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Technology Licensing: Common Market Competition Implications

by David J. Noonan*

On a theoretical level, the enforcement of intellectual property rights inherently conflicts with policies designed to ensure competition. For example, the grant of a patent confers exploitation monopoly rights limited only by time, territory and the scope of the claims of the patent. The enforcement of those patent rights will restrict competition. As we know, there is and must be an accommodation between the concepts of competition and intellectual property rights. Competition rules and intellectual and commercial property rights, when properly harmonized, should provide businesses with enough certainty and reward to insure and justify continued investment and expansion, while ensuring that business’ exercise of the proprietary rights does not frustrate the philosophy and principles behind the competition laws of the state.¹

Statistics establish that a very high percentage of all royalty payments to U.S. businesses flow from European Economic Community (E.E.C.) countries.² This article analyzes the effect of the Common Market’s competition rules³ on the existence and exercise of intellectual and commercial property rights as they are involved in the transfer of technology. An examination of the case law in this area reveals agreements which transfer technology, but which run afoul of Common Market principles of law. These “offending” transfers of technology fall into three basic categories: (1) those agreements whose purpose is purely to divide markets; (2) those agreements where the license of an intellectual or commercial property right is part of a larger agreement to restrict competition; and (3) those licensing agreements with restrictions that are

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¹ The term “state” is used throughout this article to describe a sovereign nation state.


³ See Treaty Establishing the European Economic Community, March 25, 1957, arts. 85-94, 298 U.N.T.S. 11 [hereinafter cited as the E.E.C. Treaty]. There are several other E.E.C. Treaty provisions (e.g., arts. 30-36, 222) which, while not “true” competition rules, nonetheless greatly effect the exercise of intellectual property rights.
more easily said to be ancillary to the whole agreement and therefore less objectionable.

In order to provide a point of reference for the practitioner, the article begins with introductory notes of comparison between U.S. and E.E.C. competition rules. Next, points of procedure are examined which should provide an understanding of the process of competition/intellectual property cases through the national courts, the Commission, and the European Court of Justice. With that as a background, the article examines the related principles of exhaustion and common origin, Article 85(1) of the E.E.C. competition rules (with a detailed focus on patent licensing), the possible effects of Article 85(2) on a technology license, and the impact of Article 86. Additionally, an attempt is made to determine whether the Common Market's competition rules treat the licensing of know-how in a manner different from the statutorily created rights of patents, copyrights and trademarks. Finally, the Common Market competition rules are analyzed in order to determine whether they provide both a reassuring environment for business, and protection for European economies from potentially abusive business practices.

I. A Brief Comparison of U.S. and E.E.C. Competition Laws

To discern any philosophical differences that may exist between U.S. and Common Market competition law, reference must be made to the Community's basic objectives as seen in Article 2. This Article reads:

The Community shall have as its task, by establishing a common market and approximating the economic policies of member states, to promote throughout the community an harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between states belonging to it.

Article 3 lists specific tasks to be completed in order to obtain the goal set forth in Article 2. These tasks include:

(a) the elimination, as between member states, of customs duties and quantitative restrictions on the import and export of goods, and all measures having equivalent effect . . .
the institution of a system ensuring that competition in the common market is not distorted.

In spite of the designation and the development of specific competition rules, the prime motivating factor in most decisions of the Commission, and of the European Court of Justice, is not so much the maintenance of competition, as is the case in U.S. antitrust law, but rather the prevention of the repartition of national markets through the use of intellectual property rights. It must be borne in mind that unlike the federation of states which comprise the United States, the European Economic Community consists of ten nations, each with a distinctly different culture, language and legal system. Because of the desire to foster single market integration, the analysis of cases before the Commission and the Court does not differ greatly whether the action concerns competition rules (Articles 85 and 86) or free movement of goods rules (Articles 30 through 36).

In addition to a philosophical difference between U.S. and E.E.C. competition laws, numerous substantive and procedural differences exist. Although the Sherman Act served as a model for Articles 85 and 86, there are important legal distinctions between the Act and the articles.

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8 The term "industrial property rights" is frequently used in the European literature.
10 E.E.C. Treaty, supra note 3. Article 85 reads:

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of Paragraph 1 may, however, be declared inapplicable in the case of:
   —any agreement or category of agreements between undertakings;
   —any decision or category of decisions by associations of undertakings;
   —any concerted practice or category of concerted practices;
   which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned concerted restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Id. at art. 85. Article 86 reads:

Any abuse by one or more undertakings of a dominant position within the com-
The Sherman Act by its very terms applies to both interstate and foreign commerce,\(^{11}\) thus providing at least a textual basis for its extraterritorial application.\(^{12}\) Neither Article 85 nor Article 86 provides the same jurisdictional basis.\(^{13}\) Articles 85 and 86 lack explicit criminal sanctions\(^ {14}\) while the Sherman Act does not.\(^ {15}\) While U.S. antitrust enforcement is

mon market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member states. Such abuse may, in particular, consist in:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.


\(^{12}\) See United States v. Aluminum Co. of Am., 148 F.2d 416, 434-44 (2d Cir. 1945) (establishing the "effects doctrine"); Timberlane Lumber Co. v. Bank of Am. Nat'l Trust and Sav. Ass'n, 549 F.2d 597, 613 (9th Cir. 1977) (intelligently modifying but continuing the doctrine).

\(^{13}\) Although the Commission has adopted an "effects test" in both Re The Franco-Japanese Ballbearings Agreement, 15 Common Mkt. L.R. D 8 (1975), and Re The French and Taiwanese Mushroom Packers, 15 Common Mkt. L.R. D 83 (1975), the Court of Justice has not sanctioned such a jurisdictional basis. In I.C.I. v. E.C. Commission, 11 Common Mkt. L.R. 557 (1972), 628-29 (the "Dyestuffs" case), the Court based its jurisdiction on the traditional "presence theory" finding the parent present through the acts of its subsidiaries. See also Commission's Sixth Report on Competition Policy 1977, 31-33. For a comprehensive analysis of jurisdictional bases for the extraterritorial application of E.E.C. competition law, see B. Barack, THE APPLICATION OF THE COMPETITION RULES OF THE EUROPEAN ECONOMIC COMMUNITY TO ENTERPRISES AND ARRANGEMENTS EXTERNAL TO THE COMMON MARKET 11-39 (1981).

\(^{14}\) It must be noted, however, that under Council Regulation 17, Article 15 may arguably be considered criminal in nature. See Regulation 17, 5 J.O. COMM. EUR. 2922 (1962) [hereinafter cited as Christmas Message].

\(^{15}\) In the extraordinary case of Rio Tinto-Zinc Corp. v. Westinghouse Electric Corp.,
dependent on private rights of action, no such private right of enforcement is recognized in common market law. The treble damage provisions of U.S. antitrust law are an anathema to Europeans. No similar provisions exist in E.E.C. competition laws. In fact, no provisions are made for any damages. Finally, the scope of remedial action available under the two laws is different. Under U.S. antitrust law, courts have ordered the divestiture of major components of a defendant’s corporate structure, but it is generally believed that no similar power exists for either the Commission or the European Court of Justice.

II. General Procedural Comments

A case requiring the application of Common Market competition or free movement of goods rules can begin and develop procedurally in any number of ways. For example, Article 85(3) of the E.E.C. Treaty provides a formal exemption mechanism for the Community to bend and shape its competition rules in order to meet the changing economic requirements of the day. It provides a back door method of applying a “rule of reason.” As Valentine Korah has repeatedly and articulately pointed out, the “rule of reason,” to the extent it has been adopted by the Common Market, is applied only under Article 85(3).

Pursuant to the authority in Article 87, the Council of the E.E.C. in 1962 adopted Regulation 17, which implements Articles 85 (subsection 3 in particular) and 86. Regulation 17 provides for a system of notification of agreements and practices, whereby parties can obtain either: (1) a negative clearance which amounts to a Commission decision that

[1978] 1 All E.R. 434, the House of Lords, while trying to decide if letters rogatory issued during a U.S. antitrust proceeding should be given effect, discussed whether fines under Regulation 17 were criminal in nature, thus justifying Rio Tinto’s exercise of the privilege against self-incrimination.

16 Contractual or tort-based actions which may be brought as a result of Article 85(2) are discussed later in this article. See infra text accompanying notes 218-38. These actions, however, amount only to indirect applications of Common Market competition laws, and cannot be compared to the direct utilization of U.S. antitrust laws by “private attorneys general.”


18 The availability of treble damages under the U.S. antitrust laws was a prime motivating factor in the adoption of the U.K. Protection of Trading Interest Act, 1980, ch. 11. See id. §6 in particular.


21 For an example of the application of the “rule of reason” in U.S. antitrust law, see Standard Oil v. United States, 221 U.S. 1 (1911).


23 However, in a recently decided case, the Court did utilize a “rule of reason” process under Article 85(1). See L.C. Nungesser K.G. v. E.C. Commission, 36 Common Mkt. L.R. 278 (1983). See also infra notes 136-55 and accompanying text.

24 The Council is the ministerial arm of the Community. It is composed of representatives of the governments of member states, and is the main decisionmaking body of the Community.

the notified agreement does not violate Articles 85(1) or 86; or (2) an exemption by the Commission, pursuant to Article 85(3), of the notified agreement/practice (i.e., although Article 85(1) was violated, extenuating circumstances are found to exist which justify not applying it). Through the Commission’s notification and exemption system, issues involving competition and intellectual property cases are generated. Commission decisions can be appealed to the Court of Justice pursuant to Articles 172 or 173 of the E.E.C. Treaty.

The provisions of Common Market law create a new system of rights for individuals and undertakings in member states. Additionally, Articles 85 and 86 are directly applicable to the legal systems of member states. Consequently, national courts routinely apply both national and Common Market competition rules. These national courts, however, must refrain from deciding Common Market competition issues once the Commission has “initiated” proceedings.

Since Articles 85 and 86 are directly applicable to, and create rights for, individuals and undertakings, contracts (i.e., licensing or distribution agreements) are frequently challenged on the grounds that they are incompatible with Community competition or “free movement of goods” rules. National courts have three options at this point. First, they may rule that the agreement does not come within the prohibition of Article 85(1) and enforce the contract. Second, they may refuse to enforce the whole agreement or, if severance is possible, refuse to enforce the offending provisions. Last, they may postpone their decision and refer the case.

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26 Id. The practitioner should also be aware of the following regulations which have amended and supplemented Regulation 17:

1. Council Regulation 19/65, 8 J.O. COMM. EUR. 553 (1965), which empowers the Commission to promulgate and grant bloc exemptions to certain agreements.


