

**TRADE MARKS, PATENTS AND DESIGNS  
FEDERATION**

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**GENERAL MEMORANDUM  
SUBMITTED TO THE  
DEPARTMENTAL COMMITTEE  
TO EXAMINE THE  
BRITISH PATENT SYSTEM**

*March, 1968.*

## **NOTE ON THE TRADE MARKS, PATENTS AND DESIGNS FEDERATION**

The Trade Marks, Patents and Designs Federation was founded in 1920 by a number of leading industrialists for the purpose of protecting and furthering their common interests in industrial property.

It has, in the intervening years, become recognised as an authoritative body in this field, both by government and industry. It is, indeed, the only industrial organisation dealing exclusively with this specialised subject. It works in close association with the Confederation of British Industry and also takes an active interest in international developments in this field.

The work of the Federation is carried on by a Council and specialist committees. A list of the members on the Council is set out below.

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G. B. A. WATT (J. & P. Coats Ltd.)  
F. A. WEBSTER (The English Electric Co. Ltd.)  
C. G. WICKHAM (Monsanto Chemicals Ltd.)  
J. WOOLARD (The British Petroleum Co. Ltd.)  
J. B. C. CARR, H. R. MATHYS (Confederation of British Industry)

In addition representatives of the Manchester Chamber of Commerce and the Chemical Industries Association Limited take part in Council discussions.

**Secretary :**

Sir ARCHIBALD F. HARRISON, C.B.E.

## SUMMARY OF THE GENERAL MEMORANDUM

The general theme of these submissions is that the patent system is important to the development of technology in a modern industrial State; that it is part of and interlocks with an international system and that unilateral abandonment is unthinkable.

The three principal complaints of industry are of uncertainty, delay and high cost. The uncertainty complaint is beamed mainly towards the difficulty of ascertaining at a given point of time what the patent situation is in regard to a particular industrial operation. The delays of which industry principally complains are in reaching a speedy and authentic answer on questions of validity and infringement—the complaint of high cost is particularly directed at High Court actions.

In broad terms we recommend that the most urgent requirement is for the provision of a comprehensive “state of the art” search report and next to this the provision of a quick and reasonably priced procedure for securing an authentic ruling on validity and eventually on infringement. We also recommend that the Patent Office should be given much wider powers to refuse applications on the grounds of lack of novelty and subject matter, with the aim of ensuring that the standards applied by the Patent Office in granting a patent should come far closer than at present to the standards applied by the High Court in determining validity.

In recommending the conduct of a much stricter examination we are aware of the great practical difficulties facing the Patent Office, which is already under severe strain in conducting a narrow search and a limited examination. We recommend that the examination should be more selective and that this may be achieved by the avoidance of multiple examination and by making available to inventors an alternative route by which they could safeguard their own freedom of operation without having to seek a monopoly excluding all other users. We think such a route could reduce the attractions to inventors of filing applications for defensive or relatively minor improvement patents, especially if the deposit of a

single document would safeguard this freedom of operation in a number of countries.

We warmly welcome the BIRPI initiative for a Patent Co-operation Treaty directed towards the avoidance of multiple searching and multiple examination and recommend that the States and organisations involved should be strongly urged to create immediately in the I.I.B. a comprehensive patent documentation centre.

## GENERAL MEMORANDUM

### INTRODUCTION

It is important to state at the outset that the Patent System had its origins in the needs of the political community and not in any altruistic desire to reward invention or inventors. The first formalised expression is found in s. 6 of the Statute of Monopolies 1628, but individual grants had been made in England for centuries before this date. The intention behind these grants was clearly stated by Cardinal Moreton, the Lord Chancellor of Henry VII in the following terms:

“ that our people be set on works in arts and handicrafts; that our realm may subsist more of itself; that idleness be avoided, and the drawing out of our treasures for foreign manufacture stopped.”

The primary intention was the encouragement of new manufactures within the realm and the form was a barter arrangement by which the applicant publicly described his manner of new manufacture and received in return from the State the right to exclude all others from using it for a limited period of years. While the early intentions may have been to secure the setting up in this country of manufacture already practised abroad, it very quickly demonstrated its ability to encourage the devising of entirely new methods of manufacture at home.

