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MODERN SYSTEMS IN THE ADMINISTRATION OF
INDUSTRIAL PROPERTY OFFICES^{2/}

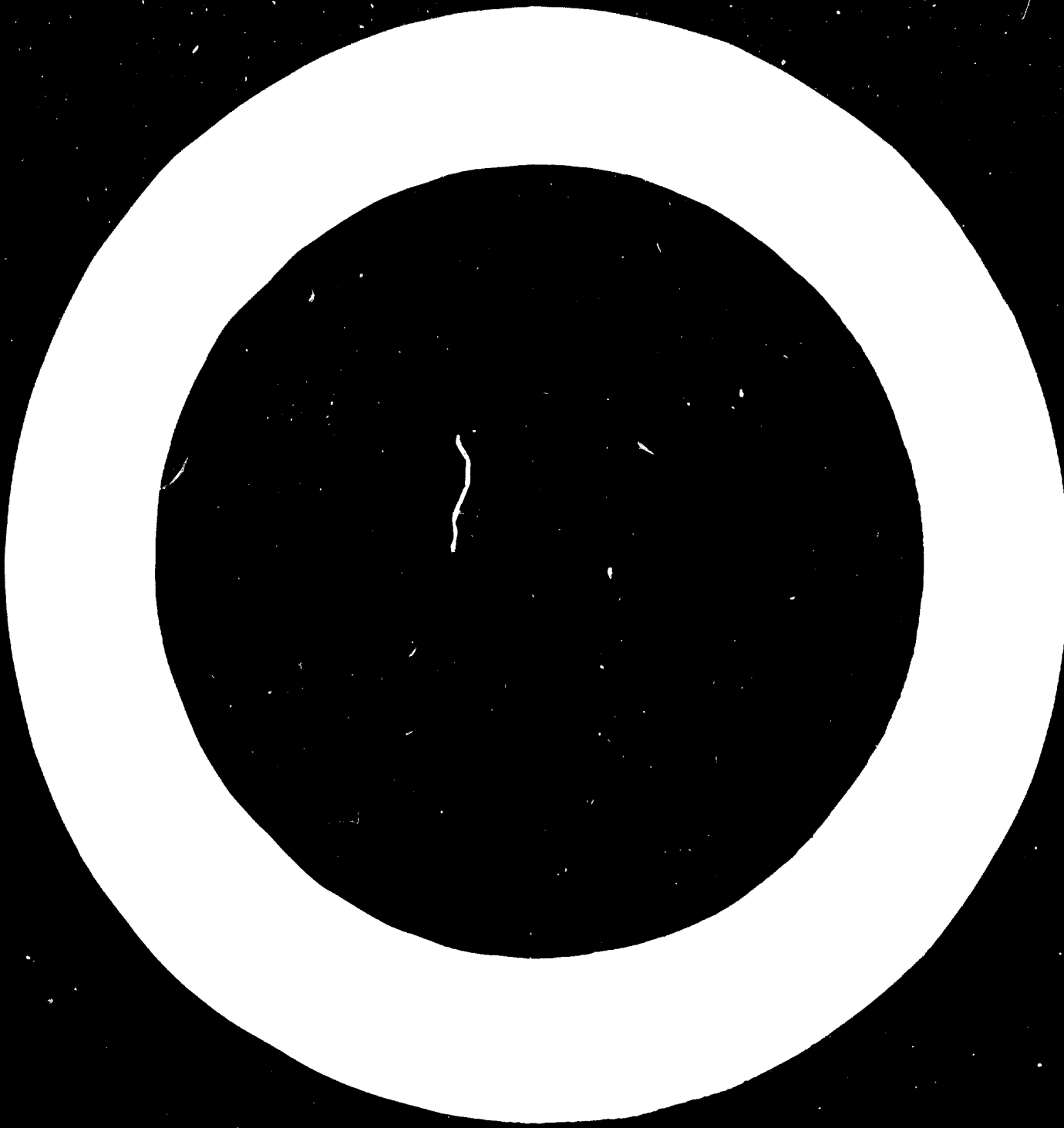
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Since I have to speak here on modern systems in the industrial property offices, I must begin by saying a few words about the scope of the subject. I hardly think it would be unwise with the purpose of this meeting to talk about the measures, objectives and organizational arrangements which in all countries have been taken in a large, highly industrialized country, which also possesses well-equipped industrial property offices with many years of experience behind them.

