

# COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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## COMMITTEE OF EXPERTS ON PATENTS

Draft Report  
by the Committee of Experts to the Committee of Ministers  
on the meeting held at Strasbourg  
from 2nd to 5th May 1961

### I. Introduction



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1. The Committee of Experts on Patents met at Strasbourg from 2nd to 5th May 1961 under the Chairmanship of Mr. Grant (United Kingdom). The meeting was attended by experts of all member countries of the Council of Europe except those of Luxembourg, who had been unable to come, and Austria, who were prevented from coming by an unfortunate accident. Observers from Spain, the Principality of Monaco and Switzerland, the Director and Deputy Director of the Geneva International Bureau for the Protection of Industrial Property, and representatives of the European Economic Community, Euratom and the International Patent Institute

of The Hague were also present. A list of participants is attached at Appendix I and a list of working papers at Appendix II.

Mr. von Haeften, Director of Legal Affairs, welcomed Committee members on behalf of the Secretary-General of the Council of Europe, whose duties had kept him from Strasbourg.

2. The Committee approved the draft Agenda but decided, at the suggestion of Mr. Grant, Chairman, to take the items in the following order:

- (1) Resolution adopted by the  
Working Party of Heads of  
Examining Patent Offices .....EXP/Brev B (61) 2
- (2) Recommendation concerning the  
provision of international  
classification symbols on  
official copies of applications  
used for claiming international  
convention priority dates .....EXP/Brev I (60) 12
- (3) Acceleration of work of  
classification .....EXP/Brev I (60) 13

- (4) Preliminary draft European Convention on the unification of certain points of patent legislation .....EXP/Brev B (61) 3
- (5) United Kingdom proposal regarding international collaboration on patent applications .....EXP/Brev (60) 2
- (6) Other business

II. Resolution adopted by  
the Working Party  
of Heads of Examining  
Patent Offices

3. As was explained to the Committee of Experts at The Hague meeting in November 1960 [Doc. CM (60) 1507], a Working Party of the Heads of Examining Patent Offices had met several times under the Chairmanship of Mr. Psenicka, President of the Austrian Patent Office, to draft a Convention to facilitate the making of patent applications in different countries for the same invention, and lightening the burden on the Examining Offices.

4. At their last meeting, held in Munich in January 1961, they adopted a Resolution reproduced at Appendix III /Doc. EXP/Brev B (61) 27/. In it they expressed the wish that the Convention on which they were working be concluded within the framework of the Council of Europe and that the Working Party should continue its activities, if necessary with a wider membership, as a sub-committee of the Committee of Experts of the Council of Europe.

Mr. Finniss (France), (Vice-Chairman and Rapporteur-General), recalled that the establishment of the Working Party had been agreed at the meeting of the Committee of Experts in October 1955 and that its activities had always been pursued in close collaboration with the Council of Europe. The Experts were accordingly of the opinion that it would be highly desirable for the activities of the Working Party to continue under the auspices of the Council of Europe, and the Committee unanimously approved the Resolution in question.

5. Since it would be expedient to convene the new sub-committee in the Autumn of 1961, the Experts recommend that the Committee of Ministers should grant the necessary appropriations for such a meeting.

6. Reference was made to the special case of Finland, which is represented on the Working Party but not on the Committee of Experts of the Council of Europe.

It was apparent from the discussion that, even if that country could not actually be represented in the proceedings of the new sub-committee, it would always have the option of acceding to the Convention in preparation.

III. Recommendation concerning the provision  
of international classification symbols on  
official copies of applications used for claim-  
ing international convention priority dates

7. This Recommendation [Doc. EXP/Brev I (60) 12] had already been submitted to the Committee of Experts at their last meeting in The Hague. The Committee had then postponed a decision on the point until the present meeting.

Although the Committee were at one in acknowledging the value of the recommendation, some Experts indicated that implementation of the suggested procedure in their countries would meet with serious difficulties. This was the position of the British and Swedish Experts, who nevertheless, as a token of their desire to co-operate, agreed to approve the recommendation in principle without committing themselves as regards its implementation. The Committee accordingly decided to propose that the Committee of Ministers adopt the recommendation reproduced at Appendix IV.

IV. Acceleration of work of classification

8. This problem, which had come up at The Hague meeting, was discussed once more by the Committee. While paying tribute to the quality of the work already done, they again stressed the value which they attached to having a detailed classification available as soon as possible. The Experts of the member States of the European Economic Community were particularly insistent on this point and stressed the importance of such a classification for the operation of the European Patent which those States are actively preparing to introduce.

9. It appeared from statements by Mr. Reiland (Sweden) and Mr. Rubach (Fed. Rep. of Germany), Chairman and member respectively of the Working Party of Experts on Classification, that measures of two kinds could expedite the work considerably: in the first place, direct contacts between Netherlands and German members of the Working Party on the one hand and British Experts on the other during the intervals between the two annual plenary meetings; secondly, recourse to the practice of preliminary written observations in order to lighten the agenda of the meetings.

