

# COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 24th March 1961

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Or. Fr.

## BUREAU OF THE COMMITTEE OF EXPERTS ON PATENTS

Report of the meeting held in  
Paris on 16th and 17th March 1961



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The "Expanded Bureau" of the Committee of Experts on Patents met in Paris on 16th and 17th March 1961, in accordance with the Committee's decision at the meeting in The Hague from 28th November to 2nd December 1960 (Doc. CM (60) 150, page 11).

In the absence of the Chairman, Mr. GRANT (United Kingdom), Mr. de HAAN (Netherlands), Vice-Chairman, presided.

### Present:

MM. FINNISS (Vice-Chairman, Rapporteur-General)	(France)
KÜHNEMANN (Vice-Chairman)	(Fed. Rep. of Germany)
von ZWEIGBERGK (Vice-Chairman)	(Sweden)
HAERTEL	(Fed. Rep. of Germany)
PFANNER	(Fed. Rep. of Germany)
ROSCIONI	(Italy)
WALLACE	(United Kingdom)

Observer:

Mr. MORE

(Switzerland)

Mr. J. SECRETAN, Director of the Combined International Bureaux of Geneva, and Mr. MAGNIN, Deputy Director, also attended the meeting.

1. The first part of the meeting was devoted to discussion of the work being done by various groups of countries on the unification of legal systems or the institution of common procedures in the field of patents.

Mr. Kühnemann (Federal Republic of Germany) reported on the progress made by the Working Party of Heads of Examining Patent Offices by the end of their last meeting in Munich in January 1961.

Mr. Finniss (France) announced that the competent Under-Secretaries of State of the member countries of the European Economic Community had, at a meeting on 19th December 1960, approved the conclusions of the Co-ordinating Committee on the harmonisation of legislation relating to industrial property. He had been officially instructed, as Chairman of the Co-ordinating Committee, to inform the Committee of Experts of the Council of Europe of the progress of the work to be done in Brussels, where the Working Party on Patents would very soon be holding their first meeting.

Mr. von Zweigbergk (Sweden) said that the preliminary draft uniform law on patents prepared by the Experts of the Scandinavian countries would be submitted to the proper quarters in April. The final draft would not be ready until next year, and there was, therefore, no prospect of its coming into force before 1963 or 1964.

The Expanded Bureau agreed on the importance of co-ordination and strict synchronisation of the Council of Europe's work with that of the various groups of countries.

2. The Bureau then proceeded to consider the possible terms of a preliminary draft Convention which would unify certain points of the substantive law on patents, on the basis of the preliminary Report, submitted by Mr. Finniss, the Rapporteur-General (Doc. EXP/Brev B (61) 1).

After discussion, they decided to submit the provisions appended to this Report to the plenary Committee by their next meeting.

Generally speaking, the Expanded Bureau agreed in proposing that it should not be obligatory to embody the provisions of the future Convention, which in some respects would represent minimum requirements, in municipal law, word for word, but only to secure the conformity of municipal law with their substance.

(A) With regard to "industrial character", participants decided not to take over the negative criteria proposed by the Experts of the Federal Republic of Germany and quoted in the Rapporteur-General's preliminary Report (EXP/Brev B (61) 1, page 3), on account of the imprecision of those criteria.

It was agreed further that, to obviate ambiguity, the preliminary draft Convention should contain a reference to inventions debarred from patentability in the public interest ("ordre public" or "bonnes moeurs") or because they belonged to certain technical provinces, such exclusion, however, being clearly distinguished from the general conception of "industrial character".

They thought the Convention might, at the same time, record the intention of the contracting States to harmonise legislation, relating to the patentability of pharmaceutical and food products.

(B) In the case of "novelty", the Bureau decided to endorse the principle of absolute novelty. Mr. Wallace (United Kingdom) agreed to the presentation of a clause drawn up on these lines.

Of the two versions proposed respectively by the Scandinavian Experts and by those of the Federal Republic of Germany, the former was adopted, with the changes already incorporated by the Scandinavian Committee in the latest edition of their draft.

The wording of the Scandinavian Experts was also adopted in connection with the "immunity" secured to an inventor during the six months previous to filing his application.

On this last point, moreover, it was agreed that the clauses proposed would be so framed as to ensure that immunity was effective throughout all the contracting countries.

(C) It was decided unanimously to make no reference in the Convention to the requirement of "technical progress".

With regard to "creative effort", the majority of the participants favoured the text of the Scandinavian draft (insertion of the adverb "significantly" in the clause requiring novelty).

Some Experts, however, expressed a preference for the criterion of "obviousness" to an "expert of average skill", finding the other formula at once too vague and, in some respects, too restrictive, since it would apparently deny patentability to anything not substantially novel.

It was agreed that both versions would be proposed as alternatives.

(D) The two versions submitted concerning "prior patent rights" were held to be essentially the same and were approved by a section of the Bureau.