There are numerous other regulations and notices concerning agreements and practices which may be found through the Official Journal’s methodological tables.


29 U.S. and Common Market competition laws are similar in function to the competition laws of the constituent members of each federation. Both sets of laws supplement, and when in conflict, supersede the competition laws of individual states or member nations. See, e.g., Walt Wilhelm v. Bundeskantellamt, 8 Common Mkt. L.R. 100 (1969). This supremacy feature is clearly necessary to help ensure that the objectives of the Community, as set forth in Article 2, are ultimately obtained.

30 See Christmas Message, supra note 14, art. 9(3).
to the Court of Justice pursuant to Article 177 of the Treaty.\footnote{31}

Cases typically arise either directly through the Commission notification process or through the national courts, where at any time the proceedings may be suspended either because of a reference by that court to the Court of Justice, or because the Commission has "initiated" action, thus triggering Article 9(3) of Regulation 17.

Two additional procedural comments should be made concerning the Commission and the Court of Justice. First, the vast majority of cases which come before the Commission are settled, usually because the parties to an agreement or practice agree to modify the offending clause or activity.\footnote{32} Second, the U.S. practitioner will find the decisions of the Court of Justice, at a minimum, different and quite possibly unsatisfying. The actual judgment is often summary in nature with little explanation of the rationale behind the decision. Therefore, it is essential that one pay attention to the opinion of the Advocate General, who serves in the combined roles of amicus curiae and Attorney General. When the judgment conforms to the suggested disposition of the Advocate General, his or her opinion takes on more weight. In competition and intellectual property cases the need for a detailed economic analysis is frequently apparent. The Court of Justice has at times engaged in such analysis,\footnote{33} but more frequently eschews that task.\footnote{34} When a judgment lacks detailed analysis and justification, dissenting opinions often provide the light at the end of the tunnel. Unfortunately, due to the potential political ramifications, dissenting opinions in Court of Justice decisions are not issued.

III. The Exhaustion Principle

A. Exhaustion of Intellectual Property Rights in General

Basic economic considerations and, to a lesser extent, legal and ethical notions of estoppel, have given rise to the doctrine of exhaustion of intellectual property rights. On the simplest level, the doctrine can be

\footnote{31} The process of making references of issues from national courts to the Court of Justice is similar in general terms to the function in U.S. courts of rendering advisory opinions. Under Article 177, the Court of Justice is actually rendering an opinion on "abstract" questions of law posed by the national courts. The European Court of Justice's lack of plenary appellate power in Article 177 situations is viewed by many European judicial scholars to be a serious shortcoming. For further reference concerning the jurisdiction of the Court, see E.E.C. Law, supra note 5.

\footnote{32} Refer to any of the General Reports on Competition in the Official Journal for an indication of types and number of cases the Commission processes. Also note the general usefulness of the General Reports on the Activities of the European Communities (e.g., 13th General Report 1979, § 4 at 98, where an explanation exists of why fines were increased in export ban cases).

\footnote{33} See La Technique Miniere v. Maschinbau Ulm G.m.b.H., 5 Common Mkt. L.R. 357 (1966).

seen in operation in a wholly intrastate transaction. A manufacturer with both a product and process patent contracts to sell the product to the buyer. An implied right in the contract of sale allows the buyer, perhaps a wholesaler, to use the product. As to that user, an estoppel arises preventing any infringement claims from the manufacturer. At the next level of commerce the principle of exhaustion comes into play. The retailer or ultimate consumer would, of course, never purchase from the wholesaler if possession and use of the patented product would infringe on the patentee's rights. It is at this point that exhaustion of the patentee's rights takes place. If the patentee's rights are not terminated as to those particular goods which she or he manufactures and then sells, the patent rights involved will be of no value, as no one will purchase and use goods which will prompt an infringement action.

Due to the growth of international trade and multinational corporations, and their concommitant need to stay competitive on an international level, parallel intellectual property rights have been increasingly exploited internationally. This development has forced national and super-national legal systems to decide if an international exhaustion doctrine should be applied to transnationally related property rights. The Common Market decided to adopt a community-wide exhaustion principle.

Because national governments used quotas for protection purposes, an essential remedial element in the E.E.C. Treaty is Article 30, which reads in pertinent part: "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." The operative terms in this discussion of exhaustion principles are "all measures having equivalent effect." Article 30 of the Treaty, however, must be read in conjunction with Article 36 and, to a lesser extent, Article 222. Article 36 provides: "The provisions of Article 30-34 shall not preclude prohibitions or restrictions on imports . . . justified on grounds of . . . the protection of industrial

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35 The author wishes to acknowledge the use of, and benefit from, the ideas of David L. Perrot, Senior Lecturer of Law, Exeter University, Exeter, England.

36 An additional economic justification for the doctrine is that if the patentee is able to charge his monopoly fee at each stage of commerce, the patentee may become less productive and the technology may become overpriced.

37 National laws throughout the Community differ in regard to treatment of the exhaustion principle. For example, the law of the United Kingdom has, since 1871, recognized a limited form of exhaustion of patent rights. In Betts v. Willmott, 6 L.R. Ch. 239 (1871), the court established an implied right to remarket and use the product in a different country, thus exhausting the patentee's right. The limitation to this principle is seen by the fact that an expressed reservation by the patentee or his licensee will prevent the exhaustion from occurring. See also U.K. Patents Act, 1977 ch. 37 § 60.

38 E.E.C. Treaty, supra note 3, art. 30 (emphasis added).
and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states." Article 222 provides: "The Treaty shall in no way prejudice the rules in member states governing the system of property ownership." Through the application of Articles 30 and 36 by the Commission and the Court, the Common Market has adopted a community-wide exhaustion of rights policy.

B. Exhaustion in Detail

There are several reasons why the price for the same product differs between Common Market countries. For example, national laws may inflate or deflate the prices. Additionally, traditional methods of doing business and market structures are different from state to state, and may or may not, under a "rule of reason" theory, justify attempts to maintain different prices.

Market protection implemented to maintain price differentials can be attempted either through pricing agreements, which will almost certainly violate Article 85(1), or more subtly, through the exercise of intellectual and commercial property rights. Thus, the principle of exhaustion is important because it can apply in situations where Article 85(1) does not. Such a situation occurs, for example, when a parent and a wholly-owned subsidiary agree to restrict prices, which under Common Market law consists of but a single undertaking.

The Court of Justice first applied the principle of exhaustion in Deutsche Grammaphon Gesellschaft v. Metro-S.B.-Grossmarkte. Deutsche Grammaphon manufactured and sold records in Germany under the Polydor label. Metro, which specialized in selling low price records, purchased Polydor records in France from a Deutsche Grammaphon subsidiary. Due to favorable price differences, Metro exported the records back to Germany. Deutsche Grammaphon brought an action in the German courts claiming an infringement of copyright and requesting an injunction to prevent further imports. The Court relied on Article 30 in finding that the exercise of the German property right was a measure having an effect equivalent to a quantitative restriction. According to the Court:

If a protection right analogous to copyright is used in order to prohibit

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39 Id. art. 36 (emphasis added).
41 See Korah, supra note 34, at 7.
44 Although a parent and a wholly-owned subsidiary were involved in this case no agreement or practice between undertakings within the meaning of 85(1) could be found.
45 Note that under German law the right involved was closely akin to copyright.
in one member state the marketing of goods that have been brought onto the market by the holder of the right or with his consent in the territory of another member state. . . . such a prohibition maintaining the isolation of national markets conflicts with the essential aim of the Treaty. . . .

The Court continued by defining the limits of the effect of Article 36 in relation to Article 30. The Court wrote:

Although Article 36 permits prohibitions or restrictions on the free movement of goods that are justified for the protection of industrial and commercial property, it only allows such restrictions on the freedom of trade to the extent that they are justified for the protection of the rights that form the "specific object of this property."  

This principle of looking at the "specific object" of the property right in question was to become a major consideration of the Court of Justice and the Commission in cases involving the free movement of goods (Articles 30 and 36) and Article 85(1).

In summary, as a result of Deutsche Grammaphon, once a product is marketed in another member state by either the proprietor of the right involved or by one with his or her consent, national rights cannot be exercised so as to prevent the importation of that product back into the state where the proprietor's parallel rights exist. The economic effect of the decision is to discourage manufacturers from charging more in one state than in another, lest the product be exported back into the higher priced market.

In Centrafarm B.V. v. Sterling Drug, Inc., the Court extended the exhaustion principle to patents and trademarks. The Court also further explained the concept of the "specific object" of the right in question.

Sterling Drug was a U.S. corporation which held patents and trademark rights for the drug Negram in both the United Kingdom and the Netherlands. The corporation retained its Dutch patent but licensed its Dutch trademark rights to its Dutch subsidiary, Sterling Winthrop. Centrafarm was a parallel importer of drugs throughout the Community. Due to a substantially lower price in the United Kingdom, the drug was purchased by Centrafarm from Sterling's subsidiary and then exported to the higher priced Dutch market. Sterling Drug sought to exercise its Dutch patent rights, and Sterling Winthrop sought to exercise its trademark rights to prevent entry of the drug into the Dutch market.

46 Deutsche Grammaphon, 10 Common Mkt. L.R. 631.
47 Id. (emphasis added).
48 The Deutsche Grammaphon case is a prime example of the need to consider the opinion of the Advocate General. Nowhere does the Court even use the term "exhaustion." The submissions of the Advocate General must be consulted to find the term that has come to be associated with this case. The same is true with regard to understanding the development of the concept of the "specific object" of the property right.
51 Id. at 503.
The Court once again noted the distinction between restricting the exercise of national property rights and affecting the very existence of these rights.\textsuperscript{52} It explained that Article 36 allows derogation from the rules providing for the free movement of goods only to the degree justified for the protection of the rights which constitute the specific object of such property. In the case of patent rights,

\textquote[The specific object of industrial property is inter alia, to ensure to the holder so as to recompense the creative effort of the inventor, the exclusive right to utilize an invention with a view to the manufacture and first putting into circulation of industrial products, either directly or by grant of licenses to third parties, as well as the right to oppose any infringement.\textsuperscript{53}]

It was no defense that under Dutch patent law Sterling's right was not exhausted by the sale in the United Kingdom. Here, the exercise of national intellectual property rights would have to bend to the degree necessary to ensure the free movement of goods.