On the first point, the value of Mr. Reiland's suggestion was unanimously acknowledged, and the Experts of the countries

concerned declared their readiness to recommend their Governments to bear the cost of such missions.

10. It was felt, moreover, that the work could be accelerated if short meetings of the separate sections were held from time to time independently of the plenary meetings. The delegates of the countries represented on the Working Party, namely France, the Netherlands, the Federal Republic of Germany, Sweden and the United Kingdom, stated that they were prepared to bear the cost of the participation of their experts in such additional meetings.

V. Preliminary draft European Convention  
on the unification of certain points  
of patent legislation

11. At their meeting in The Hague (28th November - 2nd December 1960) the Committee of Experts instructed their "Expanded Bureau" to prepare and submit to them the elements of a preliminary draft Convention for the unification of certain points of patent legislation.

12. The Expanded Bureau met in Paris on 16th and 17th March 1961 [Doc. EXP/Brev (61) 3] and prepared a draft.

Before inviting the Committee to examine this text, the Chairman thought it would be useful for Committee

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members to be informed of the progress of the work undertaken by the member States of the European Economic Community in the field of patents.

Mr. Finniss reported that, on 19th December 1960, the Secretaries of State responsible for industrial property had met in Brussels to examine the proposals submitted to them by the Co-ordinating Committee. The Secretaries of State had approved the Committee's conclusions, and the six member Governments, through diplomatic channels, had signified their agreement on the principles which should underlie the studies of the Working Party on Patents.

The task of that Working Party was to study the question of introducing a European Patent which would co-exist with national patents, with an independent juridical status and based, inter alia, on the principle of absolute novelty and on a broad conception of legal patentability. The European Patent, which would include claims, would invariably give rise to a search for novelty carried out by the International Patent Institute at The Hague. It would be issued by an independent Office. Disputes relating to the validity of a European Patent would, at least in the last instance, come before an International Court of Justice, and those relating to infringement before the domestic courts judging according to municipal law.



Mr. Finniss emphasised that the Convention introducing the European Patent would be open for accession by third countries, without such accession in any way implying acceptance of the whole or part of the provisions of the Rome Treaty. Moreover, there was agreement in principle on a possible form of association with the Convention whereby third States could be bound by certain of its clauses only.

13. The first meeting of the Working Party on Patents was held in Brussels last April under the chairmanship of Mr. Haertel (Fed. Rep. of Germany). In view of the imminence of the meeting of the Committee of Experts of the Council of Europe, the Working Party had first examined the points of substantive law discussed at the meeting of the Expanded Bureau of the Committee of Experts on 16th and 17th March, namely:

- (1) definition of patentable invention;
- (2) the idea of novelty;
- (3) that of "creative effort";
- (4) influence of pending patent applications on the validity of new applications;
- (5) determination of the extent of protection (requirement and interpretation of "claims").

14. At the present meeting, the Committee of Experts had before them the proposals of the Expanded Bureau and also the conclusions of the Working Party on these points.

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The discussions of the Committee, which took the fullest account of the findings of the Brussels Working Party and the explanation regarding them given by its Chairman, issued in the preliminary draft Convention given at Appendix V to this report.

15. Article 1 reproduces the substance of the text proposed by the Expanded Bureau. A slight change was made in the drafting of the French text of the second paragraph. For the English text, the Committee decided to insert the French words "ordre public", these words to be taken in a narrow sense.

It was understood that scientific laws and theories, instructions to the human brain (such as accounting systems or rules of games), creations of form and the mere disclosure of a pre-existing fact (discovery) do not fall under the notion of "invention".

16. Article 2 gave rise to considerable discussion. The Italian Experts were doubtful as to the expediency of including it. The proposed clause would treat as patentable any invention, whatever its intended field of use (agriculture, fishing industry, etc.), if its exploitation necessarily involved an industrial operation. The text proposed by

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Mr. Wallace (United Kingdom) was adopted unanimously. The last phrase of the second paragraph ("purely biological, horticultural or agricultural processes") was added to meet the observations of certain experts.

17. Article 3, paragraph 1, follows word for word the draft prepared by the Brussels Working Party.

Paragraph 2 is based on the same draft.

With regard to paragraph 3, the Committee could not reach unanimous agreement on the conception of the "prior patent rights" destructive of the validity of a patent. Sub-paragraph (a) reflects opinion in the United Kingdom, the Scandinavian countries and Switzerland: the protection conferred by the patent is alone regarded as belonging to the state of art. In sub-paragraph (b), the whole of the application is comprised in the state of art, even if it has simply been made public without the issue of a patent. This second clause, wider than the first, corresponds to that adopted by the Brussels Working Party. It merely gives States an option which they are in no way bound to exercise.

