO meetings
with General Directorate 3, - I might
venture to say - the European paten-
t court.

8. What does the future hold?

Developing the European patent
system will remain a task in the fu-
ture, particularly for the interested
circles. For this work we need men
and women who, like the pioneers
to whom we owe our gratitude for
what has been achieved so far, are
prepared to commit themselves,
alongside their own stress-filled pro-
fessional duties, to the political fu-
ture of their profession in the Euro-
pean context. I call on my readers to ask themselves if this would not be a stimulating and worthwhile task for them. The diversity of personal contacts, especially colleagues from other countries and the discovery of «how other people tackle things» is an enriching reward for the commitment.

Nor will there be any shortage of problems in the future. Some are already very pressing now. Let me conclude by citing just one - the cost of the European patent system. On this subject I would like to remind you once again of the words of the CIFE representative in his closing speech to the Munich Diplomatic Conference in Autumn 1973: «There is tremendous pressure on industry to provide full employment for workers and continuous growth in their real purchasing power and to make ever-increasing contributions to social welfare payments. The productivity of undertakings would have to show a constant increase for this to be possible. The standardisation of systems for granting patents is a very important factor for productivity.»

Everyone is talking today about the procedural fees of the EPO being expensive in comparison to those of the Contracting states, too expensive especially for middle-sized companies and private inventors. On the subject of the financing of the EPO, should you wish to pursue this, I would like to draw your attention to a short article by my colleague Curt Edfjäll published in the »Mitteilungen der deutschen Patentanwälte« 1993, Pg 162-165, which provides a good basis for discussion.

Alleged registration of patents by private companies

According to inform from the European Patent Office the private company »SES-Verzeichnis AG« from Bern, Switzerland, seems no longer to be a threat to applicants, who were made to believe that this company could offer intellectual property protection.

On the basis of the revised Swiss unfair competition law the Swiss Office for Intellectual Property filed a demand for prosecution, which has resulted in the imposition of a fine on the manager and two employees of »SES-Verzeichnis AG«. It seems that this company has now stopped its misleading mailings of »notice to pay«. The EPO will therefore no longer send out warnings of the illicit actions of this company to applicants.
## EUROPEAN PATENTS - LEGAL DOCUMENTATION

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| COMMUNICATIONS | 5 | / | / | / | / | / | / |

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| GUIDELINES | 7 | 7 | 7 | / | / | / | / |

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<sup>b</sup> only for the decisions published in the OJ

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2. key words 5. publication reference 8. Index 10. Summary
3. Related Articles and Rules 6. Headnotes

### Notes

- **a)** PAVIS e.G. Postfach 1546 D-82305 Starnberg
- **b)** Information und Kommunikation D. Rieth GmbH Hartmann von Au Straße 9 D-7801 Freiburg-Au
- **c)** EUROPEAN PATENT OFFICE Principal Directorate 0.4 Patent Information A-1072 Vienna
- **d)** EUROPEAN PATENT OFFICE Principal Directorate 0.4 Patent Information A-1072 Vienna
- **e)** EUROPEAN PATENT OFFICE Directorate 5.2.2. D-80331 Munich
- **f)** EUROPEAN PATENT OFFICE Directorate 5.2.2. D-80331 Munich
- **g)** EUROPEAN PATENT OFFICE REPORTS Brian C. Reid et al Sweet & Maxwell/Esc Publishing Mill Street, Oxford OX2 OJU
- **j)** EUROPEAN PATENT OFFICE DG3 Direction 3.0

- **k)** Robert Jehan GOAN PUBLISHING chorley Wood Herfodshire WD3 5DR (GB)
The WIPO Arbitration Center

W. Holzer (AT)

Intellectual property disputes, to the extent permitted by national laws, may be referred to the WIPO Arbitration Center, which is to commence operation on October 1, 1994, by including a WIPO Arbitration Clause in a contract or by concluding an ad hoc Arbitration Agreement.

