

# Winds of Change Are Blowing

*Licensing executives must deal with many variables in changing world of technology transfer*

BY EDWARD ARMITAGE, C.B.\*

There was a time, no doubt, when the legal framework against which intellectual property licensing is carried out was stable and well defined by statutes having characteristics such as are commonly attributed to those of the Medes and Persians. Now you may be forgiven for feeling like W.S. Gilbert's unfortunate billiards player who, you will remember, was condemned to play on a cloth untrue, with a twisted cue and elliptical billiard balls; and, one might add, with someone shaking the table and changing the rules in the middle of the game. Almost nothing will stay still, or can be taken for granted. To enumerate some of the variables:

1. Domestic patent law is in the process of receiving its biggest change in its whole history.

2. Patent protection in this country has acquired a European and even a world dimension. It will shortly be possible to get a patent in U.K. by any one of three and possibly four routes.

3. The impact of domestic competition law on patents is pretty well established; but European competition law is still developing and unpredictable.

4. A community trademark is under negotiation.

5. Copyright law may be expected to change in a number of ways before long, following the Whitford Report. In particular there is a state of uncertainty, or at any rate a lack of awareness, as to the effect of the 1956 Act plus the 1968 Design Copyright Act on industrial design protection. And sooner or later the beady eye of Brussels may be expected to focus on this area.

6. Possibly the biggest question mark of all — the attitude of developing countries toward the patent system.

In all this, 1977 looks like a busy year. Not merely the Royal Silver Jubilee and the 10th anniversary of LES U.K., but also passage of the Patents Bill; entry into force of the EPC and probably the PCT; the start of serious negotiations for a community trademark; and active pursuit of the other matters I have mentioned. I should like, if I may, to say a few words on how these things appear to me.

The Patents Bill, as you know, has emerged from the Lords considerably tidied up. The bill is, I believe quite

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comprehensible and readable (famous last words!) notwithstanding the criticism which has been levelled at it. But as a drafting exercise it has been fiendishly difficult, and many of the amendments even more fiendish to understand. Indeed the Lord Chancellor, during one of the evening sessions devoted by the faithful to amendments to the transitional provisions, was moved to say, after having read out an explanation of

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more than normal obscurity (supplied I may say by the Patent Office) on some esoteric point, "If any noble Lord did not understand all that I have just read out, I fully, wholeheartedly and entirely sympathize with him . . .". Perhaps after a few more stages in the Commons we shall have got it right (or as right as it will ever be). One thing, the Bill has to be passed because, with bipartisan agreement, we have already ratified the EPC, and we need the Patents Bill to become law in order to enable us to pay our national contribution to the initial running costs of the EPO quite apart from giving legal effect in the U.K. to EP applications. It has taken a long time to get this legislation before Parliament, but now that it is there, the willingness of both Government and Opposition to clear the decks and advance its passage is something which, I am sure, all of you from this country will welcome. I hope that those of you from other countries will also welcome it as bringing nearer the time when a single application in one language will bring uniform patent protection over the whole of Europe and, using the PCT procedure, will get one some way on the route to worldwide protection.

On a very specific point, I am glad that it has proved possible for the Department of Health to negotiate such arrangements with the pharmaceutical industry that the existing provisions for compulsory licenses for food and drugs can be omitted from the new act. It is good news that the competitiveness of the British pharmaceutical industry is to be no longer at risk from this source as compared with its counterparts abroad.

## European Patents

Looking at European patent developments, as most of you know, the EPC enters into force after ratification by six countries which can muster between them a certain number of patent applications per annum (in 1970 figures). Germany, Netherlands, U.K. and Switzerland having already ratified, and ratification by Luxembourg being imminent, it looks as though the critical country will be France. Its ratification has been set back by some Parliamentary complications. The current expectation seems to be for French ratification

by July. This should bring the convention into force by October. The EPO, it is then considered, should be open for the filing of applications from 1 June 1978. I am conscious that every public statement I make on this advances the date by about 3 months. I shall now keep my mouth shut in the hope that this one will stick.

