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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON THE LAW OF TRADEMARKS, INDUSTRIAL DESIGNS AND GEOGRAPHICAL INDICATIONS

First Session
Geneva, July 13 to 17, 1998

REPORT*

prepared by the International Bureau

INTRODUCTION

1. The Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (hereinafter referred to as “the Standing Committee”) held its first session in Geneva from July 13 to 17, 1998.
2. The following States members of WIPO and/or the Paris Union for the Protection of Industrial Property were represented at the meeting: Andorra, Argentina, Australia, Austria, Bangladesh, Barbados, Belarus, Belgium, Brazil, Burundi, Cameroon, Canada, Chile, China, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Latvia, Libya, Lithuania, Madagascar, Malaysia, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Oman, Pakistan, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Senegal,

* Subject to adoption at the second session of the SCT. Following comments received on the Draft Report (document SCT/1/6 Prov. 1), paragraphs 26 and 33 were modified, and a new paragraph 44bis was added.

Singapore, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, The Former Yugoslav Republic of Macedonia, Trinidad and Tobago, Tunisia, Ukraine, United Kingdom, United States of America, Uruguay (74).

3. In accordance with the Standing Committee's decision (see paragraph 16, below), the European Communities (EC) participated in the meeting in a member capacity, without the right to vote.

4. The following intergovernmental organizations took part in the meeting in an observer capacity: World Health Organization (WHO), World Trade Organization (WTO), Benelux Trademark Office (BBM) and International Vine and Wine Office (OIV).

5. Representatives of the following international non-governmental organizations took part in the meeting in an observer capacity: American Intellectual Property Law Association (AIPLA), Asian Patent Attorneys Association (APAA), Association française des praticiens du droit des marques et des modèles (APRAM), Centre for International Industrial Property Studies (CEIPI), European Brands Association (AIM), European Communities Trade Mark Association (ECTA), International Association for the Protection of Industrial Property (AIPPI), International Chamber of Commerce (ICC), International Federation of Industrial Property Attorneys (FICPI), International League of Competition Law (LIDC), International Trademark Association (INTA), Japan Intellectual Property Association (JIPA), Japan Patent Attorneys Association (JPAA), Japan Trademark Association (JTA), Union of European Practitioners in Industrial Property (UEPIP), Union of Industrial and Employers' Confederations of Europe (UNICE) (16).

6. The list of participants is contained in Annex II of this Report.

7. Discussions were based on the following documents prepared by the International Bureau of WIPO: "Agenda" (document SCT/1/1), "Organizational Matters and Overview of the Issues to be Considered by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications" (document SCT/1/2), "Protection of Well-Known Marks" (document SCT/1/3) and "Draft Articles on Trademark Licenses" (document SCT/1/4).

8. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made.

GENERAL DISCUSSION

Agenda Item 1: Opening of the session

9. The session was opened by Mr. Albert Tramposch, Director, Industrial Property Law Division, who welcomed the participants.

Agenda Item 2: Election of a Chair and two Vice-Chairs

10. The Standing Committee unanimously elected Ms. Lynne G. Beresford (United States of America) as Chair, and Mrs. Elizabeth Owiredu-Gyampoh (Ghana) and Mr. Ricardo García Rojas Alarcón (Mexico) as Vice-Chairs. Mr. Albert Tramposch (WIPO) acted as Secretary to the Standing Committee.

Agenda Item 3: Adoption of the Agenda

11. The Agenda (document SCT/1/1) was adopted without modification, on the understanding that the Summary by the Chair (Agenda item 9) would be presented to the Standing Committee in writing.

Agenda Item 4: Rules of Procedure

12. The Standing Committee discussed organizational and procedural matters, under Part II of document SCT/1/2.

13. The Delegation of Austria, speaking in its capacity as the Presidency of the European Communities and on behalf of its Member States declared that the EC had played a significant role in the work which had been undertaken to date in WIPO in the areas for which the Standing Committee will have responsibility. In particular, it referred to the contributions of the EC to the recent Committee of Experts on Well-Known Marks, consultations on Internet domain names and the Diplomatic Conference on the Protocol to the Madrid Agreement Concerning the International Registration of Marks. The interest of the EC in the work of the Standing Committee was due to Community legislation in relevant areas, including a Council Directive to Approximate the Laws of the Member States Relating to Marks, the Council Regulation on the Community Trade Mark and several Council Regulations on the protection of geographical indications in the field of agriculture. Moreover, it was expected that the Council of the EC would adopt, in September, a Directive on the Harmonization of the Laws of the EC Member States on Industrial Designs. Within the legal order of the EC, legislation adopted at Community level provided the basis on which the EC acquired authority to conduct international relations in areas covered by that legislation. For these reasons, the EC had been accorded member delegation status in the context of previous Committees of Experts and Diplomatic Conferences within the framework of WIPO. Considering the particular competence of the EC in the matters to be discussed by the Standing Committee and the status of the EC Delegation in previous meetings of various WIPO Committees of Experts and conferences in this field, the EC and its Member States deemed it to be appropriate and justified that the EC be granted the status of member of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications. The Delegation therefore proposed the adoption of a special rule of procedure to allow the EC to participate as a member delegation in the Standing Committee.