Here we must deal with problems which concern a lower industrial level of development just first to build up and second, in order to speed up this development, and to ensure effective protection for a successful system.

One more preliminary remark is that of this

general answer can be given to the question which measures are the best and which arrangements are the most effective, that will depend on the particular circumstances of the case: the degree of industrial development, the administrative structure, the available financial resources, the economic development of the country concerned, and many other factors. In a general sense, therefore, to start from a "model" case which will serve as a guide for the most or perhaps all of the countries in question, usually, to assume that the country is in the very earliest stage of industrial development, for all practical purposes, possesses no official institutions for the protection of industrial property. If we start on our search for a model for an optimum system, we are perhaps more likely to accept as the starting point the organizational and administrative measures the study of which should be applied to begin with. To compare conditions in a given country with the model, it will be easier to establish the measures which should be taken to reach the target that a country sets itself. In this way, too, it will be easier to find the golden mean between the usually arbitrary measures which are taken as a solution that is incapable of meeting the requirements of the country's economy.

Industrial property offices are generally the so-called official institutions responsible for the protection of inventions, trademarks, designs, trade names and indications of origin, and also the suppression of unfair competition; in certain circumstances, they are also responsible for the protection of registered designs and design patents. We may ignore the latter in this paper, as they are

undoubtedly of lesser importance, but we must recognize on the other hand that the protection of inventions and the protection of trade-marks involve specific tasks, the fulfilment of which calls for appropriate facilities. The primary question is, therefore, whether it is advisable to set up separate and independent authorities for each of these purposes or to establish a single office responsible for them all. If there are two separate authorities, each should clearly define its own special responsibilities, and, as of course, the administration of each should be clear and simple structure, so that it is straightforward and easy to keep under review. It will also be easier to limit the time-wasting and ever-complicated procedures, etc. However, the main advantage of a central office for the protection of all intellectual property is that it would make maximum facilities or equally necessary in both branches - the protection of inventions and of trade-marks - and that it is therefore more economic to incorporate them in a single authority. Above all, staff requirements will also be smaller. It is no accident that, in even the largest of the industrialized countries, the trend is to centralize the protection of all types of industrial property within a single authority. And it is clear that the smaller the country is, and the more limited the resources it can devote to this purpose, the greater will be the effect of this advantage. It is therefore not difficult, in choosing between specialized authorities and a single industrial property office, to decide in favour of the second alternative.

II.

Let us now turn to the administration of patents, i.e., that part of the office which is responsible for granting patents and for administrative matters related to valid patents.

Let us first take it as our hypothesis that the patent law of the country in question lays down the following conditions for the granting of patents: the invention must be of a technical nature; it must be new; it must constitute a technical advance and be capable of industrial application, that is to say, of repetition. We need not consider here the way in which the law defines each of these concepts.

No one, surely, will dispute that, as far as the offices here referred to are concerned, examination of patent applications in respect of novelty and inventive value is out of the question. Such examination is possible only subject to two conditions, which are hardly likely to be met: there must be adequate documentation to make examination possible and there must be a fairly considerable staff of highly qualified examiners, at least one for each branch of technology. While in the microfilm era it is not a physical impossibility to obtain the documentary material required, as it was earlier, but only a question of cost, it should not be forgotten that no completely satisfactory system of conducting examinations by means of microfilm documentation has yet been discovered. It would admittedly be possible to facilitate the establishment of novelty by obtaining the requisite novelty, perhaps from the International Patent Institute in Geneva, though once again the question of cost would play a decisive role.

In these circumstances, it will probably be decided to adopt a system for granting patents under which any examination whether the conditions for the granting of a patent are fulfilled is carried out post priori, through court proceedings which are initiated only at the request of an interested party.