Some of you from countries outside Europe may feel a greater stirring of interest for the PCT than for the EPC. This is particularly the case for those of you from the U.S., since the PCT was launched on a U.S. initiative and U.S.A. was the first major country to ratify. The PCT will enter into force upon ratification by eight states with rather complicated filing statistics. With ratification already by U.S.A., Germany and a number of developing countries, it looks as though ratification by U.K. and France or U.K. and Switzerland should suffice for entry into force. Thus if all goes well with our bill, there seems to be a good chance that PCT applications will start at about the same time as EP applications. I know that the thought of moving over, more or less in one go, to regime embodying not only a radically new domestic patent code but also the parallel operation of EP and PCT applications is a daunting one. But there is much to be said for getting it all over at once provided, of course, that we can manage the complications of organization and choice within firms and — from my point of view — within the Patent Office where the potential for trouble is considerable.

Neither the EPC nor the PCT will directly affect licensing conditions as I see it, since they both result in national patents in the countries designated. The CPC, which is waiting in the wings, is a different kettle of fish. Our new Patents Act will permit U.K. ratification of the CPC. But we shall have to wait some time for the other countries to follow. Most seem to have left it for a second bite of the legislative carry and it seems that even Netherlands, Germany and France will be a year or two before they can get the necessary legislation through. It is anybody's guess when all nine (or will it then be all 11 or 12) will line up. My own guess is that the commission machinery will be cranked up if it looks as though the project is going to stagnate.

#### Procedure for Licensing

What no doubt interests you all more than the procedure for obtaining patents is the procedure for *licensing* them. We may feel with some justification that the impact on licensing of our domestic restrictive practices legislation is both modest and reasonably clear. And although you might find that these are not the adjectives which come most readily to the tongue in relation to United States antitrust law, at least the field is well worked over. But there is considerable uncertainty in the two areas I mentioned earlier, viz the EEC and developing countries.

In the community, the problem arises from the fact that the Rome Treaty expresses some principles in only the most general way; and that all the practical detail — which is what really matters — is to be worked out painfully case-by-case by commission or Court of Justice jurisprudence or — perhaps even more painfully — to be expressed in clauses in certain additional instruments such as the Community Patent

Convention or, most recently, the draft Regulation on block exemptions under Article 85 of Rome Treaty. There is, I know, a lot of apprehension about the block exemption Regulation, apparently on the good old patent doctrine that what is not claimed is disclaimed: what is not expressly exempted must be prohibited. Given that that can be overcome, as I'm sure it can, I must say that there seems to be everything to be gained by getting security over at least some part of the field. I would, therefore, like to get in a plug for refraining from attacking the regulation per se and concentrating on getting the line drawn in a reasonable place. A great deal of play has been made of Article 43 of the CPC in relation to Community licensing in general and the block Exemption Regulation in particular. The commission has, in my opinion, taken up a quite exaggerated position in condemning Article 43 out of hand because of its general approval of territorial and exclusivity clauses; given that the article cannot be invoked in contradiction to the Rome Treaty. But some industrial spokesmen have been equally unreasonable in the opposite direction by arguing that Article 43 means that *all* territorial and exclusivity clauses should be given block exemption treatment. The truth, as so often, lies in between. It is really, I suspect, a question of onus. The commission's philosophy, as I understand it, is that such clauses are guilty under Article 85(1) until they prove themselves innocent under Article 85(3), while the CPC philosophy (in terms of *patent* law) is rather the reverse. I prefer, myself, to look at it from the CPC viewpoint (understandably, since I fought for it at Luxembourg), but the two approaches seem to me to be perfectly compatible. And it is to be noted that the commission accepts that exclusive licenses are not automatically bad; and that territorial restrictions may be justifiable, particularly for small- and medium-sized undertakings. On the other hand, the commission takes a harder line on territorial limitations for trademarks than for patents. What depresses me, quite frankly, is that the argument always seems to take place at the juridical level. What is needed is a meeting of minds at the level of what makes economic and commercial sense for the prosperity of Community industry, traders and consumers.

There is even more uncertainty with *developing countries*. It is still a matter for speculation whether they will turn away from the patent system or, alternatively, will try to get the best of both worlds by retaining the patent system but so oppressing patentees as to frighten away foreign industrial investment. The battle for the confidence of these countries has yet to be won and it is being fought on two fronts. The front that I and my colleagues see is that in WIPO and UNCTAD meetings when patience is the watchword. Special provisions favoring developing countries have been inserted in a number of treaties and agreements, including the PCT and the TRT. But attention is focusing on amendment of that most fundamental of all industrial property agreements, the Paris Convention. I venture to believe that patience is bringing its reward and that the initial hard cynicism and distrust is being replaced by a degree of understanding of the economic

(Please turn to Page 239)

## Winds of Change Are Blowing

(Continued from Page 170)

realities.