It was, of course, understood that nothing in this paragraph should prohibit the grant of a patent for a new invention being an improvement within a previously claimed wide field.

Paragraph 4, which deals with the immunity attaching to certain disclosures prior to the filing of the patent application, is essentially in line with the Expanded Bureau's proposals, by which the Brussels Working Party had been directly inspired.

However, the notion of "official, or officially recognised, international exhibitions" was restricted to the definition given in the Convention of Paris of 1928 Regarding International Exhibitions.

An option was also introduced for the benefit of States which grant wider immunity, on the understanding that there would be no obligation on the other States to take such special immunity into consideration.

18. Article 4 (former Article 3 (a)) was agreed to with certain drafting changes. The Italian delegation, however, expressed doubts as to the expediency of this clause.

19. Article 5 (former Article 4) paragraph 1, reproduces the first sub-paragraph of the Expanded Bureau's text. Paragraph 2 is in line with the corresponding provision in the draft of the Brussels Working Party.

The Scandinavian and Swiss delegations expressed a preference for the second variant of paragraph 1 of the Expanded Bureau's text, which was based on Swiss legislation.

It was agreed that there was no necessity to use the description for interpretation, if the claims are clear.

Paragraph 2 of the preliminary draft of the Expanded Bureau was struck out.

20. Article 6, paragraph 1, corresponds to the final Article of the Expanded Bureau's preliminary draft, relating to **reservations**. It was adopted. At the request of a number of delegations, however, chemical substances and alloys may also be the subject of reservations.

The Danish and Swiss delegations would have liked also to include, respectively, processes for obtaining food products and non-chemical processes for obtaining pharmaceutical products.

The second paragraph, on the withdrawal of reservations, was adopted in the form proposed by the Secretariat.

VI. United Kingdom Proposal regarding  
International collaboration on patent applications

21. The United Kingdom delegation observed that, in making their proposal, they had been actuated mainly by the hope of stimulating a broad discussion on ways and means of furthering closer collaboration among European countries in the field of patents. It was now apparent that the Six were proposing to set up an international patent office, and it was unthinkable that there should be two separate international patent offices in Europe. The Chairman accordingly thought that examination of this proposal should be postponed. The Committee agreed.

22. As the British proposal raised various problems which have been or will be discussed by the member States of the European Economic Community, a number of questions were put to Experts from those States concerning the solutions they expected to bring to these problems.

The questions related, inter alia, to the conditions of examination of the European Patent, the grant of temporary protection, disputes relating to validity and infringement, accessibility of the European Patent to nationals of States not parties to the Convention establishing that Patent, and the arrangements contemplated for associating third countries.

The Experts of the member States of the European Economic Community explained that they could not answer all the questions, since some of them had not yet been touched upon in Brussels.

Details were given of the proposed issuing procedure for the European Patent. The patent application would first be subjected to an examination limited to formalities and legal patentability, and would be published at the same time as anticipating references prepared by the International Institute of The Hague. Such publication might confer temporary protection. At the end of a period to be determined would come the procedure for issuing or confirming the patent; that procedure would be carried out by an international Bureau specially created for the purpose. At the request of the Applicant or of a third party, this final procedure might take place before the end of the period.

With regard to the association of third countries, it was indicated that arrangements would in any event have to be negotiated separately for each case. In certain of those countries the European Patent could be treated as a domestic patent and become justiciable in their courts.

## VII. OTHER BUSINESS

23. The Committee expressed the desire to meet again at Strasbourg, from 7th to 11th November to continue their examination of the draft Convention appended to this Report and perhaps to study the draft prepared by the Working Party of Heads of Examining Patent Offices, referred to in Section II of this Report.

They asked the Committee of Ministers to grant the necessary appropriations for holding the meeting.

The Secretariat was instructed to prepare a preliminary draft of the preamble and final clauses to be inserted in the appended draft Convention.

24. The Committee took note of a letter dated 13th February 1961 from the Committee of National Institutes of Patent Agents (CNIPA) Doc. EXP/Brev (61) 17 and recommended that this organisation be granted consultative status with the Council of Europe.

The Experts were informed, further, that the International Association for the Protection of Industrial Property (IAPIP) had already applied for consultative status, and they expressed the hope that this request would be met promptly.

25. Reference was made to the possibility of consulting these organisations, as well as the "Fédération Internationale des Ingénieurs-Conseils en Propriété Industrielle" (which already has consultative status), on the draft Convention, once its preparation had reached a sufficiently advanced stage.