The dispute settlement procedures for which WIPO will make available procedural Rules will comprise mediation, arbitration, expedited arbitration as well as mediation and default arbitration. These Rules have been drafted by WIPO with the help of international experts and non-governmental organizations such as EPI. The following comments pertain to the latest draft of the WIPO Arbitration Rules, because at the time of writing these notes these Rules were nearing completion.

The Arbitration Rules inter alia provide that after the claimant has submitted the request to the Center and to the respondent the ensuing procedure will be governed by strict time limits, in particular in the case of expedited arbitration, in order to ensure an economical procedure, as regards both time and costs. Otherwise, the WIPO Rules provide for relatively great freedom for the parties to decide and agree on the specific rules for the arbitration proceeding, thus ensuring a great amount of flexibility.

The Arbitration Tribunal will have to be decided on by the parties. Whenever the parties do not agree the Tribunal in normal arbitration cases, and always in expedited arbitration, will consist of one arbitrator, except when in normal arbitration the Center determines that a tribunal of three members is appropriate.

Unless parties have agreed to the number and to the manner of appointment of the arbitrator(s) within an agreed period of time, default appointment will take place by the Center. The Center will send to the parties a proposal of names from a list of arbitrators which will be maintained at the Center in the form of a searchable data base as to the qualifications, experience, training etc. of persons who make themselves available to the Center by means of a special application form. Any arbitrator can be challenged in case of doubt as to the arbitrator's impartiality or independence in accordance with a procedure contained in the Arbitration Rules. Unless otherwise agreed by the parties, the place of arbitration shall be decided by the Center.

Thus, apart from administrative work, the Center may remain relatively inactive if the parties agree and decide on all the relevant issues, or it may be active if the parties do not agree, deciding for instance on the Tribunal in a default appointment, the number of arbitrators if it exercises its discretion, the release or the replacement of arbitrators and the place of arbitration. In this context it will be interesting to see who will be responsible at the Center!

The Arbitration Tribunal once installed shall ensure that the procedure takes place with due expedition. Upon request, the Tribunal may issue provisional orders or take other interim measures, including injunctions, in the form of an interim award. At the request of either party or if the Tribunal so decides an oral hearing will be held in private. The Tribunal may also, after consultation with the parties, appoint one or more experts. The Awards will be made in writing and will normally be provided with reasons.

Under the WIPO Arbitration Rules time limits are a critical issue in the proceedings. Thus, for instance the statement of defence has to be rendered within a certain fixed time limit of 30 days. In case of expedited arbitration the time limits are much shorter than in normal arbitration. Ordinary arbitration should be completed within 9 months after the statement of defence or the establishment of the Tribunal, whilst expedited arbitration should be completed within 3 months. The award should be made within 3 months and 1 month thereafter, respectively.

It remains to be seen whether the ambitious goal WIPO has set in the Arbitration Rules regarding time limits can be met in practice. Likewise interesting will be the development of the cost situation which the Rules try to structure and confine. The draft Rules at hand envisage that a non-refundable application fee which will be at least $ 500 ($ 2000 in a claim of e.g. $ 1,500,000) should be paid to the Center as well as a handling fee e.g. ($ 7,000 for a claim or counter-claim of up to $ 1,500,000). The handling fee shall be paid by the claimant and any counter-claimant within 30 days. The amount of the fees of the arbitrator, unless agreed on by the parties, shall be determined beforehand by the Center within a range of minimum and maximum fees set out in a Schedule of Fees attached to the Arbitration Rules, taking into account all the relevant circumstances. Typically for a claim of $ 1,500,000 the minimum fee of a sole arbitrator is envisaged to be US $ 22,000.

Thus, a typical case with a claim of $ 1,500,000 will involve minimum fees of $ 31,000. The parties will have to make equal deposits as an advance. After the award has been made the balance will be calculated. In the award the Tribunal will fix the costs of arbitration including the WIPO handling fee,
the arbitrator's fee and other expenses.