On the other hand, some members held that both versions had the drawback of extending consideration of the "prior rights" to the whole contents of the application from which they were derived, instead of limiting it to the protection afforded by the application.

A third version was accordingly proposed by Mr. Wallace (United Kingdom) and is included in the preliminary draft, together with the other two.

It was also observed that, in some countries, prior rights could be derived from an application which, without having led to the grant of a patent, had been "published officially".

It may be asked whether Mr. Wallace's text, which does not contain the word "patent" but only the word "protection", covers this special situation.

(E) With regard to the "claims", the Expanded Bureau agreed to submit to the Committee of Experts the provisions proposed by Mr. Morf (observer for Switzerland) in Doc. EXP/Brev (60) 4, leaving out the last paragraph.

Some Experts, however, preferred the provisions of the Swiss law on the subject, while others thought the Convention should merely state the general requirement of claims, in the belief that it would be inexpedient to include a clause designed to direct national authorities in their interpretation.

For the "description", the Bureau agreed on Mr. Wallace's proposal that the applicant should be required to indicate the best method known to him of performing the invention; but some Experts had doubts on this point.

3. At their next meeting (Strasbourg, 2nd - 6th May 1961), the plenary Committee will have the following business:

(i) Preparation of the preliminary draft Convention on the unification of substantive law;

(ii) Discussion of the Resolution adopted by the Working Party of Heads of Examining Patent Offices with a view to the continuance of their activities under the Committee of Experts of the Council of Europe;

(iii) Discussion of the proposal by the United Kingdom Experts for the introduction of an international patent (EXP/Brev (60) 2);

(iv) Matters relating to the international classification of patents and held over from the last meeting of the Committee (Doc. CM (60) 150, page 13, points 25 and 26).

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It is understood that the members of the Expanded Bureau took part in the meeting of 16th and 17th March 1961, only in their capacity of Experts and that the views expressed by them do not commit their Governments in any way.

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A P P E N D I X

Provisions of a preliminary draft Convention on the  
unification of certain points of substantive law

Article 1

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

Inventions, the exploitation of which would be contrary to the public interest (ordre public ou bonnes moeurs), shall not be patentable.

Article 2 (industrial character)

The subject of an invention shall be deemed susceptible of industrial application if it is capable of serving industrial or agricultural ends in any way whatsoever.

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 processes directly employed to obtain such species].

Article 3 (novelty, prior patent rights and creative effort)

1. An invention shall not be deemed novel unless it differs [significantly] (1) from what was known before the filing of the application.

Anything which has been made public through writings, lectures or use, or in any other way, shall be deemed to be known.

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(1) The word "significantly" expresses the requirement of "creative effort".

2. An invention which has not been made public shall also be deemed to be known if such invention has been the subject, in the country concerned, of an application resulting in the grant of a patent. 7 (1)

2. The state of the art shall also cover patents published on or after the date of filing, in so far as they arise from elements of applications made prior to that date. 7 (2)

2. The state of the art shall also comprise the protection granted for an invention of earlier priority date, even if it has not been made public at the date of the application under consideration. 7 (3)

3. Nevertheless, a patent valid in all contracting States may be granted for an invention made public in one of the contracting States, within the six months preceding the filing of the application, if the disclosure was due:

(1) to an evident abuse in relation to the applicant or his legal predecessor, or

(2) to the fact that the applicant or his legal predecessor has displayed goods at official, or officially recognised, exhibitions.

Certificates issued by the competent authorities of one of the contracting States, in connection with an exhibition duly recognised by the Government of that State, shall confer entitlement in the other contracting States to the temporary protection referred to above.

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.

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- (1) Version on "prior patent rights" by the Scandinavian Experts.
  - (2) Version on the same subject by the Experts of the Federal Republic of Germany.
  - (3) Version proposed by Mr. Wallace and amended by the Bureau.

Article 3a (creative effort)

Even when an invention is novel, a patent shall not be granted in respect of it if it is obvious to a person skilled in the art in the technical field concerned. 7 (1)

Article 4 (claims and descriptions)

1. The patent application must contain, in addition to the description (and any drawings necessary), one or more claims defining the invention. (2)

The claims shall be conclusive for the scope of the protection conferred by the patent, in that the protection shall not be limited to the claim in its literal sense but shall cover all forms of execution employing the essential idea of the invention as expressed in the claim.

The description may be used to interpret the claim, i.e. it shall only be taken into consideration in determining the scope of the protection, in so far as it refers to a part of the claim.

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

The claims shall be conclusive for the scope of the protection conferred by the patent.

The description may be used to interpret the claims. 7 (3)

2. The description must indicate the best method known to the inventor of performing the invention.

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(1) Variant of the formula given above (viz. insertion of the word "significantly" in Article 3, 1).

(2) Some members of the Bureau suggested limiting the clause on claims to this paragraph.

(3) Variant taken from the Swiss law.

Article ...

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 pharmaceutical or food products.