The Court defined the specific object of a trademark as,

\textquote[Inter alia, to ensure to the holder the exclusive right to utilize the mark for the first putting into circulation of a product, and to protect him thus against competitors who would take advantage of the position and reputation of the mark by selling goods improperly bearing the mark.\textsuperscript{54}]

The Court's rather limited definition of the specific object of Sterling's patent rights is unfortunate. This decision had the effect of lumping all national patent laws together. Instead of engaging in any real exploration of the various functions patent laws in each country may serve,\textsuperscript{55} the Court merely searched for some common denominator. The decision illustrates the Court's greater concern with achieving single market integration than with analyzing the function of intellectual property rights and how those rights foster or impede competition.

In \textit{Coditel v. Cize Vog Films},\textsuperscript{56} the exhaustion principle was not applied to the exclusive right of a Belgian licensee to broadcast a film. Applying Article 59 of the Treaty, the Court decided that there was a principle of free movement of services as well as free movement of goods. The Court made an appropriate distinction between copyrights that protect performances that may be repeated (\textit{e.g.}, a dance performance or the showing of a film) and copyrights that attach to material media such as books, records and tapes. These latter products, although protected by copyright, are more similar to goods protected by patent or trademark rights than to products whose essence is performance. Speaking of the

\textsuperscript{52} \textit{Id.} at 518.
\textsuperscript{53} \textit{Id.} at 503.
specific subject of the right involved, the Court said: "[T]he right of a copyright owner and his assignees to require fees from any showing of a film is the essential function of copyright in this type of literary and artistic work." The Belgian copyright licensee was allowed to prosecute his copyright infringement action against Coditel. Coditel had rebroadcast the film over a cable network after the film had been captured from the German airwaves, where it had been properly aired.

Finally, in the area of exhaustion of intellectual property rights, Merck & Co. Inc. v. Stephan B.V. & Petrus Stephanus Exler\(^5\) is a significant case which extends the exhaustion doctrine in a manner not easily anticipated in light of the prior case law. Merck was a pharmaceutical company which marketed drugs throughout the E.E.C. It held parallel patents in several states, including the Netherlands, for the antihypertension drug "Moduretic." Although at the relevant time patents for pharmaceuticals were not granted in Italy,\(^6\) Merck nonetheless marketed the drug there, where it was purchased by Stephar and exported into the Netherlands. Dutch patent law does not recognize the principle of international exhaustion. Thus Merck, in the absence of Community law, could have prevented the import of the drug.

If patent rights had existed in Italy, and if they were held by Merck or one of Merck's licensees, based on the cases discussed, it would seem that once the product was placed on the Italian market, Merck's parallel patent rights in the Netherlands could not be exercised. But, since there were no parallel rights in Italy, Merck, in theory, was never able to exercise a monopoly right and thus receive monopoly profits for the first marketing of the product. Prior case law had established that the essence or specific object of patent rights was the right to be the first to market the product and receive compensation for the creative act. Thus, by exercising its rights under Dutch law, Merck appeared to be protecting that which the court had previously said national law could protect.

Merck argued that Sterling Drug was limited to situations where there were parallel patent rights existing in the state of export (i.e., Italy). A right, Merck argued, could not be exhausted unless it existed.\(^6\) Merck also argued that although the Convention for a Community Patent\(^6\)

\(^5\) Id. at 399-400.

\(^6\) Id.

\(^5\) In Musik-Vertrieb Membran and K-tel Int'l v. GEMA, 31 Common Mkt. L.R. 44 (1981), the Court applied the exhaustion principle to copyrights held by a performers association. GEMA, the protection society, was prevented from seeking additional royalties on records exported from the United Kingdom where a statutorily imposed royalty was less than that paid in Germany. The Court held that GEMA's attempts to extract an additional royalty amounted to an indirect quantitative restriction in violation of Article 30.


\(^6\) In 1978, the Royal Decree of June 29, 1938, No. 1127, which prevented the issuance of patents for drugs, was declared unconstitutional. Id. Patents for pharmaceuticals are now issued in Italy.

\(^6\) Id. at 478.

Community Patent Convention, 19 O.J. EUR. COMM. (No. L 17) 1, 1-43 (1976), will, once ratified, provide for the issuance of a single unified Community patent which will provide
adopts an exhaustion doctrine, it also provides for an exception when there are grounds which would justify the exercise of the rights conferred by the patent. The inability to obtain a patent, Merck argued, should be just the type of exception which the Convention envisioned. The Court, however, did not find Merck's arguments persuasive. Following the reasoning of the Commission, the Court reiterated the holding in *Sterling Drug*. It rejected Merck's interpretation of the case by noting that only when no patent rights exist in the country of export, and when the product is marketed by a *third party without the consent* of the proprietor of the right, would the use of the patent right be permitted. Here, Merck itself had marketed the product in Italy. Thus, the exhaustion principle had to be applied.

Most important in the *Merck* decision is the Court's narrowing of the definition of the specific object of a patent right. The Court described the essence of a patent to be:

That right of first placing a product on the market which enables the inventor, by allowing him a monopoly in exploiting his product, to obtain the reward for his creative effort without, however, guaranteeing that he will obtain such a reward in all circumstances.

By so redefining the protectable essence of the patent right, the Court put to rest Merck's argument that because they did not reap monopoly profits in Italy they should be allowed to reap them in the Netherlands.

Valentine Korah has made several valuable comments on the *Merck* decision. She points out that if Merck is not allowed to exercise its patent rights in countries where patent protection exists (i.e., the Netherlands), then the patentee has no chance of ever earning a profit to pay for its sales in countries where no patent protection exists (i.e., Italy). The result would be that Merck would, at a minimum, withdraw from the Italian market, thus depriving the Italian public of a useful drug. Merck might even cut back on research and development. Korah explains that it was the patent protection Merck thought it had elsewhere in the E.E.C. that justified the innovation expenses and the ultimate marketing of the product in Italy.

The decision in *Merck* would also seem to apply where a company is entitled to a patent but chooses not to seek one, or where the company at

the same rights in all member states. This is to be contrasted with the European Patent Convention, which provides a simplified system for obtaining patent protection in more than one European country. If a European patent is granted, it has the same effect as a national patent in each of the states designated in the patent application. See Benson, *The Impact of the Patent Cooperation Treaty (PCT) and the European Patent Convention (EPC) on U.S. Practitioners*, 60 J. Pat. Off. Soc'y 118, 119-20 (1978); see also D. Guy & G. Leigh, *The EEC and Intellectual Property* (1981).
one time had a patent which later expired. In any event, it is now clear that the free movement of goods (Article 30) is a principle that applies only to intra E.E.C. trade.\textsuperscript{69} Furthermore, it is not possible to obtain an exemption under Article 85(3) for agreements or activities that prevent the free movement of goods in violation of Article 30.\textsuperscript{70}

IV. Common Origin

Perhaps no other Community concept has been more criticized than the common origin concept. As with exhaustion, the apposite Treaty Articles are 30 through 36. Common origin involves the application of the free movement of goods principle to a situation where two or more undertakings have intellectual property rights which at some time earlier were owned by the same proprietor — thus the term common origin. To date, the principle has been applied by the Court in only one case, \textit{Van Zuylen Freres v. Hag A.G.},\textsuperscript{71} although the Commission has applied it in another.\textsuperscript{72} The common origin concept has been applied to trademarks, but not yet to patent rights.

Because the principle developed out of the \textit{Hag} case, which had particularly unusual facts that are not likely to be repeated, the strong derivative connection to the exhaustion principle is often overlooked. In a straightforward assignment of a trademark, the subdivision of the mark occurs with the consent of the owner. Thus, when the assignee of the mark puts the goods on the market in his or her state, the situation is similar to the situation that invokes the principle of exhaustion; it can be said that the goods were marketed with the consent of the "original" owner of the right.

Briefly, the facts in \textit{Hag} are as follows: Hag A.G., a German company, held the trademark "Hag" in Belgium, Luxembourg and in Germany. It later assigned its Belgium and Luxembourg rights to its

\textsuperscript{69} In E.M.I. Records, Ltd. v. CBS United Kingdom, Ltd., 18 Common Mkt. L.R. 235 (1976) (a "common origin" as opposed to an "exhaustion" case), the Court held that even if the exercise of the trademark rights did have an effect equivalent to a quantitative restriction, there was no effect on the free movement of goods between E.E.C. states. See also Polydor, Ltd. & R.S.O. Records, Inc. v. Harelquin Record Shops, Ltd. & Simon Records, Ltd., 33 Common Mkt. L.R. 677 (1982), in which the Court construed a provision similar to Article 30 that was contained in the Treaty between the E.E.C. and the Portuguese Republic (see E.E.C. Council Regulation 2844/72, of Dec. 19, 1972). The Court in \textit{E.M.I. Records} further held that this specific provision in the Free Trade and Association Agreement did not have direct effect on national law. 18 Common Mkt. L.R. at 253-56. \textit{But see} Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., 36 Common Mkt. L.R. 1 (1983), in which a tax nondiscrimination provision in an EEC Free Trade Agreement similar to Article 95 in the E.E.C. Treaty was found to have direct effect.

\textsuperscript{70} It is interesting to consider methods of avoiding the operation of the exhaustion principle. Two possibilities may lie in: (1) notational sales, where all sales are designated as ex-works, resulting in the delivery and the passing of title (under most national laws) occurring in state A; and (2) making sales through third countries outside the E.E.C.

\textsuperscript{71} 14 Common Mkt L.R. 127 (1974).

subsidiary in Belgium. After World War II, the property of the Belgian subsidiary was confiscated by the Allies and the Hag trademark in Belgium was sold to the Van Oevelen family. In 1971, these same rights were sold by Van Oevelen to Van Zuylen. Hag A.G. in Germany subsequently began exporting "Hag" marked coffee into Belgium, triggering an infringement suit by Van Zuylen.

The Court began by differentiating trademark rights from other intellectual property rights. Because these rights lasted indefinitely, the Court felt that they were potentially more threatening to the free movement of goods in the Community. The Court went on to explain why Van Zuylen should be prevented from exercising his proprietary rights. The Court wrote:

> It could not therefore be accepted that the exclusiveness of the trademark right, which can be the consequence of the territorial limits of the national laws, should be relied on by the holder of the trademark with a view to prohibiting trade in one member state, in goods lawfully produced in another member state under an identical mark which has the same origin.

The Court focused briefly on the specific object of the right and concluded that consumers would not be confused by having two identical marks on products from different producers, as additional distinguishing information could be added to labels.