14. The Delegation of the United States of America declared that, while it recognized the contribution which the European Communities and its Member States had made to the enhancement of international protection of intellectual property rights, it was concerned that the status of member of the Standing Committee would give the European Communities a

right to vote in addition to those of its Member States, to which the United States of America was opposed.

15. The Delegation of Australia, supported by four other delegations, suggested that, following the example of the Standing Committee on Information Technologies (SCIT), the European Communities be given the status of a member of the Standing Committee without a right to vote.

16. As invited in paragraph 11 of document SCT/1/2, the Standing Committee adopted the special rules of procedure proposed in paragraph 5 of that document. In addition, the Standing Committee adopted one additional special rule of procedure, namely, that membership in the Standing Committee would also be extended to the European Communities, provided that it shall not have the right to vote.

17. The Standing Committee noted the working arrangements described in paragraphs 6 to 10 of the same document with the following understandings:

18. The question of languages with respect to interpretation and translation of documents (paragraph 7 of document SCT/1/2) would be revisited at a future meeting of the Standing Committee in the light of any decision taken by the Assemblies of the Member States of WIPO on that issue.

19. In the process of circulating the draft Report for comment following the sessions of the Standing Committee (paragraph 8 of document SCT/1/2), the International Bureau would, if possible, circulate the first draft in three languages within two weeks of the meeting, and would make arrangements for participants to have the opportunity to comment on proposed changes to the Report. The time limit for commenting on the draft Report would be counted from the date on which all language versions have been distributed, and holiday periods would be taken into account.

20. The Standing Committee agreed that there would be no general declarations at the beginning of its sessions, but that delegations and representatives would have the opportunity to make general statements at the opening of discussions on each of the issues to be discussed. Summaries of these general statements, a summary of the discussions concerning the issues to be discussed, and references to specific reservations expressed by member delegations would be included in the Report.

21. An SCT Electronic Forum would be established prior to the second session of the Standing Committee, for the electronic distribution of, and submission of comments on, a provisional draft working document for the second session concerning the use of trademarks on the Internet. The procedures that had been adopted by the Standing Committee on the Law of Patents (SCP) for the SCP Electronic Forum would be followed as an interim matter, and the Standing Committee would review the procedures for the SCT Electronic Forum at its next meeting.

22. The question of languages for interpretation and translation of documents and of funding for participation of delegates at any future Working Group of the Standing Committee (paragraph 10 of document SCT/1/2) would follow any procedures decided by the Assemblies

of the Member States of WIPO on those issues, and meetings of the Working Group would be scheduled, if possible, on dates adjoining the dates of a meeting of the Standing Committee.

Agenda Item 5: Issues to be considered by the Standing Committee

23. The Standing Committee discussed the issues to be considered by that Committee, under Part III of document SCT/1/2, as follows:

Provisions on Well-Known Marks

24. Concerning this issue (paragraphs 14 to 19 of document SCT/1/2), a number of delegations and representatives of observer organization stated that it was important that the work on the Provisions on Well-Known Marks was brought to an end in an expeditious manner. Some of those delegations and representatives pointed at some overlap between the problems dealt with in draft Article 6 of the Provisions (i.e., “Protection of Well-Known Marks Against Conflicting Domain Names”) and the issue of use of trademarks on the Internet. In response to the interventions of two delegations, the International Bureau explained that the Standing Committee was entitled to make a recommendation to the WIPO General Assembly concerning the form in which the Provisions should be adopted and, given the advanced state of the work on the Provisions, the time seemed to be ripe to make such a recommendation.

25. It was agreed that the Provisions on Well-Known Marks should be discussed with highest priority at the first session of the Standing Committee, and that it should be included on the agenda for the next session.

Trademark Licensing

26. The Standing Committee discussed this issue (paragraphs 20 to 23 of document SCT/1/2) and agreed that this issue should be discussed with second priority at its first session (see paragraph 108, below), and that it should be included on the agenda for the third session.