For the information of our readers, EPI Information publishes hereafter the contents of the application forms for becoming a WIPO Mediator and/or Arbitrator. WIPO requires that its original forms be used for making an application since they will be optically scanned into the WIPO data base. Persons interested in becoming active in this field should, therefore, order the original application forms from the following address:

WIPO Arbitration Center
34, Chemin des Colombettes
CH-1211 Geneva 20
Tel. +41 22 7309111
Fax +41 22 7335428

Form

1. Family Name

2. First or Given Names

3. Date of Birth (Day, Month, Year)

4. Nationality

5. Sex

6. Title

   Professor □
   Dr. □
   Mr. □
   Mrs. □
   Ms. □
   Miss □

   Other:

7. Address (a)*

   Telephone
   Telex
   Facsimile

8. Do you wish to be considered for Appointment as (b)*

   a Mediator □

   and/or

   an Arbitrator □

* See Explanatory and Guidance Notes on page 116
9. Educational and Professional Qualifications

<table>
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<th>Name and Place of institution or professional body concerned</th>
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10. Languages *(c)*
(List mother tongue first) | Spoken | Written | Oral Comprehension |

11. Present Position

12. Membership of Professional Bodies

13. Areas of Specialization *(d)*

14. Experience in Intellectual Property *(e)*

15. Major Publications

16. Experience in Court Litigation *(f)*

17. Professional Training in Mediation *(g)*

18. Professional Training in Arbitration *(g)*

19. Experience in Mediation *(h)*

20. Experience in Arbitration *(h)*

21. Availability to Serve as a Mediator or an Arbitrator *(i)*

Are there any special, foreseeable constraints on the time that you can devote to serve as a mediator or an arbitrator

If Yes, please indicate the nature of those constraints:

Yes □ No □

* See Explanatory and Guidance Notes on page 116
EXPLANATORY AND GUIDANCE NOTES

(a) **Address.** Please give the address to which you wish communications to be sent. The full postal address, telephone, facsimile and, if applicable, telex number should be included.

(b) **Appointment as Mediator or Arbitrator.** Please indicate whether you wish to be considered for appointment only as a mediator, only as an arbitrator or both as a mediator and an arbitrator. If you wish to be considered only for appointment as a mediator, you need not complete items 18 and 20. If you wish to be considered only for appointment as an arbitrator, you need not complete items 17 and 19.

(c) **Languages**

*Spoken:* List here only those languages that you speak to a level of proficiency sufficient to be able to conduct mediation or arbitration proceedings.

*Written:* List here only those languages that you are able to write to a level of proficiency sufficient to be able to draft communications and a settlement agreement or an arbitral award.

*Oral Comprehension:* List here only those languages that you understand to a level of proficiency sufficient to be able to understand conversation, oral testimony and submissions.

(d) **Areas of Specialization.** Please indicate those areas of law, arbitration, business, commerce, engineering or science in which you have a recognized speciality, proceeding, where appropriate, from the general to the particular, as in the following examples:

*Example 1:* Intellectual property - patents - chemistry  
*Example 2:* Intellectual property - copyright - films  
*Example 3:* Intellectual property - copyright generally  
*Example 4:* Arbitration - international commercial arbitration generally  
*Example 5:* Engineering - electrical  

Descriptions of areas of specialization may be more detailed and, where appropriate, more than one area of specialization may be indicated. The objective is to give as much information as is useful to enable your particular area or areas of specialization to be easily and precisely identified.

(e) **Experience in Intellectual Property.** Please give details of the professional capacity in which you have acted in the field of intellectual property, specifying

(i) the number of years of experience you have had,

(ii) the capacity in which you have been involved (for example, patent attorney; attorney; corporate counsel in intellectual property generally; head of corporate trademark department, etc.), and

(iii) the principal nature of your functions (for example, litigator; drafting patent applications; negotiating and drafting patent, copyright or trademark licensing contracts, etc.).

(f) **Experience in Court Litigation.** Please give details of the number of court cases in which you have acted in a professional capacity, specifying

(i) the capacity in which you acted (as judge, counsel or attorney/solicitor),

(ii) the countries in which the litigation took place, and
(iii) the main subject matter of the litigation (for example, intellectual property - all fields; corporate and commercial, etc.).