Nevertheless, a system of post priori examination in the procedure for the granting of patents involves a number of indispensable elements. First, care must be taken to ensure that the date of application can always be unequivocally ascertained, since it usually determines the priority accorded to applications. This, in itself, is not a complicated matter. It is sufficient to enter the date on the application - for example, with a date stamp - at the time it is received. At the same time, it should also be ensured that all the documents enclosed with the application (description, patent claims, drawings, etc.) should be identified as referring to the application; because if - as is always possible - amended drawings, descriptions, etc., are later submitted in the course of proceedings, it is essential, for the purpose of the subsequent establishment of the extent of protection, that the date at which each of the enclosures was delivered to the office can be immediately determined. Apart from entering the date of receipt on the applications themselves, the office must also keep a special record of the applications it receives. Otherwise very great expenditure of time and an extremely large staff would be required

to retrieve individual applications from even a moderate number of applications received. Thus the time and work entailed in keeping such a register of applications, preferably in book-form or loose-leaf filing system is also conceivable, but this has the disadvantage that the individual cards can more easily be lost or arranged in wrong order - i.e. not properly indexed.

Even though no examinations for novelty are carried out, it will nevertheless be necessary to employ staff of clerks to check applications received in the light of certain criteria. Above all it will be necessary to establish that the applications comply with the formal requirements: i.e., whether the fee to be paid on application - such a fee will in most cases be mandatory - has in fact been paid; if the application is made by a representative, whether the representative's power of attorney is enclosed, etc.

Therefore the substance of applications must also be investigated: it must be established whether the application does in fact describe an invention and whether the invention is of a technical nature, that is to say, applications that either do not involve inventions or involve inventions that are obviously not patentable must be eliminated. This of course entails rather more detailed study, because it is necessary to judge whether the descriptions and their relevant drawings are in fact comprehensible and not clearly erroneous. It is thus clear that such examination requires a fair-sized though not excessive staff of specialists with technical and legal training. Each of these officials would be responsible for handling a particular technical field, which should of course not be too narrow. This presupposes that a unit must be set up to consider applications before examination and allocate them to the appropriate examiner. Such units might consist of only one or two persons, perhaps selected from the examiners themselves, who might be responsible for allocating files for processing, in addition to their main work as examiners.

When the examination is completed and the result is positive, the patent must be granted; if the result is negative, the patent application must be rejected. In some countries, there is a further stage of processing before these decisions are taken: namely, the public announcement of the application, giving interested persons an opportunity to oppose or object to the granting of a patent. This,

however, presupposes the establishment of a body competent to give rulings on such objection or opposition. Since such a body would also have to consist of officials with expert knowledge - because it would usually have to verify the objection that the invention is not new - it would consist of the services of at least one expert for each branch of technology. Such opposition proceedings would, therefore, not only mean delegating the whole procedure of granting patents, but would also require considerable expenditure of staff. It is therefore the establishment of such opposition proceedings requires very careful consideration, especially in small countries, and should depend on the possibilities of the country concerned.

In any case, reasons must be given for the rejection of a patent application, and appeals against such rejections must be possible. Since it is expedient for the authority handling such appeals - usually a court - to be outside the industrial property office, we do not discuss this organization here.

Once a patent has been granted, the things that happen - varying that granted must be entered in a register, and a patent specification must be published for each patent. The purpose of the register is to enable the public to ascertain the legal position concerning particular industrial rights (whether a right that is still valid or whether it has lapsed, the possible further duration of protection, the name of the patent holder, the inventor, etc.). The purpose of the patent specification is to give the public the opportunity to learn the nature of the rights conferred. The various requirements which have to be fulfilled when setting up institutions of this kind follow from these two aspects.

Generally speaking the form of patent register that has proved to be most convenient is one that provides sufficient space for each patent so that all necessary data and information can be entered according to a particular layout. Each patent in the register also receives a serial number. In this section of the register set aside for a given patent, everything of legal significance which occurs during the duration of the patent is entered: partial withdrawals of protection, transfers of rights, licence contracts, expiry of the protection period or lapse of the patent for other reasons, for example, declaration of invalidity or non-payment of the annual fee. In any event, the register must be open to inspection by all and sundry and must provide authoritative information concerning the status of the patent

in question. This means, of course, that even for these purely administrative duties a number of officials must be available, including at least one with higher qualifications, because it will often be necessary to decide on questions requiring legal knowledge, e. g. whether a patent has been transferred in a formally correct manner, whether the annual fee is paid in time, etc.