Due to the coercive nature of the divestiture of the mark from Hag's subsidiary, it is difficult to claim that consent was involved and that in reality Hag had "exhausted" its rights. The result is more acceptable, however, if the Hag decision is applied to the garden variety trademark assignment, where consent is present. For example, if an undertaking has registered marks in two different states, when it assigns a mark it is giving the assignee at the same time the right to export directly into the state where the assignor still retains a mark. In essence, the common origin principle is applying the exhaustion concept to the assignment itself instead of waiting for the exhaustion to occur when the holder of the mark puts the goods on the market.

The Court's decision in Hag, however, must be read together with its decision in Terrapin, Ltd. v. Terranova Industrie C.A. Kapferer & Co. Terrapin and Terranova had trademarks with no common origin, and marks arguably similar and potentially confusing to the public. The Court found the exercise of the rights involved to be within the meaning of Article 36.

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73 *Hag*, 14 Common Mkt. L.R. at 143.
74 *Id.* at 143-44 (emphasis added).
75 *Id.* at 144.
76 *See* Sterling Drug, 14 Common Mkt. L.R. 480.
77 18 Common Mkt. L.R. 482 (1976).
78 *Id.* at 505-06. The "common origin" principle does not apply to goods originating outside the Community. *See E.M.I. Records*, 18 Common Mkt. L.R. 235.
V. The Effect of Article 85 on Patent, Trademark, Copyright and Know-How Licenses

A. Elements and Parameters

The three essential elements of an Article 85(1) violation are (1) a collusion and/or agreement between undertakings which (2) affects trade and (3) noticeably restricts, or intends to restrict, competition within the Common Market. The term "undertaking" encompasses the full range of legal persons, be they companies or partnerships, individuals, or subsidiaries of large multinational corporations. The term "agreement" is not restricted to a formal contractual agreement, but includes an informal agreement as well. The terms "prevention," "restriction" or "distortion" seem to be treated by the Commission and the Court as largely synonymous. Commentators, however, have drawn attention to the fact that most agreements and practices found to trigger Article 85(1) have been characterized as "restrictions."

Agreements and practices that are related to activities occurring within only one member state may still violate Article 85(1), in spite of the phrase "which may affect trade between member states." In Vertegenwoordiging van Cementhandelaven v. Commission, the Court held that a price fixing agreement among members of a cement manufacturer's association solely within one state was, nonetheless, violative of Article 85(1) because the agreement resulted in a national partitioning of that market.

Until the adoption of the new regulation applying Article 85(3) to certain exclusive distribution agreements, agreements covering the whole Common Market could trigger Article 85(1). In Re The Agreement Between Europair International Ltd. & Duro-dyne Corp., an exclusive distributorship agreement which covered the entire E.E.C. was found to restrict interstate trade because no other E.E.C. concern could purchase from the U.S. supplier, which thus prevented exports to another member state. This holding is now in doubt due to the permission granted in Regulation 1983/83 for exclusive distributorships for resale within the whole

84 See E.E.C. Treaty, supra note 10, art. 85(1).
Common Market. Agreements affecting exports to nonmember states can also violate Article 85, in spite of the lack of a foreign commerce clause similar to that found in the Sherman or Clayton Acts.\(^8\) According to the Commission, certain exports to non-E.E.C. states may be imported back into the E.E.C. and ultimately affect trade within the Common Market.\(^9\) Finally, for Article 85(1) to apply, the effect on trade between member states must be appreciable. The Court established what amounts to a "de minimus" rule in \textit{Volk v. Ets. J. Vervaeke},\(^9\) where even though the contract in question obligated a producer to protect the distributor from parallel imports,\(^9\) the agreement was found not to trigger Article 85(1) because "it only affects the market insignificantly."\(^9\) To put this "de minimus" rule in perspective, it should be noted that the market share involved was 0.2 percent.

If there is a classic case with regard to the application of Article 85 (1), it is \textit{Ets. Consten S.A. \& Grundig-Verkaufs-G.m.b.H. v. Commission},\(^9\) the first competition case to reach the Court. This case established basic principles of E.E.C. competition law. Grundig was an important German manufacturer and distributor of various electronic components. Consten was a French retailer of such equipment. The exclusive distribution agreement between the two provided for complete territorial protection for Consten backed by Grundig's promise to impose export bans on other Grundig distributors. Additionally, Consten's right to the trademark GINT allowed for enforcement of the reciprocal export bans. Consten sought to exercise its French trademark rights to prevent a parallel importer from marketing the covered goods in France. Had the agreement not contained export bans it may have been granted an exception\(^9\) under Article 85(3).

In their appeal to the Court of Justice, Consten and Grundig argued that the Commission's action prevented Consten from exercising his national trademark rights in violation of Articles 36 and 222 of the Treaty.\(^9\) They also argued that the purpose of the distribution agreement was to increase sales of Grundig products in France, thus theoretically increasing intra-brand competition in France. The Court rejected these arguments, stating that the parties could not justify a restraint on intra-brand trade merely because the agreement might increase trade. Once an agreement is found to have as its object the prevention, restric-

\(^{8}\) See supra note 10.
\(^{92}\) As we have seen in the exhaustion cases, and will discuss in the \textit{Consten \& Grundig} case, see infra text accompanying notes 94-101, the prevention or restriction of parallel imports amounts to a per se violation of Common Market law.
\(^{93}\) Volk, 8 Common Mkt. L.R. at 282.
\(^{94}\) 5 Common Mkt. L.R. 418 (1966).
\(^{95}\) At this time, Regulation 67/67 was not in effect. See supra note 26.
\(^{96}\) Consten \& Grundig, 5 Common Mkt. L.R. at 443.
tion, or distortion of competition, Article 85 (1) is triggered, and the Commission is under no obligation to discern if there are positive effects of the agreement.\textsuperscript{97} Because the Court did not require any market analysis or rule of reason application, the holding established what amounted to a per se rule that export bans violated Article 85(1). As the examination of patent licensing makes clear, export bans continued to be per se violations until \textit{L.C. Nungesser K.G. \& Kurt Eisele v. Commissioner},\textsuperscript{98} where a rule of reason was, to a certain degree, finally utilized by the Court.\textsuperscript{99}

With regard to the trademark rights involved, Consten and Grundig argued that it was not the agreement providing for the transfer of the right that affected competition; rather, it was the registration of that mark under French law which provided for the absolute territorial protection. This line of reasoning was necessary in order to set up their attempted defenses under Articles 36 and 222. The Court stated that Consten held the exclusive use of the trademark in France as a result of Grundig’s authorization in the agreement. The fact that similar agreements for other distributors provided for similar exclusive uses of trademarks established an intent to control and erect obstacles to parallel imports. This intent to control triggered Article 85(1).\textsuperscript{100}

The Court went on to make a key distinction between actions of the Commission which affect the existence of national rights (which presumably would be unacceptable) and actions in which only the exercise of the right was affected. In the Court’s view the Commission’s injunction effectively limited the exercise of the trademark rights to the extent necessary for the attainment of the purpose of Article 85(1), without “touching” the grant of those rights.\textsuperscript{101} The Court’s decision on this particular issue involved a fair amount of sophistry. Nonetheless, the Commission and the Court continue to apply the distinction between the “exercise” and the “existence” of the right.

\textit{Sterling Drug}\textsuperscript{102} and \textit{Merck}\textsuperscript{103} illustrate a strict application of the exhaustion principle. Transfers of technology which impede single market integration by preventing the free movement of goods will be prohibited even when the Community’s competition laws (Articles 85 and 86) have not been violated. Article 85, however, affects patent licensing agree-

\textsuperscript{97} \textit{Id.} at 473.
\textsuperscript{98} 36 Common Mkt. L.R. 278 (1983).
\textsuperscript{99} It should be noted that although export bans have continuously been held to violate Article 85(1), exemptions under Article 85(3) have been granted in numerous patent licensing cases.
\textsuperscript{100} \textit{Nungesser}, 36 Common Mkt. L.R. at 342.
\textsuperscript{101} \textit{Id.} at 351. This distinction between Common Market competition laws affecting the exercise rather than the existence of national rights was further developed in \textit{Park-Davis \& Co. v. Probel}, 7 Common Mkt. L.R. 47 (1968), where patent rights as opposed to trademark rights were at issue.
\textsuperscript{102} 14 Common Mkt. L.R. 480.
\textsuperscript{103} 32 Common Mkt L.R. 463.
ments and trademarks, copyrights and know-how agreements in additional ways.

B. Exclusivity

In order to give undertakings guidance, and to make a policy statement as to just what accommodation should be made between competition rules and intellectual property rights, the Commission published "The Announcement On Patent License Agreements, December 24, 1962." The "Christmas Message,"\textsuperscript{104} as it is called, is a non-binding notice, the legal authority of which is limited to preventing the issuance of fines under Regulation 17.\textsuperscript{105} The "Christmas Message" espouses a generous policy toward exclusive licenses. The philosophy behind this generosity stems from German law, where the theory of the inherent right of the patent\textsuperscript{106} justifies the granting of limited licenses. This German philosophy is in turn indebted to U.S. antitrust law, which excludes the scope of the patent from the application of antitrust laws.\textsuperscript{107} Early dominance by German officials in forming E.E.C. competition policy resulted in the adoption of German legal theory in the "Christmas Message."\textsuperscript{108}

Specifically, the "Christmas Message" stated that the following restrictions did not violate the prohibitions of Article 85(1):

1) field of use restrictions (i.e., granting only a specific type of manufacturing rights);
2) limits on the quantity of products produced;\textsuperscript{109}
3) clauses limiting the license by time, territory and right of usage (i.e., prohibiting sub-licenses);
4) clauses limiting the grant to only a use, manufacture or sales right;
5) obligations to mark the product;
6) requiring the procurement of supplies, due to quality control reasons, from specified sources;
7) requiring non-exclusive grant backs of patent improvements (so long as the obligation was mutual); and most importantly,
8) granting an exclusive license.\textsuperscript{110}

\textsuperscript{104} Christmas Message, \textit{supra} note 14.
\textsuperscript{105} The value of this notice has been seriously undermined by both the decisions to date and the series of draft notices on patent licensing published, but not yet effective. \textit{See} 22 O.J. EUR. COMM. (No. C 58) 11 (1979), in which the Commission stated that until the entry into force of the new regulation, reliance on the "Christmas Message" will prevent the issuance of fines.
\textsuperscript{106} This theory basically states that since the patentee is entitled to prevent anyone else from exploiting the patent, granting a limited or exclusive license for a specific territory only increases competition because the license allows competition that would otherwise be illegal. \textit{See} Korah, \textit{Patents and Competition Law: Recent Decisions of the European Commission}, 1 EUR. L. REV. 185 (1976) (seemingly urging the re-adoption of this theory in relation to exclusivity clauses).
\textsuperscript{107} \textit{See} H. JOHANNES, \textit{INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW} (1976).
\textsuperscript{109} This type of restriction can operate like an export ban, as the licensor allows only enough production under the license to satisfy demand in the licensed territory.
\textsuperscript{110} Christmas Message, \textit{supra} note 14. There is a difference between a sole license, in which
The announcement recognized that the exclusivity issue was controversial, but then merely stated that the clauses "are not likely to affect trade between member states as things stand in the Community at present." Due to the Commission's lack of sufficient experience with such licenses, the announcement did not apply to agreements relating to joint ownership of patents, reciprocal licenses or parallel multiple licenses.