This has been the established pattern for more than three hundred years, the system has been copied and adapted throughout the world and while the grant to the applicant has never been substantially extended his rights have been progressively eroded, and not only in cases where the monopoly has been abused.

It is a fact of history that no country lacking a patent system has become great industrially—the few countries which experimented with the abandonment of the patent system very quickly reinstated it—even in very modern times the return of the Soviet Union to membership of the International Convention is the clearest possible vindication of the proposition that the patent system is vital to the industrial growth of a State engaged in international trade.

The test of the value of the patent system must rest on the needs of the community as a whole. If the objective of state policy is to nourish and expand technological progress it has to be accepted that this cannot be achieved without vast expenditure on research and development and the acceptance by industry of these expenditures and of the risks and expenses of creating new manufacturing facilities and introducing new products on the market.

If the protection afforded by the patent system were withdrawn, if competitors were free to copy the innovations arising from successful research and development projects, and to pirate new manufacturing techniques and new products, the inevitable result would be that in very many cases the industrialist would no longer be able to justify the high cost of modern research and the high risk of manufacturing and product innovation in return for a mere marginal advantage in the world's markets.

It is also to be observed that a strong argument in favour of the patent system is that it results in early publication of the discoveries made in research organisations. This is a most important stimulus to technological advance. The opposite to this, namely keeping new ideas secret, is detrimental to industry as a whole.

Since the creation of the Banks Committee there has been widespread discussion on the value of the patent system to the country and to industry and also as to the ways in which this value might be assessed. It is our view that no very clear or comprehensive answer is possible. It is, for example, apparent that a number of the most important industrial countries of the world are not prepared to abandon the patent system and in these circumstances a unilateral abandonment by the U.K. of what is in effect a complete and interlocking international system, seems unthinkable. Such a unilateral abandonment would we believe have a truly formidable deterrent effect on the growth of U.K. technology and on the money spent on research and development. Competition alone would ensure that research and development would continue, but its nature would probably alter and its level would certainly be reduced. Also as long as patent systems

continued in other major industrialised countries there would be returns which might justify the cost of research.

There has also been appreciable discussion as to whether some other method could be devised as an alternative to the patent system and most people with an intimate knowledge of the problems of protecting and exploiting technology would be able to put forward suggestions; for example there is the Russian system of Authors Certificates. The great virtue of the patent system is that it has worked for several hundred years. Undoubtedly it has its shortcomings but in our view it is better to attempt to correct these shortcomings than to experiment with untried systems. One of its great virtues is that it offers an opportunity to a research organisation really to hit the jackpot. This is undoubtedly a great encouragement to research. The possibility of licensing which it offers can be important in the recovery of heavy research expenditure. It can materially assist the bringing forward to commercial fruition of developments which, in its absence, would never reach this stage; for example in some cases market research can predict with precision the total market for a particular commodity. There are undoubtedly cases where the ability to monopolise this market for a relatively short period of years may alone justify the costs and risks involved. Finally it is possible to state two conclusions from the recent history of the pharmaceutical industry; first that in the absence of patent protection inventions will indeed be pirated and, secondly, that all the miracle drugs, which have done so much for mankind, were invented in countries granting protection for pharmaceutical inventions.

In short therefore it is very strongly the view of this Federation that the continuation and improvement of the patent system is necessary if the technological growth of this country is to be sustained.

## THE SHORTCOMINGS OF THE PRESENT U.K. SYSTEM

There is general agreement that the patent system today has three main failings from the point of view of industry—



uncertainty, delay and high cost. Causes may be attributable as follows:

- (1) far too high a proportion of granted patents would be held by the Courts to lack inventive merit;
- (2) because it is so easy to obtain a patent, too many patent applications are filed, many on material which is no more than mere workshop practice;
- (3) it takes too long to reach the point of grant;
- (4) it takes too long and costs too much to test validity and infringement.

The Patent Office is faced with three grave problems—the dramatic increase in applications, largely due to the increase in filing of foreign equivalents, the flood of scientific literature and the practical difficulty of recruiting and housing an adequate number of examining staff of the high scientific quality necessary for examining modern inventions of great scientific complexity.