Trademarks and the Internet

27. The Standing Committee discussed this issue (paragraphs 24 to 27 of document SCT/1/2). Almost all delegations and representative of observer organizations which took the floor emphasized that there was great urgency to address this issue, and the International Bureau was asked to take up work on it as soon as possible. It was decided that the issue should be included on the agenda for the next session with highest priority. In preparation for that session, the International Bureau would prepare a study, with the help of consultants, on the following two questions, for discussion by the Standing Committee: (i) How can a relationship be determined between a sign or mark that is used on the Internet and particular goods or services? and (ii) How can a relationship be determined between a sign or mark that is used on the Internet and a particular country or territory?

Geographical Indications

28. With respect to this issue (paragraphs 28 to 32 of document SCT/1/2), four delegations recalled that work on the protection of geographical indications was ongoing within the framework of the TRIPS Council of the World Trade Organization (WTO) and that, in order to avoid unnecessary duplication, the Standing Committee should not deal with the question. One of those delegations declared that, in its view, geographical indications were best protected under trademark and unfair competition law. Furthermore, that delegation said that trademark rights which had been acquired in good faith had to be safeguarded against conflicting geographical indications.

29. Three delegations were of the opinion that the Standing Committee should give a high priority to work on geographical indications in parallel with the work of WTO in that field. Two delegations said that, although WTO's work did not preclude the Standing Committee from dealing with that issue, the two Organizations should draw from each other's experience, and that cooperation between the two Organizations should be pursued.

30. The Representative of the International Vine and Wine Office (OIV) referred to the existing links between his organization and WIPO and gave a summary of the present state of OIV's work in the field of geographical indications for wine. In conformity with the recommendations adopted at several meetings of its General Assembly, OIV had created an electronic database in order to publish geographical indications. Currently, this database contained 1,761 geographical indications which were often composed of one or several protected names, amounting to more than 4,000 relevant entries. For each name, the database contained a reference to the official text under which the name was protected, the applicable international or national system of protection and, as the case may be, the region of protection and type and color of the produced wine. This database was monitored for accuracy and updated regularly. The representative concluded by expressing the wish of his organization that a collaboration between OIV and WIPO concerning work in the field of protection of geographical indications be established, allowing WIPO to take advantage of the results already accomplished by OIV in that field.

31. It was agreed that the question of geographical indications would be revisited at the next session. In the meantime, the International Bureau would continue monitoring developments in this field, and would continue preparations, as contemplated in the WIPO Program and Budget for 1998-99, for a world-wide symposium to be held in the biennium.

Trademarks and International Nonproprietary Names for Pharmaceutical Substances (INNs)

32. The Standing Committee discussed this issue (paragraphs 33 to 36 of document SCT/1/2).

33. The Representative of the World Health Organization (WHO) declared that her Organization was traditionally seeking collaboration with its Member States and other intergovernmental organizations in order to reduce existing problems concerning drug nomenclature. Possible conflicts between International Nonproprietary Names for Pharmaceutical Substances (INNs) and trademarks were, *inter alia*, addressed in a World Health Assembly Resolution passed in 1993. Following the request of its Member States,

WHO had established policy guidelines in order to discourage use of names derived from INNs and to minimize the risks for users of pharmaceutical substances. To illustrate the seriousness of the problem, the representative said that, during the course of last year, the WHO secretariat had notified its awareness of possible conflicts between INNs and trademarks in more than 200 cases. It was against this background that the representative thanked WIPO for the possibility to cooperate on this topic and that she supported, on behalf of the WHO Secretariat, the proposal to conduct the survey.

34. It was agreed that the International Bureau would conduct the survey referred to in paragraph 36 of document SCT/1/2, and that it would present the results of that survey to the Standing Committee at its third session.

PROVISIONS ON WELL-KNOWN MARKS

Agenda Item 6. Draft Provisions on Well-Known Marks

35. The Standing Committee discussed the document concerning the draft Provisions on Well-Known Marks (document SCT/1/3).

36. The Committee agreed that a decision would be taken at this session on the text of each provision, as to whether that provision was adopted, adopted with modifications, deleted, reserved for further discussion or referred to the International Bureau for further study, with the understanding that provisions which had been adopted, adopted with modifications or deleted would be closed for further discussions, except if there were an exceptional reason to re-open discussion.

37. Concerning the issue of well-known marks in general, the Delegation of Japan stated that the Japanese Patent Office was currently collecting information on marks of Japanese and foreign companies and that it planned to publish them on the Internet during the year 1998. However, any information published together with the marks was neither comprehensive nor conclusive as to the status of that mark and a decision whether a given mark was well known had to be made on a case by case basis. Nevertheless, the publication of such lists was seen by the Japanese Patent Office as a first step in strengthening the protection of well-known marks.