It has proved convenient in practice, even for smaller offices, to keep other types of records, apart from the actual register. Inquiries are frequently made, for example, about the patents held by a particular person or firm. In such cases, it would be extremely time-consuming to search through the whole register, and a card index of patent holders, which can be set up and maintained without excessive cost, is a useful aid. The simplest arrangement is to keep a card for each patent holder with the numbers of the patents granted to him entered on it. If a patent holder is granted a further patent or if an existing patent is transferred to him, the new patent number is entered on his card. It is doubtful whether it is advisable to enter the date of a patent, e. g., by underlining the patent number in red. It is true that this would make it easy to verify the number of patents held by a given firm and at the same time to ascertain which are still valid, but it would have to be ensured that appropriate entries would be made in the index of patent holders when, for instance, the status quo was restored - e. g. through the revival of a patent which had lapsed through non-payment of the annual fee. If it is decided not to enter the date of patents in the index - which means a significant saving of work - then it will be necessary in every case to consult the register in order to verify the legal position. However this cannot in any case be avoided.

The case in which a patent belongs to more than one person requires special mention. Then a card must be made out for each of the patent holders, but the number of the patent will be entered only on the card of the holder whose name comes first in the register. The cards of all the other holders will contain only a reference to the card of the first holder. A somewhat similar procedure is followed when a patent holder, or a firm holding a patent, changes its name. Then a new card must be made out in the new name, the numbers of all patents belonging to the holder in question being entered on it. However, the card in

the old name will not be removed; a reference to the new name must be entered on it, because inquiries regarding the patents held by the firm will again and again be received from persons who are unaware of the change of name. In any event, in passing, that reference card of trade name can also be made out.

Since the industrial property office does not usually handle the printing of patent specifications, we need not deal with this subject here.

Special mention must be made, however, of another office which is of considerable importance in the administration of patents. Under general rule, regulations prescribe the payment of an annual fee for the protection of a patent; in other words, the question whether the law requires payment of an annual fee requires great significance in account of the attendant legal consequences. The basic requirement, however, is that the maturity of the patent is to be kept under review. The most efficient way of ascertaining that is to keep an index in which a special fee maturity card is inserted for each patent, the calendar month in which the annual fee falls due being marked on it (e.g. by punching) in such a way that it can at once be seen, even from the outside. In this way, one can see at a glance all patents for which annual fees fall due in a given month. When fees are paid this fact must be entered on the appropriate cards, which should be filed separately. The remaining cards with maturity dates in doubt in question will then represent patents which have lapsed owing to non-payment of annual fees. Of course any period of grace allowed for payment should be taken into account by providing that the cards in question will not be further processed until after the end of that period. Then, lapsed patent cards must be sent to the patents register, every month, because the extinction of the patents in question must be recorded there.

A special kind of problem is raised by the verification of the payment of processing fees. A fee is generally charged for applications, but other processing fees (for the granting of patents, etc.) may also be charged. These fees differ essentially from the annual fees: the continuance of rights does not depend on their payment or non-payment, but their payment is the condition for action on a particular request, e.g., in the case of an application, the request for the granting of a patent.

The simplest system of verification of whether such a fee has been paid consists in the issue of revenue stamps of various values, which should if possible be obtainable without too much difficulty throughout the country and must, in any event, be available from the industrial property office itself. The purchaser of stamps to the appropriate amount affixes to the document and signs the particular request constituting proof that the fee has been paid. This avoids the necessity for any further verification. It is very desirable as a procedure, and also has a disadvantage: it will probably not be economic to provide such stamps solely for the purposes of the industrial property office - they will also have to be used for the payment of other kinds of fees. It will therefore be impossible to establish subsequently the price level of the fee, which is perhaps regrettable from the standpoint of statistics and price-fixing policy.

When this method of payment is impossible, it is advisable to make the unit which is responsible for supervising the payment of annual fees also responsible for verifying payment of processing fees. Accordingly, every file must be passed to this unit, which is responsible for verifying the payment of fees at the appropriate stage of processing - i. e., in the case of application fees, before the application is dealt with; the unit must enter in the file, not mentioning the fee payment - mentioning the date of payment and the amount paid - the record. The detailed organization of this unit will depend on the payments facilities and practices of the country in question. It goes without saying that, wherever possible, all book-keeping aids (carbon copy process, etc.) will be utilized in such work.