In some cases, licenses, at least before any amendment prompted by the Commission, granted both exclusive manufacturing and selling rights. An exclusive manufacturing right, by itself, does not give the licensee the territorial protection the licensee usually seeks. However, limiting a licensee's right to sell to the licensed territory is similar to an export ban, and the Commission eventually came to see the two as being synonymous.

In Raymond v. Nagoya and Re Burroughs A.G. & Ets. L. Delphanque et Fils, the Commission gave the first indication that the "inherent right of the patent" theory was losing ground. In Raymond, a French company executed a patent license with a Japanese concern, Nagoya. Raymond held patents for processes for the production of plastic components for cars. The agreement also covered certain of Raymond's know-how. The license was exclusive and for the territory of East Asia. The Commission stated that:

> When the grantor of the license undertakes to limit the exploitation of its exclusive right to a single undertaking in a territory and thus confers on that undertaking alone the right to exploit the industrial property rights and to prevent other undertakings [from] using them, it thereby loses the power to enter into contracts with other applicants for a license. In certain cases this exclusive character of a license may be restrictive of competition and covered by the prohibition set out in Article 85(1).

After stating that in theory exclusivity could violate Article 85(1), the Commission found no such violation due to its determination that competition within the Common Market was not involved.

In Burroughs, the exclusivity clause granted Delphanque, a French concern, the exclusive right to manufacture plasticized carbon paper in France. Due to Delphanque's slight share of the French market, the Commission, using the Raymond rationale, found no noticeable effect on competition. This was in effect a finding of a de minimus violation similar to that in Volk.

The progression toward declaring exclusivity clauses illegal was ac-

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the licensor retains the right to manufacture and/or sell in the licensed territory, and an exclusive license where even the licensor is barred from working the patent in the territory. Most licensees bargain for an exclusive license.

111 Id.
115 Id. at D 49.
116 11 Common Mkt. L.R. at D 70.
celerated in *Re Davidson Rubber Co.*\(^{118}\) Davidson, a U.S. corporation, possessed both patents and know-how for a process for the manufacture of plastic arm rests for cars. Davidson granted exclusive patent and know-how licenses under German, French and Italian law, to undertakings in those respective countries. The Commission reiterated its earlier rationale that the exclusive nature of the grant prevented the licensor from granting further licenses in the territories and that this constriction of freedom triggered Article 85(1). The parties agreed to amend the agreement to allow each licensee to sell outside of the licensed area.\(^{119}\)

The Commission next turned to the issue of whether it should give an exemption under Article 85(3). Although both of the processes covered by the license were important to the market, and the licensees enjoyed a one-third market share, the Commission granted an exemption. Its prime justification was that in spite of a violation of Article 85, exclusivity was required in order to ensure that this new technology was introduced into Europe.\(^{120}\) In its application of a rule of reason (although still only in terms of Article 85(3)), the Commission reasoned that the licensees of this new process needed some territorial protection to justify the risk.

As Korah points out, this reasoning is somewhat suspect.\(^ {121}\) A rule of reason should be utilized not in regard to an exemption from Article 85(3), but rather to determine whether Article 85(1) is triggered in the first instance. If no licensee would have been willing to enter the market with this new technology, then there was no competition in that market to restrict. Nonetheless, *Davidson* established in the patent licensing field a question that was to become a permanent fixture in patent licensing cases; whether penetration of a new market was involved.\(^ {122}\)

In *Re The Agreement Between Kabel- Und Metallwerke Neumeyer A.G. and Les Éts. Luchaire S.A.*,\(^ {123}\) the Commission returned to the task of defining the specific subject matter of a patent right. With regard to exclusivity, the Commission stated that the restriction of the use in a specified territory is not a part of the essence of patent rights and therefore is prohibited by Article 85(1). This conclusion amounts to a per se rule that exclusivity clauses are illegal.\(^ {124}\)

An Article 85(3) exemption was granted in *Kabel-Metal*, however, and in so doing the Commission more explicitly answered whether a new

\(^{118}\) Id. at D 52 (R.P. Supp. 1972).

\(^{119}\) Id. at D 59-60.

\(^{120}\) Id. at D 61-62.

\(^{121}\) See Korah, *supra* note 106.

\(^{122}\) The Court has held that penetration of a new market was a consideration in the context of an exclusive distributorship in determining whether Article 85(1) was violated. See *La Technique Miniere v. Maschinenbau Ulm G.m.b.H.*, 5 Common Mkt. L.R. 357 (1966).


\(^{124}\) See *infra* text accompanying notes 144-48. The per se violation stigma was later removed from exclusivity clauses. See *Nangesser*, 36 Common Mkt. L.R. 278, discussed *infra* in text accompanying notes 144-65.
product or process was being introduced as a result of the exclusive nature of the license.\textsuperscript{125} The Commission wrote: "The protection which this territorial advantage gives against the risk of insufficient use of production capacity that has had to be created could not be attained by measures which would restrict competition to a lesser degree."\textsuperscript{126}

It is sometimes difficult to determine whether a licensee is developing a new market, for which an exemption is possible, or whether the licensee is merely extending an existing market or process. An ancillary problem is determining the point at which a process ceases to be new, thus theoretically ending justification for granting an exemption. Negotiating parties must guess as to when they may be forced by the Commission to end the exclusive nature of the grant. Exclusivity is also an important factor in determining royalties.\textsuperscript{127}

One patent licensing case where an exemption from Article 85(1) was not granted was \textit{A.I.O.P. v. Beyrard}.\textsuperscript{128} The license agreement in \textit{Beyrard} contained a host of clauses which the Commission found objectionable. The licensor had phrased his grant of exclusive selling rights as a right to sell only in France, the licensed territory. The Commission seems to have treated this exclusive sales right as an export ban and refused an exemption. The Commission did, however, indicate that cases might exist where an exclusive manufacturing license could be supported by a limited export ban.\textsuperscript{129}

C. Export Bans

In \textit{Consten & Grundig}, the Court adopted a per se rule that export bans are prohibited by Article 85(1).\textsuperscript{130} The fact that the Court required the Commission to engage in a fuller examination of the facts surrounding the exclusivity clause, but did not require the same for the export ban, seems to substantiate this reading of the case.\textsuperscript{131}

In \textit{Raymond}, an implied export ban specifically allowed only patented products, incorporated in parts of Japanese cars or whole cars themselves, to be exported anywhere in the world.\textsuperscript{132} One of the license

\textsuperscript{125} \textit{Kabel-Metal}, 16 Common Mkt. L.R. D 40, D 48-49. The Commission once again forced the parties to eliminate the exclusive selling clauses found in the licenses.

\textsuperscript{126} \textit{Id.} at D 48 (emphasis added). While this quote concerns the grant of exclusivity for the transfer of know-how, the principle is equally applicable to patents.

\textsuperscript{127} These issues do not disappear as a result of the Proposal for a Commission Regulation on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 22 O.J. EUR. COMM. (No. C 58) 12 (1979) [hereinafter cited as 1979 Draft Regulation].


\textsuperscript{129} \textit{Id.} at D 26. For an additional case concerning exclusivity clauses, see Zuid-Nederlandse Bronbemaling en Grondboringen B.V. v. Heidemaatschappij Beheer N.V., 16 Common Mkt L.R. D 67 (R.P. Supp. 1975), in which the absence of new market penetration led to a denial of an exemption under Article 85(3).

\textsuperscript{130} \textit{Consten & Grundig}, 5 Common Mkt. L.R. 418 (1966).

\textsuperscript{131} See V. KORAH, \textit{COMPETITION LAW OF BRITAIN & THE COMMON MARKET} (3d ed. 1982).

\textsuperscript{132} \textit{Raymond}, 11 Common Mkt. L.R. D 47.
agreements in Davidson did contain an export ban, but the agreement was amended prior to the Commission’s decision. The original Kabel-Metal license did not contain a pure export ban, but did have a specific provision preventing sales to certain E.E.C. countries which later was removed “voluntarily.” In Beyrard a de facto export ban prevented exports to any country where there was a prior licensee or assignee of the patent rights. The Commission found the restriction to be a conditional export ban and stated that the “existence of the patent right is not at issue when the licensor prohibits the licensee from exporting to countries . . . ”

VII. 1979 Draft Regulation on Patent Licensing

In the 1979 Draft Regulation on Patent Licensing (Draft Regulation), the Commission developed a distinction between exclusive manufacturing licenses; allows exclusive selling licenses and export restrictions, for the duration of the latest patent, but only when the party benefiting from the territorial protection has a turnover under 100 million units of accounts (approximately $1 U.S. per unit); allows minimum production requirements to be placed upon the licensee (note the difference with the “Christmas Message” where restrictions on maximum production amounts were allowed); allows clauses requiring the licensee to procure “raw” supplies from the licensor, but only if indispensable to proper exploitation of the patent (same as the “Christmas Message”); allows field of use restrictions upon the licensee (same as the “Christmas Message”); does not allow “no challenge” clauses which prevent the licensee from attacking a patent’s validity, but the licensor can terminate the agreement if a challenge is made; allows quality control requirements; allows “grant back” clauses as long as they are nonexclusive and/or bind the licensor as well (same as “Christmas Message”); allows “most favored” licensee clauses; except to the degree exclusive manufacturing and selling clauses are permitted (see No. 2 & 3), prohibits clauses preventing competition between the licensor and licensee (i.e. preventing the licensee from also selling products of the licensor’s competitors); prohibits the payment of royalties after a patent has expired or the “know-how” is in the public domain. (Unfortunately this prevents the licensor/licensee from agreeing to spread payments out over a term longer than the life of the patent which may be close to expiring); prohibits paying royalties on products not covered by patents or “know-how” agreements (i.e., where licensee utilizes some nonpatented process to manufacture the product); prohibits clauses which prevent the licensee from using the “know-how” after the expiration of the agreement (but a fair royalty can be charged); prohibits “tie-in” clauses that condition the granting of one license upon the acceptance of other unwanted licenses; requires notification to the Commission of all arbitral settlements (since most technology licensing agreements have arbitration clauses this requirement is
licenses to manufacture and use within the licensed territory and exclusive licenses to sell.\textsuperscript{138} The Draft Regulation allows restrictions on selling and related export bans, limited by the size of the licensee to be protected. The rationale section of the Draft Regulation states that "[t]he territorial protection that arises from exclusive sales rights and related export bans can only be allowed if it is requisite for ensuring the expansion of technical progress."\textsuperscript{139} The rationale section continues by echoing what patent license decisions have been saying since \textit{Davidson}; that penetration of a new market is essential if special treatment is to be given to normally prohibited clauses. The Commission's rationale states that it "accepts that this protection is necessary for the . . . development and marketing of new technologies."\textsuperscript{140}