38. The Delegation of the Republic of Korea referred to the importance for its country of international investment and, in this context, expressed its hopes for the expeditious completion of the work on the draft Provisions for the Protection of Well-known Marks. It proposed that protection of well-known marks in foreign territories should not require registration or use in cases where there was an unfair intention to obstruct the market entry of the true holder of the well-known mark, or to dilute the distinctive character of the well-known mark in an unfair manner. However, in other cases, well-known marks should only be protected when the mark had become well known through promotion in respect of the given territory.

39. The Delegation of South Africa expressed its support for the Provisions on Well-Known Marks as a whole. However, it reserved its position as regards any retroactive effect of the Provisions.

40. The representative of the International Trademark Association (INTA) stated his belief that the protection of the global trading system through the prevention of piracy and unfair competition of well-known marks was of great significance to contemporary commerce and that it was the function of the Standing Committee to examine measures that would further an increasing level of legal justice, commercial fairness and consumer protection. In particular, he emphasized the importance of the element of bad faith, and believed that, where there was a substantial similarity between the well-known mark and the infringing mark, and the fact that the mark was well-known had been determined, then the burden of proof and a presumption of bad faith should be placed on the defendant, who was very easily in a position to justify the coincidence or similarity between his mark and the well-known mark.

Draft Article 1: Definitions

41. *Item (i)*. This item was adopted as proposed.

42. *Item (ii)*. This item was adopted as proposed, subject to the omission of the word “contractante” in the French text.

43. *Item (iii)*. This item was adopted as proposed.

44. *Item (iv)*. It was pointed out that the term “empresa” in the Spanish version of the text was ambiguous with respect to whether a business was carried out by a natural or by a legal person. However, it was also pointed out that the addition of the words “of a natural or a legal person” would omit the business activities of not for profit organizations which in some countries were not considered legal entities. Further, it was proposed to replace the word “intended” with the word “used,” to remove the subjective element. In conclusion, it was decided that item (iv) would be re-drafted as follows: “a ‘business identifier’ means any sign used to identify a business of a natural person or legal person, an organization or an association.” It was further agreed that the list of examples of signs that can be considered business identifiers which was contained in the present draft would be moved to the notes.

44*bis*. The representative of one observer organization pointed out that, as regards the example used in Note 1.4, the correct spelling should be “The Coca-Cola Company” and “Coca-Cola™”.

45. *Item (v)*. This item was adopted as proposed, subject to the replacement, in the Spanish text, of the word “sarta” by the word “serie.” One delegation asked whether the term “domain name” was also intended to cover a third level domain name, and words which appear to the right of the top-level domain name in a unified resource locator (URL). In reply to that delegation, the Secretariat pointed out that the definition related a “domain name” to a numerical address on the Internet, and therefore would cover any name which corresponded to a site identified by a numerical address. Another delegation said that it was essential that the second and third level domain names were covered by the definition.

46. The representative of an observer organization pointed out that the term “business circles” used in Article 2(3) was not defined and that such a definition was perhaps desirable. There was no support for this suggestion.

Draft Article 2: Conditions of Protection

Draft Article 3: Criteria for Determining Whether a Mark is Well Known

47. These draft Articles were the subject of lengthy debate.

48. *Article 2(1)*. The Delegation of Canada declared that, while it supported the proposal that protection for well-known marks should be granted without a requirement as to registration or use as regards identical or similar goods, this kind of protection would be too broad with regard to dissimilar goods or services. The Delegation said that it could accept the protection as provided by draft Article 4(1)(c)(i) without a requirement of registration, but was opposed to extending that to items (ii) and (iii) of the same provision. The Delegation explained that protection against dilution was a very broad right which should be made subject to the registration of the mark in question, since the legitimate rights of prior users could otherwise be jeopardized. To that end, the Delegation suggested the deletion of the words “registration or” in Article 2, paragraph (1). This proposal was supported by the Delegations of Spain, Andorra, Brazil and Chile.

49. One delegation, supported by two other delegations was opposed to the principle of protection of well-known marks without any registration or use in the territory in which they were to be protected.

50. A number of delegations and representatives of observer organizations supported the present text.

51. The Delegation of Spain suggested to replace, in the Spanish text, the words “podrá no exigirse” by the words “no podrá exigirse” and the words “ha de protegerse” by the words “haya de ser protegida.”