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A P P E N D I X    I I

List of working papers

1.    United Kingdom proposal regarding  
     international collaboration on  
     patent applications ..... EXP/Brev (60) 2
  2.    Recommendation concerning the  
     provision of international  
     classification symbols on official  
     copies of applications used for  
     claiming international convention  
     priority dates ..... EXP/Brev I (60) 12
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  4.    Resolution adopted by the Working  
     Party of Heads of Examining  
     Patent Offices ..... EXP/Brev B (61) 2
  5.    Preliminary draft European  
     Convention on the unification of  
     certain points of patent  
     legislation ..... EXP/Brev B (61) 3
  6.    Letter from CNIPA ..... EXP/Brev (61) 1
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A P P E N D I X    I I I

Second Munich Meeting of the Working Party  
of Heads of Examining Patent Offices

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R e s o l u t i o n

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The Working Party expresses the wish that the Convention on patent applications on which it is working be concluded within the framework of the Council of Europe, and that this question be discussed at the next plenary meeting of the Committee of Experts on Patents of the Council of Europe. A draft Convention is in preparation, and its preparation will be continued at a meeting of the Working Party in Vienna in June 1961. It would be useful, thereafter, to continue the activities of the Working Party which could become a Sub-committee of the Committee of Experts on Patents, in which other Members of the Council of Europe could participate if they so desire. Furthermore, it seems most desirable that the Secretary of the Working Party be enabled to act in the same capacity for such a Sub-committee.



A P P E N D I X IV

DRAFT RECOMMENDATION

The Committee of Ministers of the Council of Europe,

Considering the usefulness of the practice applied in some countries of marking the official copies of patent applications used for claiming an International Convention priority date with the symbols of the International Classification;

Recommends to the Signatory Governments of the European Convention on the International Classification of Patents for Invention, signed at Paris on 19th December 1954, and to the Governments having acceded to this Convention, that they apply the said practice in a general way by instructing their Patent Offices to mark such official copies of applications with the said symbols.

A P P E N D I X V

Preliminary draft Convention on the unification  
of certain points of substantive law on  
patents for inventions

Article 1

In each of the Contracting States, patents shall be granted for any new inventions susceptible of industrial application.

There shall be no obligation to grant patents for inventions, the exploitation of which would be contrary to "ordre public" or morality.

Article 2

Industrial character.

The words "susceptible of industrial application" shall be understood in the widest sense.

Nevertheless, the Contracting States shall not be bound to provide for the grant of patents, in respect of new plant or animal species or of purely biological, horticultural or agricultural (agronomic) processes.

Article 3

Novelty

(1) An invention shall be considered to be novel if it does not form part of the state of the art.

(2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, up to the date of filing of the domestic application or of a foreign application the priority of which is claimed.

(3) (a) Additionally, the claims in a patent granted, in the country concerned, for an invention of earlier priority date shall be comprised in the state of the art even if not made available to the public at the date of filing of the application under consideration.

(b) Any Contracting Party or group of Contracting Parties may consider the whole of patent applications or patents published on or after the date referred to in paragraph 2 of this Article to be comprised in the state of the art provided that such applications, or such patents, have an earlier priority date.

(4) A patent shall not be invalid in any Contracting State by virtue only of the fact that it was made public in one of the Contracting States, within 6 months preceding the filing of the application, if the disclosure was due:

- (a) to an evident abuse in relation to the applicant or his legal predecessor, or
- (b) to the fact that the applicant or his legal predecessor has displayed goods at official, or officially recognised, international exhibitions falling within the terms of the Convention regarding international exhibitions signed in Paris on November 22nd 1928 and revised in 1948. National administrations may require the applicant to produce, within six months of filing the patent application, documents demonstrating the identity of the goods displayed and the fact and date of their exhibition.

Any Contracting State shall retain the right, without imposing similar obligations on any other Contracting State, individually to grant valid patents for inventions disclosed within the 6 months prior to the filing of the application:

- (i) either by the inventor himself or, apart from the case referred to at (a) above, by a third party as a result of information derived from the inventor,
- (ii) at exhibitions, other than those referred to at (b) above, which are officially recognised by the competent authorities of the State concerned.

Article 4

Creative effort

Even when an invention is novel, a patent shall not be validly granted in respect of it if it is obvious having regard to the state of the art.

Article 5

Claims.

(1) The patent application must contain, in addition to the description and any drawings necessary, one or more claims defining the invention.

(2) The extent of the protection conferred by the patent shall be determined by the terms of the claims. Nevertheless, the description and drawings shall be used to interpret the claims.

Article 6

Reservations

(1) Notwithstanding the provisions of Article 2, any Contracting Party may, at the time of signature of this Convention, or of deposit of its instrument of ratification or accession, temporarily reserve the right not to provide for the grant of patents in respect of food or pharmaceutical products, of other chemical substances and of alloys, as such.

(2) Any Contracting Party which makes a reservation under the preceding paragraph shall withdraw the said reservation

as soon as circumstances permit. Such withdrawal shall be made by notification addressed to the Secretary-General of the Council of Europe and shall take effect one month from the date of receipt of such notification.