In considering possible remedies it has been thought convenient to distinguish two broad areas which have been headed respectively as “Pre-grant Considerations” and “Post-grant Considerations”. Some overlap is inevitable.

## I. PRE-GRANT CONSIDERATIONS

The primary question is one of numbers, which are not only a major contributing factor to the uncertainties, delays and high cost of which industry complains, but which are also a substantial factor in the problems of the Patent Office.

There is a firmly held view that part of this problem is directly associated with the different standards applied on the one hand by the Patent Office in examining procedures and on the other by the Courts in determining validity. In the result a high proportion of the patents granted by the Patent Office are undoubtedly invalid by Court standards.

In the Appendix to this memorandum, under the title of Defensive Patenting, we have attempted to analyse the motives of industry in applying for defensive patents, and to repeat a proposal submitted by the Federation to the Patent Office for

providing applicants with an alternative means of protecting their own freedom of operation. For the purposes of the main memorandum it is perhaps sufficient to state our firm belief that so long as it is possible to secure the grant of invalid patents, so long will applications be made for them, especially under circumstances in which the only other way by which the devisors of these "inventions" can protect fully their own freedom to use them, is to disclose them immediately to their competitors.

In this section we suggest that a remedy should be sought by ensuring that the Patent Office has available the result of an exhaustive "state of the art" search (sub-section (a) below) and is given wider powers over validity in prosecution (sub-section (b) below) and in opposition (sub-section (c) below).

#### (a) THE SEARCH

The search which the Patent Office conducts is closely circumscribed and quite inadequate to disclose anything approaching a true picture of the "state of the art". This is not only the most vital single factor in a proper examination procedure, it is also vital to the question of validity in litigation of all sorts and within industry to the determining of basic issues which may decide the commercial future of a new invention. We recommend most strongly that the Patent Office should base its examination on a full search report, prepared either by itself or by using the services of an international organisation.

We are aware that the Patent Co-operation Treaty under development by BIRPI contains proposals for centralising and sharing the searching task and we warmly welcome this initiative. We believe it is helpful to distinguish between two functions, the first of which is the creation of a central documentation centre, which would establish a searching library on a realistic basis, and the second is the search itself. This library could be used as an international search centre, or the documentation could be made available to individual patent offices, should they wish, or be obliged, to conduct their own searches. The Committee will be aware that although the

bulk of the scientific literature is formidable, the major industrial companies in the U.K. must of necessity cope with that part of it which is relevant to their own industries. We strongly urge that the maximum possible pressure should be exerted on BIRPI and the Governments concerned to establish quickly a single comprehensive documentation centre in the I.I.B. Because of industrial experience we feel that the problems of creating the centre could with advantage be discussed between industry, the patent offices and the I.I.B., and the Federation would be willing to assist in such a study, either nationally or internationally. We are also of the opinion that the balance of advantages in relation to the actual conduct of the searches is in favour of having these done in a single centre.

It is perhaps worthy of mention that although a fully satisfactory method of machine searching has not yet been devised, a great deal of effort is being devoted to the problem and there are good hopes that the answer will soon be found.

(b) THE EXAMINATION

The Patent Office has available to it only very restricted grounds for refusing an application. The Patent Cooperation Treaty mentioned above proposes three main tests justifying the grant of a patent—namely that the proposal must be novel, that it must not be obvious and that it must be useful. To all intents and purposes the British Examiner can only refuse an application on one of these grounds, lack of novelty.

It is our view that the Patent Office should be given much wider powers over validity with the object of achieving a standard of grant much closer than the present one to the standards applied by the Courts in assessing validity. At least they should have the power to refuse an application which is obvious. There is no suggestion here that the standards applied by the Courts are too low.

Undoubtedly on this aspect the problem which will exercise the Committee's mind will be whether, in view of the present difficulties in the Patent Office and the experience of other examining Offices, there is any practical possibility of achieving this objective.