52. The Chair explained that, as regards the protection of well-known marks against unauthorized use or registration in respect of dissimilar goods and services, a registration requirement in order to protect honest users of the well-known mark was not useful, since similarity searches were usually carried out with regard to similar goods or services, and trademark registers normally did not show whether a registered mark was considered to be well known or not.

53. *Article 2(2) and (3)*. After lengthy discussion, it was decided that these paragraphs would be re-drafted by the International Bureau and then re-opened for further discussion.

54. *Article 3*. Several delegations and representatives of observer organizations stated that it should be made clear that the list of criteria used in this Article is not to be considered as either exhaustive or cumulative.

55. The Delegation of Brazil declared that, under the law of its country, consumer surveys were used to determine whether a mark was well known, and suggested that this criterion be included.

56. *Article 3(i)*. One delegation stated that it would prefer to replace the term “circumstances” by “evidence.” In view of the technical meaning the term “evidence” could

take under the national laws of some countries, it was decided not to make that change. The Delegation of Portugal believed that the scope of this item was too broad and therefore reserved its position.

57. *Article 3(ii)*. There was a general understanding that this item did not intend to affect substantive rules under national laws as concerns the use of marks.

58. *Article 3(iii)*. One delegation proposed to delete this item since it deemed it to be of marginal relevance.

59. The representative of one observer organization pointed out that it was important that not only existing registrations, but also applications for registration be taken into account under this item.

60. There was agreement on the substance of this item, on the understanding that registrations or applications should only be taken into account to the extent that they reflected use or recognition of the trademark.

61. *Article 3(iv)*. The Delegation of Spain suggested to replace, in the Spanish text, the words “the mark was recognized as well known” by “the mark had been declared as well known.” One delegation was in support of the criterion as suggested, since its Constitution required that foreign law be taken into consideration. Another delegation suggested to delete the item.

62. *Article 3(v)*. One delegation declared that, in view of the existing variety of methods for evaluating trademarks, this item was only useful if concrete guidelines for how to use it existed. In the absence of any such guidelines, the delegation suggested that the item be deleted.

63. Another delegation suggested that the word “financial” in that item be replaced by the word “economic.” Alternatively, it was suggested that the expression “the value associated with the mark” could be used. Moreover, that delegation supported the suggestion proposed that work be undertaken on guidelines that could be used for the evaluation of intangible assets.

64. In conclusion, it was agreed that the item would be re-drafted to read, “the value associated with the mark.”

65. In addition to the criteria already proposed, the representative of an observer organization suggested that an additional criterion be added to this Article, namely the inherent or acquired distinctiveness of the mark.

66. One delegation suggested that, as a general principle, a well-known mark should only be considered to be well known if it was well known to a substantial part of the public. In reply to that delegation, another delegation declared that the term “substantial” would unduly raise the criterion for protection of well-known marks.

67. After a full discussion of Articles 2 and 3, it was agreed that their substance would be merged by the International Bureau into a revised draft Article 2, to be submitted to and

discussed by the Standing Committee at the present meeting. The text of the revised draft Article 2, as presented to the Standing Committee, is reproduced in Annex I of this document. The discussion concerning that text is summarized below.

Revised Draft Article 2: Determination of Whether a Mark is a Well-Known Mark in the Territory of a Party

68. The Representative of INTA, speaking on behalf of a large number of representatives of observer organizations, stated that those organizations welcomed the revised draft Article 2 and that they fully supported the text as proposed.

69. *Introductory words.* One delegation proposed that the reference to the Paris Convention and the TRIPS Agreement in the introduction to that Article also contain a summary of the level of protection required under those treaties. In reply to that delegation, the Secretariat pointed out that the introduction aimed merely at recognizing the existence of an international standard for protection for well-known marks, without giving an interpretation of it. There was no additional support for the proposal.

70. Subject to drafting changes in the French text, the introductory words to revised Article 2 were adopted as proposed.

71. *Paragraph (1)(a), introductory words.* The Secretariat explained that the substitution, in this draft, of the words “a relevant sector” for “the relevant sector” was intended to emphasize that there could exist several relevant sectors which could be taken into account when determining whether a mark was a well-known mark.

72. The Delegation of the United States of America suggested changing the words “if the mark is well known in a relevant sector” to “if the mark is known in a relevant sector,” since Article 16.2 of the TRIPS Agreement referred to taking account of “the knowledge of the trademark in the relevant sector of the public,” and stated that, without such a change, it would reserve its position on the provision. The International Bureau observed that a Party would still be free under the draft Provisions to adopt a standard of “known in a relevant sector of the public.” The Delegation of Canada pointed out that it was appropriate and necessary to keep the present wording of the text, so that the test that would be applied could be whether a mark was “well known in a relevant sector of the public.”