Behind the diplomatic front is the other front, that of the real world where technology is actually transferred and not just talked about. And on that front you people are in the firing line. I suspect that more good can be done by fair play on the spot, i.e. licensing for local manufacture where at all feasible and otherwise supply at most favorable prices, than by any amount of tinkering with the Paris Convention or the UNCTAD code of conduct.

I seem to have spent most of my time talking about patents. As we all know technology transfer commonly involves licensing of both patent and trademark rights and I am constantly being told that a good trademark is commonly worth much more than a good patent. Perhaps, therefore, before I end I should say just a few words about the community trademark. There is, I sometimes feel, a tendency in this part of the world to think that all that matters about this is that we should get the CTM Office in London. Well, I certainly hope we shall do so, and I believe that the government will continue to press for that but it needs to be recognized that in some years' time we are likely to see a situation in which the basic trademark law will be the same in all EEC countries; in which it is still possible to get one-country protection; but in which the scales are weighted in favor of a community trademark in a single ownership throughout the EEC for all interstate trade in the EEC. We got down to it seriously in Brussels last week but it is early yet to predict the time scale. The European patent has taken some eight years to come to pass; we may profit from experience to get a shorter schedule for the community trademark, but the legal problems are more troublesome for the trademark than for the patent. So what should we say, five years?

## Japan and Southeast Asia

(Continued from Page 174)

economies, in order to narrow this income gap and make this world a peaceful and harmonious family of nations. If such an open-door policy and preferential treatment for developing countries is not possible from the advanced industrialized countries, the only alternative may be to form a common market of ASEAN countries and set up a high duty barrier against products of non-regional origin. This would however diminish world trade to a great extent and impede the free trade system of the world.

Gentlemen, Southeast Asia is a diverse and complex paradox. It is impossible to describe it completely in a short presentation.

Sometimes, the heart of Asia is beyond the logical comprehension of western people. I would like to con-

clude my remarks with an episode which occurred in Manila, Philippines, when I was invited as a lecturer at a UNIDO meeting.

We had been discussing various restrictions imposed by developing nations on technology transfer from industrialized countries. A delegate from an industrialized country commented: "You are free to set up many difficult rules on the transfer of technology but if it is too difficult it may be detrimental to your own economy. It is just like playing tennis. You are on the other side of the net and we are playing this side. But tennis can be played only when we play it according to fair rules. If you arbitrarily change the rules to your own liking, nobody will play tennis with you. Then you will be able to draw no benefit."

There was a slight lull after this persuasive argument. But after awhile an official of the Philippine government stood up and said, "I understand your point. It is a fair and persuasive statement. But what Asia really needs is not that you play tennis on the other side of the net but you come to our side and play with us. This is the sentiment of Asia."

## Changing Environment in Canada

(Continued from Page 181)

biggest changes occurring in Canada. You are probably all aware that Canada is revising its patent laws for the first time in decades. The task is proving difficult, and is taking much longer than was at first expected. As a result, the revisions may not be passed by Parliament within the next two or three years, but nevertheless, a consensus is beginning to form. Perhaps some of you have heard of the somewhat radical proposals originally put forward for discussion. You will be relieved to know that few of these will be adopted. In fact, the resulting patent law will follow very closely those in the European Common Market and will be within the terms of the European Patent Treaty. For example, patents will be issued on a first-to-file rather than the first-to-invent basis now used in Canada. The terms of patents on products or processes worked in Canada will probably be about the same as in other countries, namely about 20 years, although somewhat shorter on patents not worked in Canada. As at present, compulsory licenses will be available on all food and drug products. One of the most important provisions from your point of view as licensing executives is the requirement that all licenses would have to be registered with the Patent Office to be valid in Canada. In addition, certain periodic reports together with periodic maintenance fees would have to be made by patentees. I need not warn you, of course, that you should check these predictions against the final law when it is passed.