In the case of persons who have acted in numerous court cases, the above-mentioned details need not be given in respect of each court case, but may be telescoped, as in the following example:

Example: Have acted as counsel in over 50 court cases (including 8 as lead counsel) in courts of first instance and appellate courts in the United States of America over the period 1978 to the present time.

The subject matter of the court cases concerned patent infringement and validity (18), copyright infringement in the area of computer programs (6), the interpretation of licensing contracts (16) and general contractual disputes (12).

Have also worked closely in an advisory role in several patent infringement suits in Germany and the United Kingdom.

(g) Professional Training in Mediation or Arbitration. Please indicate training courses attended and the institution responsible for conducting the training courses.

(h) Experience in Mediation or Arbitration. Please give details of the number of mediations or arbitrations, as the case may be, in which you have acted in a professional capacity, specifying

(i) the capacity in which you acted (as mediator or arbitrator or counsel),

(ii) the countries in which those mediations or arbitrations took place,

(iii) where applicable, the administering institution under whose auspices the mediation or arbitration was conducted,

(iv) the main subject matter (for example, intellectual property - trademarks; maritime; investment dispute; etc.) of the mediation or arbitration, and

(v) whether the mediation or arbitration was international or national.

In the case of persons involved in numerous mediations or arbitrations, the above-mentioned details need not be specified in respect of each, but may be telescoped, as in the following example:

Example: Have acted as counsel in over 30 national and international mediations or arbitrations and as mediator or arbitrator in 15 national and international mediations or arbitrations.

The national mediations or arbitrations took place in the United States of America and were either ad hoc or conducted under the auspices of the American Arbitration Association (AAA).

The international mediations or arbitrations were conducted under the auspices of the AAA and the International Chamber of Commerce.

The subject matters of the mediations or arbitrations concerned investment disputes (25, including three as arbitrator), intellectual property licenses involving trademarks and copyright (5, including one as arbitrator), contractual disputes (17), etc.

(i) Availability to Serve as a Mediator or Arbitrator. The availability of a person to serve as a mediator or arbitrator and the nature of any constraints on that person's available time will naturally be discussed at the time of the nomination of the person to act as mediator or arbitrator in any given case. Applicants are here asked to indicate in advance any constraints of a special nature that are at present foreseeable.
Changes in Compulsory Licences in Spain

M. Curell Suñol (ES)

Spanish provisions on compulsory licences.

The information given below relates to certain changes in the obligation to work patents in Spain and the granting of compulsory licences where there is a lack or insufficiency of real working.

What we say is applicable to Spanish patents and to the Spanish part of European patents validated in Spain, since the latter are subject to the provisions of the Spanish Patent Act no. 11/1986 of 20 March 1986 (hereinafter PA) in all aspects not contrary to the Munich Convention on the grant of European Patents.

Judgements of the European Union Court of Justice

As is well known, the European Union Court of Justice has handed down two judgements of 18 February 1992 concerning compulsory licences under patents (Cases C-30/90, Commission vs. United Kingdom, and C-235/89, Commission vs. Italy), declaring the national laws of the United Kingdom and Italy, which authorize compulsory licences for lack or insufficiency of real working, are an infringement of the principle of the free circulation of goods, since they favour the national production to the detriment of Community production.

According to this Court of Justice case law, the British and Italian law infringes Community Law, on treating a case where the national market demand is satisfied by imports from other Member States as a case open to the grant of a compulsory licence for insufficient working of the patent.

Thus, the question arose, in the light of these two sentences, of ascertaining whether the interpretation of the Court of Justice also affects Spanish provisions on the notion of working and compulsory licences.

Recent position of Spanish Authorities

The Directorate General of the Spanish Patent and Trademark Office (SPTO) recently expressed their opinion on the question, in a Circular released on 16 May 1994, in which criteria for the interpretation of the said Spanish provisions were adopted.