73. The Delegations of South Africa, Brazil, Chile and Spain also opposed the suggestion of the Delegation of the United States of America. In particular, the Delegation of Brazil, supported by the Delegation of Spain, pointed out that the Spanish text of Article 16.2 of the TRIPS Agreement referred to “la notoriedad de esta marca,” which could be translated as the “well-known-ness” of the mark. The same was true of the French text of the TRIPS Agreement (“la notoriété de cette marque”).

74. One delegation suggested the addition of the words “at least one” after the words “is well known in,” to improve clarity.

75. In conclusion, the introductory words of paragraph (1)(a) were adopted as proposed, subject to the reservation expressed by the Delegation of the United States of America, and the addition of the words “at least one.”

76. *Item (i)*. This item was adopted, subject to re-drafting by the International Bureau to make it clear that this sector could be made up of potential consumers only.

77. *Items (ii) and (iii)*. These items were adopted as proposed.

78. *Paragraph (1)(b)*. In reply to the representative of an observer organization, the Chair explained that this provision was intended to set out clearly that a Party would be free to give protection for well-known marks which were not well known in any relevant sector of the public in its territory, for example, those which were well known only in another territory. The sub-paragraph was adopted, subject to re-drafting by the International Bureau to clarify the purpose of the sub-paragraph, namely to emphasize that sub-paragraph (a) is a maximum requirement.

79. *Paragraph (2)(a)*. This sub-paragraph was adopted as proposed, subject to the replacement of “all circumstances” by “any circumstances.”

80. *Paragraph 2(b)*. This sub-paragraph was adopted as proposed subject to re-drafting to clarify the relationship of this sub-paragraph to sub-paragraph (a), it being understood that the term “competent authority” would also include courts of justice.

81. *Paragraph (2)(c)*. One delegation suggested to amend the drafting of that provision as follows: “The factors listed in Annex I are guidelines to assist the competent authority of the Party in deciding whether a mark is a well known mark in its territory, not prior conditions for reaching that decision. The finding will depend on the particular circumstances of each case. All, some or none of the factors may be taken into account, as the case may be. Additional factors that are not listed in the Annex may be relevant, either in isolation or in combination with others that are listed.”

82. Subject to re-drafting for clarity, this paragraph was adopted as proposed.

83. *Paragraph (3)(a), item (i)*. This item was adopted as proposed, subject to the addition of language that would make it clear that a Party cannot require that an application for the registration of that mark was filed in, or in respect of, the territory of the Party.

84. *Item (ii)*. This item was adopted as proposed, subject to the addition of language that would make it clear that a Party cannot require that a mark be registered, or that an application for registration was filed in, or in respect of, any territory other than the territory of the Party.

85. One delegation was concerned that if registration of a well-known mark was no longer required in order to protect that well-known mark against registration or use for dissimilar goods or services, well-known marks would no longer be registered. A number of representatives of observer organizations pointed out that the remedies available under the draft Provision only had effect *inter partes* and that, for the purposes of enforcement, owners of well-known marks would always prefer to rely on the registration of the marks, rather than proving that the mark was well known. However, obtaining and maintaining registrations of well-known marks in all territories in the world was an almost impossible task. Therefore, it was absolutely vital for the interest of owners of well-known marks that the proposed protection would be available without a registration requirement.

86. *Item (iii)*. This item was adopted as proposed.

87. *Paragraph (3)(b)*. This sub-paragraph was adopted as proposed, subject to the deletion of the words “in its territory” in the third line.

Revised Draft Article 2, ANNEX I: Factors for Consideration in Determining Whether a Mark is a Well-Known Mark

88. *No. 1*. This item was adopted as proposed, subject to drafting improvements in the Spanish text.

89. *Nos. 2 to 6*. These items were adopted as proposed.
Draft Article 4: Protection of Well-Known Marks Against Conflicting Marks

90. One delegation suggested to merge Articles 4, 5 and 6, in order to avoid unnecessary duplication. The new Article, which would contain the contents of the said three Articles, could be constituted of two parts, one part dealing with the scope of protection, and another part dealing with enforcement.

91. *Paragraph (1)(a)*. The Delegation of the Republic of Korea supported by the Delegation of Japan stated that mere knowledge of the existence of a well-known mark in another territory should not be sufficient for assuming bad faith on the part of an alleged infringer. The delegation further stated that only unfair intention on the part of the defendant could constitute bad faith and, consequently, suggested that the concept of “unfair intention” be used instead of “good faith” or “bad faith.”