We are aware also of the great difficulties of the Patent Office in securing Examiners with the scientific knowledge required to examine some of the highly specialised and extremely complex specifications now being filed. On the other hand people working in large industrial organisations see each year men of great ability who are specialists in advanced scientific techniques, retiring on pension. Many of these individuals are not only capable, but willing to continue in full or part time employment. There is here a large potential reservoir of specialised knowledge and it is suggested that some means could be found of utilising it—perhaps by full-time employment, perhaps part-time, or perhaps by the creation of expert panels who could be called in where required to assist the Examiners. We realise that a suggestion of this nature creates many problems, but nevertheless we recommend it to the consideration of the Committee.

The main problem to which the second part of the BIRPI Patent Co-operation Treaty is directed is the avoidance on a world scale of multiple examination. In principle we are in favour of the intentions underlying this Treaty, which is now being redrafted, and so comment on these proposals must of necessity await the revised terms. It is apparent that even if everything were favourable to the Treaty it could not become fully operative for a long time. If serious opposition emerges (and such opposition does exist) it may never materialise at all.

We think it likely that the Committee may wish to consider other possibilities for avoiding multiple examination, among which it might wish to consider the introduction of a unilateral provision by which the U.K. Patent Office would delay examination of applications originating in an examining country and would accept and lay open to opposition such an application when the Office

of its origin had itself accepted the application. A second possibility might lie in the negotiation of a series of bilateral agreements, and a third might be found in an agreement among a group of countries on a much more selective basis than the grouping comprised in the BIRPI Treaty proposal. The countries best adapted to this last possibility are Holland, Germany, Sweden and the U.S.A., which together represent some 56% of the complete specifications filed in the U.K. Office in 1966. All of these proposals, and certainly the last two, could only be internationally acceptable if the British Office were equipped to conduct a full subject matter examination itself. Moreover even if the Patent Co-operation Treaty comes into being it provides for a sharing of the examination load among selected examining Offices. If this is done it would obviously be a great advantage to British applicants if the examination proceedings were conducted in their own Patent Office.

The Committee will be well aware that the Dutch and German Patent Offices are looking for a solution to their examining problems towards a system of deferred examination—and that the U.S. President's Commission recommended a provision which would enable deferred examination to be used should it be necessary.

Under the Dutch law an application will not now be examined for seven years—this period being chosen because by this time a substantial number of patents are abandoned by non-payment of renewal fees. It is possible under the law to secure an earlier examination but, if this is not done, the patent will not normally be granted until nine years from application. The proposal is potentially of great value to the Patent Offices—from the point of view of industry it is not regarded favourably. In so far as patents are relevant to a decision on commercial innovation, uncertainty is perhaps the greatest deterrent. The introduction of deferred examination would increase substantially the period of uncertainty.

If however the Committee should be minded to recommend the introduction of deferred examination it would,

in our view, be essential to improve on existing schemes by providing adequate incentives, either financial or otherwise, which might encourage the patentee to prosecute or abandon his application.

(c) OPPOSITION

It will, we believe, be apparent from what we have said above that we would also strongly recommend a considerable broadening of the grounds of opposition. Sections 14, 32 and 33 of the Patents Act 1949 provide three possibilities for testing validity; Sections 14 and 33 before the Comptroller, Section 32 in the High Court. The widest statement of the grounds on which validity may be tested is found in Section 32. We recommend that the grounds set out in Section 32 should apply to all three sections. Section 33 provides a method by which validity may be tested before the Comptroller within a period of one year from the date of the grant. We recommend that this period should be extended to cover the life of the patent, and if this were done Section 14 could be deleted.

## II. POST-GRANT CONSIDERATIONS

It is suggested earlier in this memorandum that the three main shortcomings of the patent system from the point of view of industry are uncertainty, delay and high cost.

The Committee will of course be familiar with the recent case of *Anxionnaz and Another v. Rolls-Royce and Others*, and particularly in view of the fact that two members of the Committee were directly involved in the case it may seem superfluous to deal with it in this memorandum. It does however highlight in the clearest possible manner all three of the shortcomings mentioned.

The facts as they emerge from the judgment do not appear to be particularly complex—the discovery on which the invention was based was that the efficiency of a compressor falls considerably when the tip of the compressor blades approaches the speed of sound and the invention claimed related to the design of the air inlet passage to ensure that the

relative tip speed of the moveable blades did not reach the local speed of sound.