The specific provisions of the Draft Regulation exemption allow for export bans to support exclusivity clauses only if the undertaking to be protected is small, having a turnover of one hundred million units of account (approximately one hundred million United States dollars), including the turnover of all subsidiaries and firms economically connected. The licensee must both manufacture and sell, as the exemption does not apply to pure selling licenses.\textsuperscript{141} Additionally, Article 3(13) of the Draft Regulation prevents the application of the exemption if any impediment to the manufacture, use or sale of the licensed product exists in areas in the Common Market where the licensor (and connected undertaking) does not have corresponding patent protection. Thus, Article 3(13) will have the effect of stimulating the use of the Community Patent Convention,\textsuperscript{142} as the licensor will not be able to hold back his or her first licensee from exporting to Common Market states where the licensor has not yet sought to obtain a "parallel" patent.

The Draft Regulation on Patent Licensing does not apply to patent pools, patent licenses relating to joint ventures between competing companies,\textsuperscript{143} cross licensing agreements, or licenses involving plant breeder rights. Also, a license agreement that does not benefit from the bloc exemption possibly may obtain an exemption pursuant to Article 85(3).

\textsuperscript{139} 1979 Draft Regulation, supra note 127, at 13.
\textsuperscript{140} Id.
\textsuperscript{141} See supra note 26 (Commission Regulation 1983/83 applies to pure selling agreements).
\textsuperscript{143} For a case squarely within this category, in which a conditional exception under Article 85(3) was nonetheless granted, see Re De Laval-Stork V.O.F., 20 Common Mkt. L.R. D 69 (R.P. Supp. 1977).
VIII. The Maize Seed Case

A. A "Rule of Reason" Under Article 85(1)

The Court of Justice has addressed the issues of exclusivity and related export bans in licensing agreements only once. Although the licensing agreements in *L. C. Nungesser K.G. v. E. C. Commission* (hereinafter *Maize Seed*) involved plant breeder rights, the Court stated that from a legal point of view such rights were not different from patent or trademark rights. Thus, the case should provide precedential value for licenses involving traditional intellectual property rights.

Action on the 1979 Draft Regulation on Patent Licensing was postponed pending the *Maize Seed* decision, and the Court of Justice deliberated for over three years before rendering the decision. As a result of *Maize Seed*, the Commission has returned to the drawing boards to redraft the Draft Regulation. Although *Maize Seed* does not seem to require major changes in the Draft Regulation, the Commission has yet to publish its new draft. This one and a half year delay suggests that the Commission is struggling with one or more issues stemming from the decision. A review of the facts and issues in *Maize Seed*, focusing on its exclusivity and export ban aspects, may help to determine what implications the case has for the new Draft Regulation.

Plant breeder rights are regulated under both Community law and various national laws. The purpose of such laws is generally to ensure that the purity and quality of the seeds is maintained. I.N.R.A. was a French governmental agency responsible for developing and improving seed varieties. Because it was not authorized directly to commercially exploit the results of its development activities, it licensed other organizations to do so. Frasema, a French company, was one such licensee which engaged in imports and exports of seeds. Kurt Eisele was a German breeder and seed merchant. Frasema was later assigned all of I.N.R.A.'s rights and obligations under the contracts concluded with Eisele. Nungesser K.G. was a German partnership in which Eisele was a managing partner. Eisele assigned his rights to the partnership.

I.N.R.A. and Eisele entered into a series of contracts, the first of which authorized Eisele to represent I.N.R.A. in the administrative procedure to register seed varieties with the German authorities. In order to actually register, Eisele had to obtain the rights to the other varieties; thus, I.N.R.A. assigned its rights in Germany to Eisele.

In spite of arguments by Eisele to the contrary, the Court determined that even though the transaction was framed as an assignment, due to its connection with other contracts and the long term nature of

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145 *Id.* at 350.
the contractual relationship with its attendant restrictions, it was more like a license.\textsuperscript{148} The transaction thus remained within the scope of competition laws despite its designation as an assignment of rights rather than a license.

Through a series of additional contracts, Eisele and I.N.R.A. (and Frasema, the assignee) agreed that Eisele would organize all the sales of seeds in Germany. The contracts did not grant an exclusive right to sell, however. Eisele also agreed not to organize sales for seeds competing with I.N.R.A. seeds. Eisele was allowed to produce and distribute up to one third of the German market's demand for seeds. For the remaining two thirds of the market, Eisele was to obtain his seed from I.N.R.A. at prices suggested by I.N.R.A. (such prices would be set with French export prices in mind). Eisele also agreed to enforce I.N.R.A.'s trademark, which was assigned to Eisele. In return, I.N.R.A. agreed to prevent exports from France to Germany except through Eisele. Thus, with his previously acquired ownership rights, and assistance from I.N.R.A., Eisele was able to prevent imports from the French markets.

The Commission decided that a number of provisions in the contracts between Eisele and I.N.R.A. violated Article 85(1).\textsuperscript{149} In light of earlier decisions, the Commission's finding that the exclusive character of the license to manufacture and distribute seeds was not part of the specific object of the rights involved was not surprising.\textsuperscript{150} The 1960 agreement transferring I.N.R.A.'s breeding rights to Eisele was, to the extent it was used by Eisele to prevent imports, a violation of Article 85(1).\textsuperscript{151} The Commission refused to grant an exemption and Eisele and Nungesser appealed. The appellants unsuccessfully attempted to distinguish plant breeder rights from other rights involved in previous Commission decisions. They further claimed that the need for strict purity and quality control justified the existence and exercise of the national rights which Nungesser possessed. Additionally, the appellants claimed considerable financial risk in the development of new strains of seed.

The Court rejected appellants' unique characteristics argument, comparing breeder rights to patent and trademark rights for the purpose

\textsuperscript{148} *Maize Seed*, 36 Common Mkt. L.R. at 351.


\textsuperscript{150} Id. at 450.

\textsuperscript{151} Additionally, the Commission found fault with the following:

1) the provision restricting I.N.R.A. from producing or selling seeds in Germany through anyone but Eisele (exclusivity);
2) the obligation on I.N.R.A. not to produce or sell itself (exclusivity);
3) the duty upon I.N.R.A. to prevent third parties from exporting into Eisele's territory (enforcement of an export ban);
4) the noncompetition clause obligating Eisele not to deal in competing seeds;
5) the obligation on the licensee to sell only to certain dealers (selective distribution restriction); and
6) production limits placed on Eisele.

*Id.* at 458-59.
of applying competition rules. The Court also rejected the appellants' factual allegation that maize seed was a new, high financial risk seed. It did not, however, reject the legal theory that unique financial risks should be considered.

On the issue of exclusivity, the Court in effect reversed the Commission's ruling, opening a new dimension in the analysis of exclusive licenses. The appellants, supported by amicus curiae briefs by the British and German governments, argued that it was wrong for the Commission to conclude that exclusive licenses were per se a violation of Article 85(1). They argued that in order to develop and launch a new product, the breeder or merchant needed protection against competition from both the licensor and other third party licensees. This argument called for the Court to force the Commission to apply its form of the rule of reason under Articles 85(1), and not just under Article 85(3). The Court responded by distinguishing two aspects of license agreements: (1) pure exclusivity, as between licensor and licensee; and (2) related export bans, involving third parties and other licensees. The Court found that since exclusivity and export bans are different in substance, they should be treated differently by competition rules.

The Court then proceeded to discuss its new legal concept, the "open exclusive license." In an "open exclusive license" or assignment, the "exclusivity of the license relates solely to the contractual relationship between the owner of the right and the licensee whereby the owner merely undertakes not to grant other licenses in respect of the same territory and not to compete himself with the licensee." The Court distinguished an open exclusive license from the second type of exclusivity in a license, which involves "absolute territorial protection, under which the parties to the contract propose . . . to eliminate all competition from third parties, such as parallel importers or licensees for other territories." The Court went on to acknowledge the arguments of the German and British governments that exclusivity was necessary for the promotion and dissemination of technical knowledge in the Community. In the case of a newly developed seed, where there is risk in the cultivating and marketing of the seed, the Court held that the grant of an open exclusive license was not a violation of Article 85(1). This holding

152 Id. at 454.
153 Id.
154 The Commission and the Court have established general guidelines concerning selective distribution agreements. Objective criteria which potential distributors must meet have been allowed; other quantitative restrictive criteria (i.e., population per dealer area) have been found to trigger Article 85(1), although exemptions may be possible. See Re Omega Watches, 9 Common Mkt. L.R. D 49 (R.P. Supp. 1970); Re S.A.B.A., 17 Common Mkt. L.R. D 61 (R.P. Supp. 1976).
155 Maize Seed, 36 Common Mkt. L.R. at 352.
156 Id.
157 Id.
158 Id. at 353.
marked an end to the per se rule that all forms of exclusivity violated Article 85(1). Thus, to that extent, it is safe to say that cases such as Kabel-Metal are overruled.