The SPTO consider that it will be necessary to adapt the Spanish legislation on compulsory licences - particularly the provisions concerning the notion of working of the patent - to the Community legal system, as interpreted by the Court of Justice.

In this sense, the SPTO have consulted the Legal Service of the Ministry of Industry and Energy, to obtain a ruling on the process to be followed until such time as the above legislative adaptation occurs.

In conformity with the criterion of the said Legal Service, the SPTO have adopted the following position:

(i) Art. 87 LP requires an interpretation when there is the circumstance that the owner of the patent satisfies the demand of the national market by importing the object protected by the patent from any Member State of the European Union.

(ii) The interpretation is that when the above circumstance occurs, there are difficulties of a legal technical nature constituting legitimate excuses for the failure of the owner of the patent to carry out real working thereof on Spanish territory.

(iii) Consequently, in these cases, the grant of a compulsory licence for lack or insufficiency of real working by the owner of the patent would not be proper.

Final considerations

In the light of the foregoing, some comments of a practical nature would seem to be in order.

1) The grant of compulsory licences under any patent which is really worked in any country of the European Union and the corresponding products of which are imported into Spain and satisfy the demand of the Spanish market is excluded.
2) Any patent which is not really worked in any country of the European Union is liable to the grant of compulsory licences, in spite of the fact that the corresponding products are imported into Spain and satisfy the demand of the Spanish market.

3) The above interpretation is not applicable to certain aspects relating to patent infringement, for which the PA also requires real working in Spain, such as the calculation of the compensation for damages based on the profits that the owner would have earned and calculation based on the profits earned by the infringer (Art. 66 PA), as well as the possibility of the adoption of precautionary measures aimed at ensuring the effectiveness of the legal action (Art. 133 PA).

4) In any case, the Courts are competent to decide on the interpretation made by the SPTO.

Patent and Trademark Law and Procedure Update for China and Taiwan and Hong Kong

James K. Luchs (USA)

Summary and Conclusion:
A major roadblock to freer trade has involved less than adequate protection for intellectual property rights within China, Hong Kong and Taiwan. However, these are being removed through negotiated legal reforms and revisions. Yet even after Hong Kong reverts to China in 1997 it will still be necessary to use three separate legal systems to obtain intellectual property protection. Particularly useful features are a British type provisional patent system with a 20 year patent term as well as a ten year term utility model patent.

Text:
An all encompassing global intellectual property strategy for a multinational corporation involves three types of patents as well as trademarks and copyrights to provide protection for goods, services and trade involving China as well as Taiwan and Hong Kong. At the present time patents covering products and processes are obtained and enforced involving three different systems. A Taiwan patent as well as a Chinese patent are applied for and granted by the respective patent offices. By obtaining a European patent with the United Kingdom as one of the designated nations it is then possible to register this patent in Hong Kong. Despite the geographic separation, the three examination systems basically follow the European system.

Because the Chinese Patent Law is based on the German Law it is not unexpected that Germanic claims may be required during the course of patent prosecution.

After Hong Kong reverts to the People's Republic of China on July 1, 1997 the same system of law will be maintained along with patent, trademark and design rights. Rights, will not be extended to mainland China nor will the rights is mainland China be extended to Hong Kong. Hong Kong will maintain memberships in international organizations and continue to adhere to international conventions.

In recognition of criticisms of its similarity to the domestic favoritism of Taiwan, the recently adopted Chinese Patent Law and Implementing Regulations help to move away from this situation as a means of harmonization. Just as in Germany there will be three classes of patents: design, utility and utility model. While a utility patent will undergo full examination and have a 20 year term from the date of filing the utility model patent intended more for small improvements made by domestic inventors will have a ten year term and involve lower fees. China intends to become a receiving and search nation for Chapter Two Patent Cooperation Treaty (PCT) applications with 30 month postponement of examination. Thus even an inventor living in Taiwan (recognized as a Chinese citizen) would be able to file an international application and receive a search in the Chinese language once this is implemented. One other compromise to the first to file procedure in China which is similar to the British Provisional Patent involves filing an application with limited disclosure and then using that filing date for a more complete application filed with one year of the original application. Whereas pharmaceuticals, agriculture chemicals, etc. were previously limited only to process claims, it is now possible to obtain product claims under the new Law.