It was established that the "discovery" was known at the date of application and it was held by the Court that the patents were invalid.

The priority date of the invention was 4th December 1939, an action was commenced against Rolls-Royce alone on 14th November 1960, was converted into a consolidated action involving other parties on 18th April 1963. The case came before the Court on 1st November 1966 and occupied approximately 50 days between that date and 26th April 1967. Judgment was given on 9th November, i.e. approximately seven years after the commencement of the proceedings. In theory two further stages of appeal are possible and if they occur this will involve a considerable further period of time. It will be apparent to the Committee that the total costs will be very large.

We are only too conscious of the fact that the reform of any branch of the legal system invariably appears to present formidable difficulties, but it is our view that in relation to patent litigation, a root and branch revision is urgent.

We believe it would be possible to simplify, accelerate and cheapen patent litigation in the United Kingdom without any serious lowering of the high standards of justice. While we are rather hesitant about making any detailed suggestions we think that one area for consideration might be the creation of a special Patent Court within the orbit of the High Court and with jurisdiction over infringement and validity. The Court should have a streamlined procedure, in the pre-trial period as well as during the trial itself and might be conducted largely on the basis of written evidence, possibly along the lines laid down in the patent rules for Section 14 proceedings. The composition of the Bench might include High Court Judges and individuals having suitable experience such as Technical Experts, Senior Patent Examiners and experienced members of the Patent Bar. An analogy might perhaps be found in the practices of the Restrictive Practices Court and the Admiralty Court. There should be one stage of appeal.

## FURTHER SUBMISSIONS

The Federation proposes in the near future to submit a further memorandum on more specific matters such, for example, as the harmonisation proposals contained in the Strasbourg Conventions, the employee inventor, patents for pharmaceuticals, the protection of know-how, and so forth. The Council is most anxious to assist the Committee in every way possible and in particular to provide further information or participate in the discussion of any topic which the Committee would regard as useful to its deliberations.



## APPENDIX

### DEFENSIVE PATENTING

This note has been prepared in answer to a request from the Banks Committee.

It is generally recognised that in most countries of the world the standard applied by the Courts in assessing the validity of a patent is higher than the standard applied by the Patent Offices in granting it. The gap varies considerably, being largest in countries which do not examine applications except for form, and smallest where the applications are subject to a thorough examination. The British Office is in an intermediate position since it examines for novelty on the basis of a restricted search, but does not examine for either invention or utility. In each country there is thus an area in which a skilled patent practitioner will know that it will be possible to secure the grant of a patent which would be unlikely to be sustained in Court proceedings. In the United Kingdom it is thought that this area is quite large.

It is also demonstrable, in most countries and certainly in the U.K., that the costs of patent litigation are extremely high.

Thus a person possessed of an invention in respect of which he knows that he can secure the grant of a patent in the area described above, is also aware that a competitor could secure a similar grant which it would be extremely expensive to have revoked. Since the cost of obtaining a patent is in relative terms very small, there is a strong incentive to play for safety and apply for a patent which even if invalid when granted will safeguard the freedom of action of the applicant. This practice is generally known as defensive patenting.

It became very clear however, during discussions of this subject in the Council of the Federation, that an applicant's motives in seeking a grant in the "invalid" area are usually complex, and it is seldom that an application is filed purely for defensive reasons. The following are a few of the other factors which may influence the applicant:

- (1) The technology involved may be of real commercial importance either in itself or linked in with the patents protecting an important development.

- (2) The patent when granted may have a considerable nuisance value to a competitor and therefore constitute a useful bargaining weapon.
- (3) It is almost as cheap and easy to obtain publication by patenting in the U.K. as it is to publish in a journal, disclosure to competitors is delayed for up to 3½ years, and you get some protection in the end.
- (4) It is difficult to know the value of an invention at the date of conception and an invention which may appear of secondary importance at the time has a habit of assuming considerable value in later years. It is therefore safer to file a patent application.
- (5) Inventors are human and the grant of a patent is, at least some public recognition that the work done by the inventor is novel.