Since the agreement in Maize Seed was not an open exclusive license, but rather a restriction on the activity of parallel importers, the Court upheld the Commission's findings that the parties intended to restrict competition, and that the agreement transferring I.N.R.A.'s rights to Eisele, to the extent it was used to prevent imports to Germany of seeds already officially certified in another state, was a violation of Article 85(1). The Court also upheld the finding that the remaining clauses aimed at preventing parallel imports were in violation of Article 85(1). Its decision whether to grant an exemption under Article 85(3) focused on the fact that "absolute territorial protection manifestly goes beyond what is dispensable for the improvement of production or distribution, or to the promotion of technical progress . . . . It follows that the absolute territorial protection afforded the licensee constituted a sufficient reason for refusing to grant an exemption . . . ." 159

Several important decisions flow from Maize Seed. The Court reaffirmed that the application of competition rules affects only the exercise of intellectual property rights as opposed to their existence. 160 While maintaining that legal theory, the Court dismantled another; that all forms of exclusive manufacturing and selling rights are per se a violation of Article 85(1). Part and parcel of this ruling is the new concept of an open exclusive license agreement under which only the licensor's and licensee's rights are restricted. Thus, at least when the development and marketing of a new product or process is involved, a license agreement which does not restrict third parties will not violate Article 85(1). 161 By banning other forms of exclusive licenses, the decision reinforces holdings such as Consten & Grundig. 162 The message remains clear: absolute territorial protection enforced by export bans is contrary to Article 85(1) and cannot be exempted under Article 85(3).

Perhaps most important, it is hoped that the Maize Seed decision is the beginning of the application of a rule of reason under Article 85(1) to cases involving intellectual property rights. This development bodes well for those involved in industries where some ancillary restrictions are necessary in order to successfully develop and sell technological advances. Because the Court is still requiring some novelty in the product or process in order to justify open exclusivity, it seems that patents, copyrights (software in particular) and perhaps know-how licensing agreements will benefit most from the decision. Placing the rule of reason analysis under Article 85(1) instead of Article 85(3) will not eliminate the need for a

159 Id. at 356.
160 Id. at 347.
161 See infra the discussion at note 164 and accompanying text concerning the decision's lack of clarity as to this point.
bloc exemption to provide more certainty for licensors and licensees, but the scenario has certainly improved for potential licensors and licensees.

B. Implications of Maize Seed for the Draft Bloc Exemption

One difficulty with the Court’s decision which the Commission will have to consider while drafting a new bloc exemption stems from the Court’s definition of an open exclusive license as one that does not restrict the rights of third parties such as other licensees. The Court failed to make clear that it was only that portion of the agreement that restrained the licensor from producing and selling in the licensed territory that was permissible under Article 85(1). Therefore, the Court’s judgment might be read as allowing restrictions on other licensees. Perhaps it should have explained that the words “or those deriving rights through I.N.R.A.,” did not negate its reasoning that open exclusive licenses do not allow restrictions on other licensees. In spite of the failure to explain, the Commission will probably read the decision as holding that exclusive selling-right clauses cannot be relied upon to restrain other licensees from selling in the licensed territory. The Court’s intention seems to warrant such a reading.

Examining the purpose behind the 1979 Draft Regulation on Patent Licensing makes it possible to guess at the form the new regulation may assume. The Draft Regulation was intended to exempt licensors from their obligation to manufacture and sell in the licensed territory. In spite of Maize Seed, and because of the need for certainty, a specific exemption for licensors is still needed. A second main purpose of the Draft Regulation was to provide territorial protection through the use of selling restrictions and export bans on other licensees. Due to the Court’s definition of an open exclusive license, a regulation is still needed. The new regulation will probably continue to give territorial protection to small and medium-size undertakings, although hopefully the Commission will reevaluate the one hundred million unit of account limitation. Maize Seed does not seem to dictate major changes for the new draft regulation, but the Commission may be having difficulty drafting the regulation in such a way as to prevent those falling outside the bloc exemption (i.e., large undertakings) from using the lack of clarity in Maize Seed to circumvent Commission policy as embodied in the Draft Regulation.

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163 Maize Seed, 36 Common Mkt. L.R. at 359.
165 The new Draft Regulation on Patents is unlikely to cover patent pools, thus the practitioner should be aware of the Commissioner’s 11th Report on Competition. See 14 INT’L REV. OF INDUS. PROP. AND COPYRIGHT LAW 252-54 (1983).
IX. Clauses

A. No Challenge Clauses

The patent license in Raymond contained a clause preventing Nagoya from challenging the validity of Raymond's patent. The Commission explained that such clauses weaken the competitive position of licensees and third parties who would benefit from a successful patent challenge. The Commission felt that no-challenge clauses unduly strengthen a patent and conflict with the public policy of revoking weak patents. The Commission, however, decided that the licensee in Raymond would have no interest in such a challenge, and thus competition within the E.E.C. was not affected.\textsuperscript{166}

In Davidson, the Commission pressured the parties to eliminate a no-challenge clause because the licensee had an incentive to challenge the obligation to pay royalties.\textsuperscript{167} In Beyrard, the Commission accurately noted that the licensee who works the patent is in the best position to challenge weak patents.\textsuperscript{168} Thus, the Commission in both Beyrard and Vassen B.V. v. Morris\textsuperscript{169} continued to condemn no-challenge clauses.

The 1979 Draft Regulation on Patent Licensing continues the philosophy of encouraging patent challenges by not exempting licenses with no-challenge clauses from Article 85(1).\textsuperscript{170} The Commission has not squarely addressed the issue of the number of licenses that will be withheld due to the prohibition against no-challenge clauses, but the cost involved in defending a patent infringement action will certainly deter some no-challenge clauses. Strengthening the validity of patents through more careful examinations would seem to be a better policy than preventing the use of such clauses. The Community has the opportunity through the Community Patent System to decrease the importance of a licensee's ability to challenge patents.

B. Grant Back Clauses

The Commission's policy on grant back clauses has been quite consistent. Under Common Market policy, clauses requiring a licensee to grant back to the licensor an exclusive license to any patent improvements are unacceptable in light of Article 85(1). Non-exclusive grant back clauses are permissible, however, because they allow third parties to share in, and benefit from, technological developments.\textsuperscript{171}

C. Most-Favored Licensee Clauses

In Kabel-Metal, the Commission pointed out that, in general, most-
favored licensee clauses do not restrict competition.\textsuperscript{172} Unique economic circumstances could, however, create an exception under which a potential licensee would require significantly more beneficial license terms than other licensees, which most-favored licensee clauses would prevent. It is questionable whether under such conditions a licensor would undertake production. The 1979 Draft Regulation does permit such a clause,\textsuperscript{173} since without such protection the licensee may be unwilling to make the initial investment necessary for production.

\section*{D. Tie-In Clauses}

The law of the Common Market, like that of the United States,\textsuperscript{174} prohibits naked tie-in clauses in licenses.\textsuperscript{175} In \textit{Vasson},\textsuperscript{176} the Commission condemned a provision granting the licensee a royalty-free license to the patent process conditioned upon the licensee's purchase of sausage skins from the licensor. Article 1(5) of the Regulation allows for tie-in restrictions only if indispensable to the proper technical exploitation of the patent.

\section*{E. Restrictions and Royalties After Patent Has Expired}

On the grounds that a license could run indefinitely, the Commission, in \textit{Beyrard},\textsuperscript{177} condemned provisions where the license agreement extended until the expiration of the most recent original or improvement patent. The Commission stated that a restriction of competition occurs when, "a licensing agreement shall have a duration which is larger than the life of the last patent to have been granted at the date when the agreement was made."\textsuperscript{178}

Article 3(2) also limits license duration periods to the last patent in effect on the date of execution of the agreement. If each party retains the right to terminate the agreement at least yearly, however, the article permits a longer duration. Article 3(4) also denies exemptions to licenses with obligations to pay royalties on products not covered by the patent, or after the patent has expired or the know-how has entered the public domain.\textsuperscript{179} These provisions may cause problems when the licensee is unable to pay sufficient royalties at the beginning of the license period, but would be willing to accelerate royalty payments or make balloon payments spread out over a period longer than the life of the patent.

\begin{thebibliography}{99}
\bibitem{172} Kabel-Metal, 16 Common Mkt. L.R. D 40.
\bibitem{173} See 1979 Draft Regulation, \textit{supra} note 127, at arts. 2(1), 2(9).
\bibitem{174} See United States v. Loew's, Inc., 371 U.S. 38 (1962) (ties in copyright licenses illegal); Rocform Corp. v. Acitelli-Standard Concrete Wall, Inc., 367 F.2d 678 (6th Cir. 1966).
\bibitem{175} See 1979 Draft Regulation, \textit{supra} note 127, at arts. 2(1), 2(9).
\bibitem{177} 24 Common Mkt. L.R. 511 (1979).
\bibitem{178} 17 Common Mkt. L.R. D 14 (1976).
\bibitem{179} \textit{Id.} at D 23.
\end{thebibliography}
F. Noncompetition Clauses

In *Beyrard* the Commission totally rejected clauses prohibiting competition.\(^{180}\) Article 3(3) precludes an exemption for a license that contains a noncompetition clause except to the extent that territorial noncompetition is allowed by an exclusive license. One form of noncompetition clause does, however, seem to be permissible. In *Reuter v. B.A.S.F. A.G.*\(^{181}\) the Commission did sanction a personal noncompetition clause that was integral to the sale of a business, where know-how was involved in the transaction.

X. Trademark Licensing

As shown earlier, the exhaustion and common origin principles significantly affect the exercise of trademark rights. Article 85(1) also affects agreements involving trademark rights. In the much criticized case of *Sirena v. Eda*,\(^{182}\) the Court held that the exercise of a trademark right acquired under an agreement could violate Article 85(1) when the right was used to prevent imports from different member states. In *Sirena*, a U.S. company assigned its Italian trademark rights to the mark “Prep.” This mark was subsequently assigned to Sirena who registered it. The U.S. company had also licensed a German company to use the “Prep” shaving cream in Germany, and undersold Sirena in the Italian market. Sirena invoked its Italian trademark rights and sued for infringement.

The Court explained that the trademark right itself was not an agreement or practice within the meaning of Article 85(1). An assignment or license agreement, however, which allowed for the exercise of a trademark that was used to reestablish trade barriers could violate Article 85(1). The Court wrote: “Article 85(1) therefore applies where, by virtue of trademark rights, imports of products originating in other member states, bearing the same trademark because their owners have acquired the trademark itself or the right to use it through agreements with one another or with third parties, are prevented.”\(^{183}\)

Only a few months before *Sirena*, the Court announced the *Deutsche-Grammaphon*\(^{184}\) decision establishing the exhaustion principle. That theory could not be used, however, because the American assignor to whom the exhaustion would apply did not seek to prevent the imports. The common origin principle could not be used either, because the *Hag*\(^{185}\) decision had not yet been rendered. Seemingly caught by their inability to apply either principle, the Court in *Sirena* rendered a questionable decision: it did not require any showing that the agreement was part of

\(^{180}\) *Beyrard*, 17 Common Mkt. L.R. D 14.