The recently liberaz new law in Taiwan externals the utility patent term from fifteen to twenty years, utility model from ten to twelve years and new design from five to ten years, all from the application date instead of publication date. Foods, beverages, habit-forming articles, microorganisms, all the discovery of new uses of product per se will become patentable under the new law from mid-1993.

In China the Agency for Industrial Development (AID) provides services for both procurant and enforcement of patents and trademarks via separate Patent and Trademark Offices. Thus under AID direction the Patent Office may investigate and collect data concerning patent infringement, while the Trademark Office may take an active role in Trademark infringement in-
cluding revocation procedures. Chinese nationals who receive infringement notice concerning a utility model patent may request as expanded search and substantive examination which could result in revocation through AID.

In patent procedures I have found AID and Patent Office Officials to be helpful and to provide timely advice whether via direct FAX communication or via phone with a Washington D.C. Agent. Even during times of unrest it never took more than 48 hours to resolve a procedural problem. All routine Patent and Trademark matters requiring English to Chinese translations are normally handled via agencies in either Shanghai or Hong Kong. For similar chemical cases I have prosecuted in China and Taiwan as well as in the United States, Europe, Brazil and Australia; I rank on the basis of quality of examination best to worst: Europe, Australia, China, United States, Taiwan. However, on the basis of Examiner response time during the course of examination the ranking would be: Taiwan, China, Europe, United States, Australia and Brazil. I do not believe my experience is atypical based on talking with agents and attorneys in both corporate and private practice. Except perhaps that the delay I experienced in Brazil was that the patent office went on strike.

Conflicts with Trademarks in force in China and Taiwan and Hong Kong may present a bigger problem in the future than with patent protection. There will be cases where the same or conflicting Trademark(s) will be registered in China and Taiwan and Hong Kong. One liberalization under the new Trademark Law in China is that simply advertising a product for sale in China is equivalent to an actual sale. There are still unresolved problems here which are being addressed by Chinese Intellectual Property Professionals in Harmonization Meetings now going on in Hong Kong and elsewhere.

The Chinese Patent Office has not only adopted the revocation procedure after issue from the European Patent Office, but has added an Article 43 Reexamination procedure covered by Rules 58 to 63. Unlike the U.S. reexamination procedure or European opposition practice it is only for the patentee and may be withdrawn by the patentee. A third party can not request reexamination as in the United States. After a patent has been revoked based on facts and reasons submitted by a third party, the patent applicant may request reexamination with amendments relative to a decision of rejection or revocation. Under these new procedures a patent applicant could have three opportunities for ex parte prosecution and amendment:

- First in the regular examination after requesting examination
- Second during the revocation proceedings following issue
- Third during the reexamination proceeding following revocation

The two rules dealing with compulsory licensing are worthwhile giving verbatim since they differ from European Laws which involve judicial intervention.

Rule 68. After the expiration of three years from the grant of the patent right, any entity may, in accordance with the provisions of Article 51 of the Patent Law, request the Patent Office to grant a compulsory license.

Any entity or individual requesting a compulsory license shall submit to the Patent Office a request for compulsory license and state the reasons therefor, together with relevant supporting documents. The request and the supporting documents shall be in two copies respectively.

The Patent Office shall send a copy of the request for compulsory license to the patentee. He or it shall make his or its observations within the time limit specified by the Patent Office. Where no response is made within the time limit, the Patent Office will not be affected in making a decision to grant a compulsory license.

Where a national emergency or any extraordinary state of affairs occurs, or in cases of public non-commercial use, the Patent Office may grant a compulsory license.

The decision of the Patent Office granting a compulsory license for exploitation shall limit the scope and duration of the exploitation on the basis of the reasons justifying the grant, and provide that the exploitation shall be predominantly for the supply of the domestic market.