When we stated above that the office considered responsible, on grounds of the personnel involved, and also owing to the lack of the necessary documentation, be able to investigate the validity of patent applications, we did not of course mean that such officers should make no attempt to build up the requisite documentation. All proprietary rights create a monopoly for certain individuals, and thereby place limitations on others, as it may be considered, hamper the rest of the community. At the very least, anyone wishing to use the patent must pay the holder for a licence, which increases his production costs. It is therefore in the interests of the economy to eliminate wrongfully granted patents as far as possible, in order to reduce production costs. As has been indicated, it will as a rule presumably be possible

to have wrongfully awarded patents set aside by application to the courts for declarations of nullity. It is very important, for the purpose of such claims, that suitable documentation should be available and that research abroad should not be necessary to obtain it. Obviously, the more comprehensive and complete this documentation is, the more valuable it will be. It is well known, however, that most inventions are simultaneously protected in more than one country. This means that it is sufficient for the purpose of such declarations of nullity, which are all more or less identical in content, to collect only one set of specifications, therefore, to start collecting patent specifications for all countries. If patent specifications of the largest industry concerned are available in a form almost equally useful. But insurmountable difficulties will be encountered in the collection of such patent specifications in the normal form in which they are so far as past specifications are concerned. These difficulties can be considerably reduced by the use of microfiche. It is true that a collection of patent specifications in the form of microfiche requires the provision of a corresponding number of microfiche readers. But even with these readers, the aim in view is not yet fully achieved. The number of microfiche readers which of a large number of patent specifications are of interest for a particular purpose, our experience shows that the processing of a claim of nullity is possible only when the documentation is available in normal size in the form of photocopies. Therefore a machine is necessary for the preparation of normal-sized photocopies from microfiche.

III.

The second main sphere of activity of an industrial property office is the administration of trade-marks.

Here, two fundamental issues arise at the outset. First: In all countries, certain marks may not, for reasons of public law, be registered as trade-marks. Is it desirable that such marks should nevertheless be registered and the annulment of the registration be left to private initiative, or should the office of its own initiative exclude such marks a priori from registration?

The second issue is that not only should trade-marks constitute the means for excluding all other persons from the use of that mark, or one like it for the same or similar goods, but also that its very existence must make it possible to prevent

the subsequent registration of such a mark as a trade-mark by a third party. Therefore, whenever the office registers a trade-mark, is it desirable that it should, on its own initiative, verify whether the trade-mark infringes some older right and, if so, refuse registration? Should it at least inform the holder of the earlier trade-mark of the registration of the newer one, or should this be left exclusively to the initiative of the interested party as well?

We shall first answer the second question. For the purpose of an official examination whether an earlier right has been infringed, it is necessary, as we have said, not only to ascertain whether the mark in question is already the property of the holder of an earlier right, but also whether such earlier rights in fact exist. If this should be done, it is not enough to ascertain whether the marks in question are identical or similar. Obviously such an examination is impossible without the employment of a large number of physical facilities. For verbal marks, it would not only be necessary to have a card-index arranged according to the index arranged according to the alphabetical order, but also a card-index arranged according to the phonetic order, in order to avoid confusion between similar words in the case of just pronounced words. It would be necessary to have a card-index arranged according to signs, ideograms, etc., and pictorial signs, figures of human beings or animals, etc. . . . With the help of such cards it would then be necessary to look for resemblances, which would be an extremely laborious process. It is clear that the requirements in terms of personnel and equipment would be beyond the means of smaller offices. It would therefore be desirable to provide for any such official examination of similarity

Matters are rather different with regard to the first question. It is reasonable, indeed, to suppose that the office will not tackle this problem either because of the annulment of such marks - i. e. those which, from considerations of public law, have been declared invalid for legal protection - will also be subject to the submission of claims for cancellation, which anyone must be free to enter and which will have to be decided by the courts. It should be borne in mind that the result of such a procedure will be that it was well known contrary to public order, or which are generally used throughout the country, to indicate particular types of goods, so-called "free signs" or signs consisting only of non-distinctive elements

will be registered as trade-marks, and that, in this way, the holder will initially obtain an exclusive, state-guaranteed right to such a mark. In view of such an undesirable state of affairs it seems advisable in my case to verify applications for trade-marks officially in order to see whether the registration is prohibited on grounds of public law. Such prohibited marks include, for example, all the so-called descriptive marks, that is to say, signs which consist solely of indications of nature, quantity, origin, etc.; the above-mentioned "free signs"; and signs which are liable to offend the public order in some other way contrary to public order, e.g. national coats-of-arms and so on.