92. Concerning the question as to who should bear the burden of proof of whether a defending party was acting in bad faith, a number of delegations expressed their concern about placing that burden of proof on defending parties. The representatives of two observer organizations said that the question of burden of proof should be left to national law. However, they were of the opinion that, since bad faith involved a subjective inquiry, its presence was impossible to prove, and it should therefore be for the defendant to justify any resemblance between the mark he was registering or using and the well-known mark.

93. After some discussion, it was decided to delete the words “[in good faith]”, and to add the following at the end of paragraph (1): “unless the mark was used or registered, or an application for its registration was filed, in bad faith.” It was agreed that the question of which party would bear the burden of proof would be left to national law. The provision was referred to the International Bureau for re-drafting, to improve clarity and reduce redundancy.

94. *Paragraph (1)(b)*. This sub-paragraph was adopted as proposed, subject to deletion of the comma after “a translation,” replacement, in the French text, of the word “semblables” by the word “similaires,” and re-drafting of the French of Spanish texts to assure conformity with the official versions of the Paris Convention.

95. *Paragraph (1)(c), introductory words*. A large number of delegations and representatives of observer organizations were in favor of deleting the words “liable to create

confusion.” One delegation supported the text as proposed. The introductory words were adopted, subject to deletion of the words “liable to create confusion.”

96. *Item (i)*. This item was adopted as proposed, subject to corrections in the Spanish text.

97. *Items (ii) and (iii)*. The Delegation of Japan, supported by the Delegation of the Republic of Korea, proposed the addition of the words “and would be likely to damage his interest” at the end of items (ii) and (iii). The representative of an observer organization opposed this addition on the ground that it was already included in the concepts of “impair or dilute in an unfair manner” and “take unfair advantage.”

98. The Delegation of Canada, supported by several other delegations, proposed the addition of the words “and the well-known mark has been registered” to items (ii) and (iii). In the course of the discussion, a very large number of delegations and representatives of observer organizations supported the text as proposed, but a number of delegations stated that they could accept items (ii) and (iii) only if registration of the well-known mark was added as a separate condition, and several delegations proposed deletion of items (ii) and (iii) altogether. The delegations of Argentina, Brazil and Mexico expressly reserved their position concerning these items. In conclusion, items (ii) and (iii) were adopted as proposed, subject to the expressed reservations, and subject to corrections in the Spanish text.

99. *New Paragraph (1)(d)*. The representative of one observer organization suggested that a new sub-paragraph be added to Article 4(1) as follows: “(d) bad faith may be considered as a factor in assessing competing interests in applying sub-paragraphs (b) and (c), above.” This suggestion was supported by a number of delegations. One delegation said that it was concerned that a Party might rely on this provision to deny protection if there is no finding of bad faith.

100. New paragraph (1)(d) was adopted, subject to re-drafting, and taking into account the concerns raised.

101. *Paragraph (2)*. In reply to a question of one delegation, the International Bureau explained that, although Article 4 no longer provided for an obligation for offices to refuse the registration of a well-known mark *ex officio* if that mark was not filed by the true owner, offices should still make such decisions if an appropriate legal basis existed. Two delegations supported the text of paragraph (2) as proposed.

102. Due to lack of time, discussion of the remaining paragraphs of Article 4 and Articles 5 and 6 was deferred.

Form in which the Provisions on Well-Known Marks should be adopted

103. The Standing Committee discussed the question of the form in which the Provisions on Well-Known Marks should be adopted, as presented in paragraph 16 of document SCT/1/2.

104. While some delegations and representatives of observer organizations expressed a preference for adoption of the Provisions in the form of an internationally binding treaty, the majority of delegations and representatives of observer delegations were in favor of the suggestion that the Provisions should be adopted in the form of a resolution of the

General Assembly of WIPO. It was understood that the latter option would not exclude the possibility of concluding a treaty in that field in the future, perhaps in conjunction with related provisions that are discussed and adopted in other contexts, or in other fora.

105. The Standing Committee agreed, subject to the express reservation of one delegation, that, in the short term, it should be recommended to the WIPO General Assembly that the Provisions become a Resolution of the WIPO General Assembly once the Committee agreed on a final version of the Provisions, and that, in the long term, it would be preferable for the provisions to be incorporated into a treaty.

CONCLUSION OF THE MEETING

Agenda Item 7: Draft Articles on Trademark Licenses

106. Discussion of this agenda item was deferred.

Agenda Item 8: Future work

107. The Standing Committee agreed that, at its second session, it would devote two days to finalizing the Provisions on Well-Known Marks, and three days to a discussion of issues concerning the use of trademarks on the Internet.