The decision of the Patent Office granting a compulsory license shall be notified to the patentee as soon as reasonably practicable, and shall be registered and announced by the Patent Office. If and when the circumstances which led to such compulsory license cease to exist and are unlikely to recur, the Patent Office may, upon request of the patentee, review the continued existence of these circumstances, and terminate the compulsory license.

Rule 69. Any party requesting, in accordance with the provisions of Article 57 of the Patent Law, the Patent Office to adjudicate the fees for exploitation, shall submit a request for adjudication and furnish documents showing that the parties have not been able to conclude an agreement in respect of the amount of the fees. The Patent Office shall make an adjudication within three months from the date of receipt of the request and notify the parties accordingly.

Rule 11 distinguishes between "inventor" or "creator" referring to persons making creative contributions versus persons only responsible for organization work or the offer facilities or perform auxiliary functions.

Rule 12 is an interesting exception to first to file rule for applications received on the same day. After notification by the Patent Office a consultation will be held to decide person or persons to be entitled to file the application.

Rules 42 and 43 provide for divisional applications similar to ones created by restriction practice in the USPTO.

Rule 78 provides that any person who passes off an unpatented pro-
duct as a patented product or passes any unpatented process off as a patented process can be enjoined and fined from 100% to 300% of the amount illegal income. 

Article 60 of the Patent Law (infringement and remedies) provides for criminal liability for infringement. «If the circumstances are serious, any person directly responsible shall be prosecuted for his criminal liability, by applying mutatis mutandis the provisions of article 127 of the criminal law (article 63).»

Article 127 of the criminal law reads: where any industrial or commercial enterprise, in violation of the Laws and Regulations Relating to the Administrative Control of Trademarks, commits an act of passing off with regard to the trademark of another enterprise, the person directly responsible shall be punished by imprisonment of not more than three years or penal detention or a fine.

Bibliography
Protection Of Industrial Property In The People's Republic Of China - Union Patent Service Centre - 1993
Protection Of Industrial Property In Hong Kong - Union Patent Service Centre - 1993
Patent, Utility Model, Design And Trademark Applications In The Republic Of China (Taiwan) - Union Patent Service Center - 1992

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European Qualifying Examination

The next European Qualifying Examination will be held from 29 to 31 March 1995. Further information regarding the examination centres and conditions of enrolment have been published in the Official Journal EPO 6/1994.

Europäische Eignungsprüfung


Examen européen de qualification


Erratum

The last edition of EPI Information contains an error on page 60 under Professional Qualification Committee report, item 3, Tutorials. It should read »the examination papers 1993« instead of »the examinations papers 1994«.
Language problems

L.J. Steenbeek (NL)

Language problems continue to be an important issue. In the Report of the EPPC Meeting of 4 March 1994 (EPI Information 2/1994, p. 58), it is mentioned that the EPO is examining the possibility of omitting translated claims from the European patent specification since they delay the grant of the patent. Although in principle, any reduction as to the translation requirements is to be welcomed, I am afraid that this proposal is legally impossible in view of Article 14(7) EPC which prescribes that the specifications of European patents shall include a translation of the claims in the two official languages other than the language of the proceedings. The EPO may have been misled by Article 97(5) EPC which states that provision may be made in the Implementing Regulations to file these translations of the claims of the allowed application, which suggests that the translations of the claims are optional and may be omitted by an appropriate amendment to the Implementing Regulations. However, a closer look at Article 97(5) EPC shows that provision may be made for the applicant to file these translations, which in combination with Article 14(7) EPC, establishes that if the Implementing Regulations no longer require that the applicant files the translations, the EPO has to prepare the translations itself, as Article 14(7) EPC unambiguously requires that the specifications of granted European patents contain claims in all three official languages.