Such examination can, of course, also be carried out only if sufficient trained staff is available, but the costs involved are in any case far smaller than those required for the examination of "similarity" referred to above.

In other respects, administrative arrangements regarding trade-marks are in many ways analogous to those regarding patents. It will, of course, be necessary to enter on every application for a trade-mark the date of its receipt, so that its priority over later applications can be established. There will also have to be a unit responsible for verifying the payment of fees. Arrangements of this kind in connexion with the administration of patents are equally applicable, with the difference that there will, as a rule, be no annual fees, but rather a fee for the whole duration of protection, i.e. for a considerable number of years. It will also be necessary to keep a register - for internal use only - in which the applications for trade-marks received are entered with all the necessary particulars, so that, before registration or final refusal of registration, it may still be possible to trace the whereabouts of a file and what stage of processing has been reached.

Applications will also have to be examined to ensure that they comply with formal requirements which in any case must be prescribed by law (indication of the applicant's name and address; the wording or design of the trade-mark, as the case may be; description of the goods or services for which the trade-mark is intended; where necessary, the representative's power of attorney; the object of the undertaking by which the trade-mark will be used, etc.). When the office is required to conduct the examination described above, as to whether the registration of the mark

is prohibited on grounds of public law, then the unit made responsible for such examinations should also be responsible for checking compliance with the formal provisions, because the applicant should if possible be notified of any criticisms regarding formal aspects of the application and any substantial objections to registration, at one and the same time which would considerably simplify and shorten proceedings.

If the results of the examination are positive, the trade-mark must then be registered. As in the case of patents, the register should be kept in such a way that about one page of the register is set aside for each trade-mark registered; namely, as before, all the relevant entries will be made in the appropriate sections according to the kind of goods. Again, as with the patent register, it will be able to obtain all information relevant to the status of the trade-mark registered in the registration, i.e.: the name and address of the holder of the trade-mark; the object of his trade-mark; the date of application; any objections, if any; an illustration of the trade-mark; the number of the goods to which it applies; the date on which protection expires and/or on which it is assumed that the trade-mark is still valid, whether licences for its use have been granted, etc.

Another point should be noted for a patent register and a register of trade-marks; unlike patents, whose duration is limited by law, trade-marks can be continually renewed. While valid patents register sheets containing only legal patents - and therefore of only any further practical use - need to be kept available for public inspection, the patent register unit itself, this does not apply to trade-marks. In this case, a volume of the register must be kept ready for inspection in the registration unit, even if it contains only a single currently valid trade-mark. This fact suggests that it might be best to keep the register in loose-leaf form, though precautions must of course be taken to prevent the removal of individual sheets. With this form of register it is possible to remove the sheets of lapsed trade-marks which are of no further interest and thus thin out the register, which is a considerable advantage, especially from the standpoint of space.

In addition to the register, however, it may be useful to set up an index of companies, which - as in the case of patents - will provide information about all the trade-marks held by a particular undertaking. Statistical methods, what we said in that connexion holds good in this case too.

One particular feature will be mentioned here. Unlike the annual fees for patents, which are payable on the same day each year, the trade-mark fee is payable once only, for the whole duration of the trade-mark, i. e., every ten years. There is an obvious danger that the trade-mark holder will forget to pay the fee when it falls due and that the trade-mark will lapse unless he re-pays out of his renewal fee. While periods of grace are allowed for the payment of the fee (cf. Article 11 of the Paris Convention), this period may also elapse and so special arrangements are taken. Notes regarding the duration of the trade-mark should be sent to the holder so that the holder of the trade-mark can be warned of the date when renewal is due in time before the end of the protection period, and at least after the end of the grace period. It should, however, be made clear that such a voluntary service provided to the trade-mark holder by the office and that failure to provide such notification in no way renders the office liable for any consequences of failure to renew a trade-mark.