Someone possessed of such an invention has today only two alternative ways of preserving his freedom of action—the first is to publish, which involves an immediate disclosure of his developments to his competitors, and the second is to apply for a patent. He can of course do nothing and accept the risk of a lawsuit should a competitor secure protection for the same invention. The Federation has therefore proposed a third alternative in its submissions to the Patent Office in relation to the terms of the second Strasbourg Harmonisation Convention by which the deposit of a document describing the invention would protect the freedom of action of the depositor against any patentee whose priority date was after the date of the deposit. Publication would take place after an interval of years. This proposal could be very attractive if a single deposit could secure freedom in a large number of countries. The text of the Federation's submission is as follows:

#### **“Prior Possession of an Invention**

If it is accepted that a prior right should at least cover use and preparation for use the question arises whether prior possession of an invention at the material date should also confer a right of use. It was noted that the Council of Europe draft originally contained a paragraph conferring such a right.

Accordingly the Council (of the Federation) next proceeded to consider this question. In so doing the Council endeavoured to direct its views primarily towards trying to identify whether in practical terms such a right would be of value to industry. I think you are well aware of the great concern which is being expressed in industry throughout the world about the shortcomings of the patent system in relation to the needs of modern industry. There is little doubt that much of the concern turns on industry's difficulty in ascertaining reasonably quickly an authoritative view on the patent position which might be relevant to an important decision to install manufacturing facilities. It is felt that a substantial contributing factor to this uncertainty is the lengthening period between application and grant caused by the large number of patent applications which are filed in all the major industrial countries today. It is the experience of members of the Federation and, we believe, also a common experience that a substantial proportion of patent applications are filed for defensive reasons and not with any desire to monopolise that particular part of the technology.

In our discussions we endeavoured first to answer the question whether it should be possible to separate the right to use technology, which a particular company has developed, from the right to prevent other persons using the same technology.

This basic proposition proved much easier to accept in principle than in practice—in particular the Council members expressed concern along three main lines—

- (1) Would the proposal weaken the patent system?
- (2) How would the prior knowledge be proved?
- (3) Would the absence of publication adversely affect the development of technology?

As to the first it was ultimately the fairly general view that important inventions would still be patented since the right to exclude competitors was of the greatest importance to the introduction into commercial application of a new technological advance. It was also the view of many members, and especially those representing the great processing indust-

ries such as chemicals and oil, that they would certainly file many fewer defensive patents if their own right to use their own technological advances were assured. A substantial reduction in the number of applications of the defensive type would, it was felt, strengthen rather than weaken the patent system.

As to the second, a wide range of alternative propositions was considered but the proposal which eventually seemed to find favour was that the inventor should be obliged to prepare and deposit a document describing his invention in sufficient detail to enable its practice by one skilled in the art—in short something very similar to a patent specification. The deposit would be recorded and available to the inventor as a defence against a suit for infringement of a patent bearing a later priority date.

As to the third there was general agreement that at some point in time the document described in the previous paragraph should be made available to the public, but there was no concensus as to the period which should be recommended. Once again it seemed to the Council that a practical rather than a theoretical solution was required. If the period were too short, i.e., less than five years, the procedure would be very little used—if it were too long, i.e., more than ten years, some stimulus would be lost.

To sum up therefore consideration of the question of third party rights over the past months has indicated a strong movement within British industry in favour of developing a system which would enable an inventor to protect his own right to use the invention without having to exclude others. The system which the Council of the Federation prefers is that of an official secret deposit of a document very like a patent specification which could be used by the inventor as a defence in infringement proceedings in respect of a patent of later priority date. The patent would however remain effective against third parties. The deposited document would become available to the public after a defined period of time.”

Another possibility for minimising applications for these defensive and minor improvement patents would be a sub-

stantial increase in the cost of securing patent protection. The Federation is totally opposed to such a suggestion—we believe it to be contrary to the whole history of the patent system in the U.K. and we believe it to be much preferable that 100 invalid patents should be granted than that one valuable invention should fail to secure protection because of the inability of the inventor to bear the cost.

As indicated in the Memorandum we consider that by far the best way of minimising applications for these defensive and minor improvement patents is to remove the causes which make them attractive to applicants by increasing substantially the powers of the Patent Office to reject applications and by simplifying, accelerating and cheapening the processes by which validity and infringement are tested.