It is possible to conceive alternative solutions to the translations problem. The five months' time limit in Article 97(5) can be shortened by the Administrative Council pursuant to Article 33(1a) EPC. The latter provision also empowers the Administrative Council to amend the latter sentence of Article 65(1) EPC, a quite suitable text would be: «The period for supplying the translation shall be three months following an invitation to this effect by a court before which proceedings concerning infringement and/or validity of the European patent have been instituted, unless the State concerned prescribes a longer period.» This amendment would once and for all remove any doubt as to the competitiveness of the European patent system. As treaty law prevails over national law, there is no need to wait for corresponding amendments of national statutes.

Another mistake concerning languages has been made in the headnotes of decision T 905/90 (OJ EPO 5/1994, p. 306). The decision itself is correct in following G 6/91 which states that when the first act in the relevant proceedings (description and claims of the filed application, request for examination, notice of opposition including the statement of facts, evidence and arguments, notice of appeal even without the statement of grounds) is made in an admitted non-official language, the party concerned is entitled to a 20% reduction of the corresponding fee. However, headnote III is wrong in alleging that Rule 6(3) EPC does not permit the advance withholding by a party of the amount provided for by Article 12(1) of the Rules relating to Fees. The headnote cannot be based on the indicated parts of the decision, and contradicts the daily practice of my office. It should further be borne in mind that G 6/91 concerned the case of a Dutch opponent-appellant who filed his notice of appeal in Dutch, duly filed a translation into one of the official languages, and withheld 20% of the appeal fee in advance; this was allowed by the Enlarged Board of Appeal. The incorrectness of the headnote concerned can also easily be understood from the Supplement to Official Journal No. 6/1994, paragraph 5.2 of the Arrangements for the automatic debiting procedure, which states that the EPO shall take into consideration all factors having a legal bearing on the fees, which factors are explained on page 14, 18, 19 to include the entitlement to payment of a reduced fee: only 80% of the relevant fee will be debited. This clearly shows that an advance withholding of the reduction provided for by Article 12(1) of the Rules relating to Fees is permissible, of course only when the party concerned is indeed entitled to the reduction.

The party concerned in decision T 905/90 was not entitled to the reduction, because the first act in the opposition proceedings was not in an admitted non-official language; the Dutch language was only used in the opponent's claim for a fee reduction, which is clearly insufficient to obtain the reduction.
Kommentar zu dem vorstehenden Brief von Herrn L.J. Steenbeek,  
»Language problems«

F.A. Jenny (CH)


Was die Alternativvorschläge betrifft, bezweifle ich, daß eine Verkürzung der Fünfmonatsfrist sinnvoll wäre, solange der Anmelder dem EPA eine Übersetzung der Ansprüche in die beiden anderen Amtssprachen einreichen muß. Die vom Einsender vorgeschlagene Änderung von Art. 65(1) EPUe fände wohl kaum eine Mehrheit im EPI-Rat, da eine große Anzahl der Ratsmitglieder der Ansicht ist, die kleine und mittlere Industrie in den betreffenden Vertragsstaaten benötige die Übersetzungen gemäß Art. 65(1) bereits nach 3 Monaten seit der Wirksamkeit der Erteilung. Ohne eine solche Mehrheit könnte aber der Vorschlag nicht als offizieller EPI-Vorschlag an das EPA weitergeleitet werden.

Deadline for EPI Information 4/1994

Our deadline for the next issue of EPI Information is 4 November 1994. Documents for publication should have reached the General Secretariat by this date.

Redaktionsschluß für EPI Information 4/1994


Date de Remise des Documents pour EPI Information 4/1994

La date limite de remise des documents pour le prochain numéro de EPI Information est le 4 novembre 1994. Les textes destinés à la publication doivent être envoyés au Secrétariat Général avant cette date.
## Disziplinarrat und Ausschüsse

**Disciplinary and other Committees · Commission de Discipline et autres Commissions**

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**EPI-Mitglieder · EPI Members**

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**Berufliche Qualifikation · Professional Qualification · Qualification Professionnelle**

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** Secretary
### Disziplinarrett und Ausschüsse

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* Chairman

** Secretary

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