Lastly, registered trade-marks must be officially published. Just as the public must have access to individual patents in the form of patent specifications, it must also have the opportunity of finding out the marks of individual particular firms have exclusive rights. Whether this is done by means of a separate list of registered trade-marks or some other publication is unimportant and will depend on the particular circumstances in the various countries.

It is not advisable to publish trade-marks in the order in which the applications are received because the time between the publication and the registration of a trade-mark varies from one country to another, according to the time taken up by the elimination of any formal deficiencies, etc. It is preferable to publish trade-marks in the order of registration, i. e., according to the registration serial numbers.

The same publication should, if possible, also include cancellations, limitations and transfers of trade-marks and all other legally significant details concerning them. This is admittedly fairly expensive, but the publication will be a still the more valuable aid to interested circles.

IV.

From what we have said above it will be seen that the unit which actually receives applications can be organized to handle both patents and trade-marks. Its activity in both cases will be essentially the same: to note the date of receipt of the application on the corresponding document.

Some countries, however, have introduced a form of decentralization into this procedure in another way: while they have a single unit for the reception of applications with regard to all types of industrial property rights, there is not necessarily such a unit at the headquarters of the industrial property office itself but a number of them in different parts of the country. This obviously has the advantage -- especially in large countries whose transport systems are as yet relatively undeveloped -- that it is easier to file applications. But such a procedure will hardly pay, especially in countries in the first stages of industrial development, where the number of applications submitted from within the country will not be very high. For applications from abroad, the receipt unit at the office itself will in any case be sufficient.

Also, the unit responsible for examining the payment of fees and keeping due dates for annual fees under review can perfectly well be organized similarly with regard to trade-marks, and this is even more so.

It is not absolutely essential for the registers of patents and trade-marks to be kept by the same unit, but it will certainly pay to do so. Despite a number of differences in the way the registers are kept, the actual work of registration is the same, so that staff with the same qualifications can be employed for both duties.

We need hardly mention that the documentation unit, with its microfilm readers and photocopying machines, etc. must be responsible for such services with regard to both patents and trade-marks.

The combination of each of the above spheres of activity in a single unit makes possible more efficient use of available manpower and thus a economical and streamlined administration. Here we see more clearly the advantages of a single office for all types of industrial property, to which we referred at the beginning of this paper.

In my opinion, however, unification of the other branches of activity will hardly make for efficiency. The differences between, say, examining a patent application to see whether an invention is patentable and examining an application for a trade-mark, to see whether the registration of such mark is prohibited on grounds of public law are so profound and the types of work involved are so completely unlike that these units should be organized separately.

This, however, is of course not incompatible with the principle that all these units must be subordinate to central supervision. It is the duty of the supervisory section to prevent the various units from duplicating one another's efforts or working at cross purposes and to ensure that they work together when this is necessary for technical reasons and that bottlenecks in the unit are removed by switching personnel from another.

It has already been mentioned several times, in different connections, that the national courts are also kept busy in respect of industrial property. Decisions on legal means of redress against the office for patents - i.e. the rejection of applications for patents or the registration of a trade-mark - decisions regarding the nullity of a patent or the cancellation of a trade-mark, and the consideration of cases of infringement of existing patent or trade-mark rights and a number of other matters are best left to the courts. Ideally, the courts should therefore be so organized that they can lead an expert tribunal, but, in practice, this will hardly ever be possible - if one considers, for example, the determination of nullity of patents, where the issue is often a technical question of specification, proves that a patented invention was not novel. In such cases, the tribunal must have at its disposal experts in the relevant field. In several, therefore, courts will have to depend on expert opinions. This being the case, appropriate legislative measures must be passed to ensure that no one may be employed as an expert in a given case who has in any way been involved in the action by the patent office whose result is now to be taken into account by the court in reaching a decision.

I am aware that in these few remarks I have been unable to cover, let alone exhaust, the whole range of problems involved in organizing an industrial property office. Perhaps some of the gaps in the treatment of this vast complex of questions will be filled in during the discussion. But I venture to hope that my remarks have at least made some slight contribution to the subject and have perhaps suggested some lines of thought.





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