108. Although the Standing Committee had decided that the issue of trademark licensing should be discussed with second priority at its first session, and reverted to at its third session, the Standing Committee did not in fact discuss this issue at its first session, due to the extended discussion of the issue of well-known marks. The Committee agreed that it would revert to this issue at its third session.

109. The dates for the second session were tentatively announced as January 18 to 22, 1999, and the possibility of holding a longer meeting at the Standing Committee's third session would be considered.

Agenda Item 9: Brief Summary by the Chair

110. The Chair presented a draft Summary (document SCT/1/5 Prov.) and received comments from the participants.

Agenda Item 10: Closing of the Session

111. The Chair closed the first session of the Standing Committee.

[Annexes follow]

ANNEX I

The following is the text of revised draft Article 2, combining the substance of former Articles 2 and 3, as prepared by the International Bureau and submitted to the first session of the Standing Committee for discussion:

Revised Draft Article 2
Determination of Whether a Mark is a
Well-Known Mark in the Territory of a Party

It is recognized that protection for well-known marks must be provided, under the Paris Convention for the Protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), by Parties that are bound to apply the relevant provisions of those treaties. For the purposes of that protection and Articles [4 to 6], a Party shall apply the following provisions in determining whether a mark is a well-known mark in its territory:

(1) [*Relevant Sector of the Public*] (a) It shall be sufficient, for a mark to be considered to be a well-known mark in the territory of the Party, if that mark is well known in a relevant sector of the public in that territory. Relevant sectors of the public shall include, but shall not necessarily be limited to:

(i) actual and potential consumers of the type of goods and/or services to which the mark applies;

(ii) persons involved in channels of distribution of the type of goods and/or services to which the mark applies;

(iii) business circles dealing with the type of goods and/or services to which the mark applies.

(b) Notwithstanding sub-paragraph (a), a Party shall be free to determine that a mark is considered to be a well-known mark in its territory, even if it is not well known in a relevant sector of the public.

(2) [*Factors for Consideration*] (a) All circumstances from which it may be inferred that the mark is well known shall be taken into account.

(b) The competent authority of the Party shall consider information submitted to it with respect to factors from which it may be inferred that the mark is, or is not, well known, including, but not limited to, information concerning the factors listed in Annex I.

(c) The factors in Annex I, which are guidelines to assist the competent authority of the Party to determine whether the mark is a well-known mark in its territory, are not pre-conditions for reaching that determination. Rather, the decision in each case will depend upon the particular circumstances of that case. In some cases all of the factors may be relevant; in other cases some of the factors may be relevant; in still other cases none of the

factors may be relevant. Additional factors that are not listed in the Annex may be relevant, alone, or in combination with one or more of the factors listed in the Annex.

(3) [*Factors Which Shall Not Be Required*] (a) A Party shall not require:

(i) that the mark be registered or used in, or in respect of, the territory of the Party;

(ii) that the mark be well known in any territory other than the territory of the Party; or

(iii) that the mark be well known by the public at large in the territory of the Party.

(b) Notwithstanding sub-paragraph (a)(ii), a Party shall be free to determine that a mark which is not well known in its territory is nevertheless considered to be a well-known mark in its territory, on the grounds that the mark is well known in one or more other territories.

ANNEX I to Revised Draft Article 2

*Factors for Consideration in Determining
Whether a Mark is a Well-Known Mark*

The factors referred to in Article 2(2)(b) include, but are not limited to, the following:

1. the degree of knowledge or recognition of the mark in the relevant sector of the public;
2. the duration, extent and geographical area of any use of the mark;
3. the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies;
4. the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark;
5. the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by courts or other competent authorities;
6. the value associated with the mark.

[Annex II follows]

ANNEXE II/ANNEX II

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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(dans l'ordre alphabétique des noms français des États)
(in the alphabetical order of the names in French of the States)

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[†] Sur une décision du Comité permanent, les communautés européennes ont obtenu le statut de membre sans droit de vote.

[†] Based on a decision of the Standing Committee to accord the European Communities status as a member without the right to vote.

II. ORGANISATIONS INTERGOUVERNEMENTALES/
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ORGANIZATION (WHO)

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Association française des praticiens du droit des marques et des modèles (APRAM):
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V. BUREAU INTERNATIONAL DE L'ORGANISATION MONDIALE DE LA PROPRIÉTÉ INTELLECTUELLE (OMPI)/ INTERNATIONAL BUREAU OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)

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End of Annex II and of document]