\(^{182}\) 10 Common Mkt L.R. 260 (1971).

\(^{183}\) Id. at 270.

\(^{184}\) 10 Common Mkt. L.R. 631.

a plan to divide marks and ensure price maintainence through those rights. The emergence of the common origin principle two years later does not justify the Sirena decision, and the consequence of the decision seems to be that trademark rights can be considerably less valuable if obtained by an assignment or license rather than developed as an original mark.

In Re Advocaat Zwarte Kip v. Cimoco, the Commission applied both the common origin principle and Article 85(1). Through a series of assignments, the trademark rights for the mark "Advocaat" in Holland, Belgium and Luxembourg became vested in two undertakings. In contrast to Sirena, the holders of the rights made an agreement to prevent exports from their respective territories. The Commission held that the agreements transferring the marks themselves were part of an overall plan to restrict trade. The Commission's rejection of the argument that quality differences in the product justified the exercise of the right has further undercut one of the essential purposes of trademarks. Although there were differences in the alcoholic content of the products made by the parties, the Commission seemed to be more concerned with providing consumers with notice of the origin of the goods than with preventing a licensee from benefitting from the goodwill that might be created by the higher alcoholic content of the other product.

Re Sirdar's Agreement provides an example of a blatant violation of Article 85(1). A British and a French company, both dealing in woolen yarns, agreed not to use their "foreign" registered trademarks in each other's home markets. Possibly because each company feared a successful challenge to its marks, they agreed to export to each other's markets woolen goods under a mark totally different from their registered marks. The Commission focused on the parties' intent to prevent competition in the home markets by preventing imports of goods bearing the competitor's trademark. As a result of this agreement, each party gave up the benefit of the goodwill that each individual mark possessed. Consequently, the agreement to divide the markets triggered Article 85(1).

In Re Penny's Trade Mark, the Commission granted a negative clearance to a consent judgment settling the use of a set of similar trademarks. The settlement was treated by the Commission as an agreement that each party should have the exclusive right to one set of marks throughout the Common Market. The Commission granted the clearance because the agreement allowed both parties to remain as competitors in the same goods. Also, each party's surrender of one set of marks did not involve a significant loss of goodwill to the parties. Equally important, no contractual restrictions could result in the partitioning of

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187 Id. at D 86.
189 Id.
190 22 Common Mkt. L.R. 100 (1982).
Another case involving an informal settlement agreement is *Re The Persil Trade Mark*,\(^\text{192}\) in which two companies whose marks had a "common origin" agreed to slightly alter their marks by changing the color of the word "Persil." The Commission approved this informal settlement because it allowed each party to freely import its product, where previously a trademark dispute had prevented such imports.\(^\text{193}\)

A final decision deserving note is *Re The "Tyler" Trade Mark*,\(^\text{194}\) which involved an exclusive trademark license coupled with the sale of a business. The Commission equated such a license with a noncompetition clause and required that the ten-year license be reduced to five because the length of the exclusive license was unreasonable. The exclusive nature of the license clearly prevented competition as indicated by the failure of spin-off corporations of the original licensor to establish their product in the licensed territory when forced to market under a different trade name.\(^\text{195}\)

A Community Trade Mark\(^\text{196}\) would create a mark which could only be registered for the whole Community, thus eliminating many impediments to the free movement of goods. A new Community Trade Mark registry could be established to administer the system. Since the European Community's first publication of the proposal for a Community Trade Mark, however, little progress has been made toward it becoming reality.

**XI. Copyrights**

Copyright cases have been discussed in the context of the exhaustion principle. To date, no significant Commission or Court decisions apply Article 85(1) to copyrights. The Commission has provided guidance in the area, however. In 1977, it announced that it would apply the same principles to copyright licenses as it had to patent licenses.\(^\text{197}\)

**XII. Know-How Licensing**

Rights to protect and transfer know-how are not, strictly speaking, intellectual property rights, although they are frequently grouped with

\(^{191}\) *Id.* at 113.

\(^{192}\) 21 Common Mkt. L.R. 395 (1982).

\(^{193}\) *Id.* at 396-97.

\(^{194}\) 35 Common Mkt. L.R. 613 (1982).

\(^{195}\) *Id.*

\(^{196}\) See the Bulletin of the European Communities Supplement, May 1980 for complete discussion of the proposed Directive and Regulation.

\(^{197}\) See Commission's Sixth Report on Competition Policy at 84 (1977). The practitioner should be aware of the British Design Copyright Act of 1968, under which protection for 15 years for artistically meritorious designs can be obtained. The protection offered is much broader than that under U.S. copyright law, as it has been extended to seemingly "utilitarian designs" such as drawings for mufflers. See generally W. CORNISH, INTELLECTUAL PROPERTY, PATENTS, COPYRIGHTS, TRADEMARKS AND ALLIED RIGHTS 416-20 (1981).
such rights. Know-how rights actually involve a combination of trade secret and contract law. To the extent that trade secret law is involved, know-how rights are not positive rights which confer ownership interests in property. Know-how rights also generally are not statutorily created. There is no granting authority,\textsuperscript{198} nor is there a registry in which to record such rights. In relation to patents, trademarks and copyrights, know-how rights can be said to be sui generis. In the following discussion, the term "know-how rights" refers to any compilation of information used in business that gives the user an opportunity to gain an advantage over competitors who do not know about or use the information. Such information includes processes and formulae, design manuals, operating instructions and drawings.\textsuperscript{199}

Although less protected under most legal systems, know-how rights may be preferable to other forms of legal protection such as patent rights. In addition to the nonpatentability of a product or process, there are other reasons for relying upon trade secret protection. Some discoveries may be deemed too valuable to be subjected to public scrutiny under the patent system. Additionally, the patent system in the desired country may grant weak patents, thus inhibiting the system’s effectiveness. The cost of defending infringement actions brought against a licensee, should a developer decide to license, is another consideration. Finally, under Common Market law, the Community’s policy of prohibiting no-challenge clauses in patent licenses may decrease the value of patents and increase the attractiveness of trade secret protection.

Case law concerning know-how rights is scant. In several of the patent licensing cases in which know-how was also licensed, the decisions contain little more than a recitation that know-how accompanied the license. The license agreement in \textit{Re Burroughs-Delphanque}\textsuperscript{200} contained a clause requiring secrecy as to the technical know-how, and prohibition on its use after expiration of the license. The Commission found that such a clause did not violate Article 85(1), even though the restrictive period was effective for ten years after the expiration of the license, but the Commission modified the restrictive clause to lapse after the know-how had entered into the public domain.\textsuperscript{201} The Commission also allowed a provision preventing the licensee from granting secrecy sublicense.\textsuperscript{202} This decision clearly shows the Commission’s focus on secrecy as the essential element of know-how rights, and the licensor’s ability to maintain that secrecy.

\textsuperscript{198} U.S. trademark law differs from most European trademark law in that rights are created by use as opposed to registration.


\textsuperscript{201} \textit{Id.} at 71.

\textsuperscript{202} \textit{Id.} at 84.
In *Raymond*,\(^{203}\) the Commission ruled that an early version of the license agreement be amended to require the licensee to assign all non-patentable technical innovations made by the licensee. As part of the amendment, the parties agreed to exchange information on technique improvements. The Commission held that such exchanges of information form part of the contractual exploitation of the know-how which is provided for in the contract, and do not constitute a restriction on competition.\(^ {204}\) The decision does not explain why the clause needed modification. The Commission clearly requires nonexclusivity of grant back clauses for patentable improvements. If the offending element were the exclusive nature of the grant back clause, the Commission's reasoning would be inconsistent with its earlier view as stated in *Burroughs*, that protecting secrecy was justified. If competition rules require that a licensee be able to share with third parties improvements to know-how, then surely any secrecy protection given to the original know-how is meaningless.

The Commission, in *Davidson*,\(^ {205}\) confirmed its earlier ruling in *Burroughs* that restricting a licensee from granting sublicenses is justified by the licensor's need to insure secrecy of its know-how. However, since there is a distinction between sublicenses of the original license and licenses to improvements, *Davidson* did not answer the question raised above.

It is clear after *Kabel-Metal*\(^ {206}\) that the Commission believes an exclusive know-how license is a justified restriction on competition. Although the license in *Kabel-Metal* was a mixed patent and know-how license, the Commission treated the know-how rights the same as the patent rights. There is no inconsistency here, because theoretically the essence of know-how rights — secrecy — can be protected just as well in several licenses as in one exclusive license.\(^ {207}\) Exemptions for restrictive clauses concerning know-how will also be available under the same conditions as they are for patents.

In addition to authorizing secrecy requirements, the Commission in *Kabel-Metal* approved a clause requiring royalties to continue after the term of the license if the licensee continued to use the licensed know-how. Although only patent rights were involved, the *Beyrard* decision suggests that the Commission would not allow clauses requiring the payment of royalties after the know-how is in the public domain.

Based on these decisions, a few conclusions may be drawn concerning the treatment of know-how rights. Clearly the Commission has properly defined the essence of know-how rights to be secrecy and the

\(^{203}\) [12 Common Mkt. L.R. D 45 (1972)].

\(^{204}\) *Id.* at D 51.

\(^{205}\) [12 Common Mkt. L.R. D 52 (1972)].

\(^{206}\) *Id.* at D 40 (1975).

\(^{207}\) The purely practical argument is that the larger the number of licensees, the larger the risk of a breach of secrecy.
licensor’s ability to maintain it. Thus, secrecy restrictions generally do not violate Article 85(1). Since the 1979 Draft Regulation applies only to know-how that is ancillary to a patent license, it is reasonable to assume that with regard to exclusivity, licenses covering only know-how rights will greatly benefit from *Maize Seed*.

The Draft Regulation does have several articles that apply to know-how rights which can be analyzed in order to anticipate the treatment of know-how rights. The Draft Regulation applies to know-how licenses only if these licenses are ancillary to a patent license. Field of use restrictions for know-how licenses were not exempted under the Draft Regulation; however, Professor Korah states that Commission officials have indicated that the final version of the exemption will allow such restrictions. Secrecy restrictions, both during and after the term of the license, are permitted under Article 2(1)(5). Article 3(4)(D), however, does not allow royalty obligations after the know-how has entered the public domain. This confirms the inference that was raised in the *Beyrard* ruling. Royalty obligations cannot be imposed on licensees for products not made, at least in part, by the know-how communicated by the licensor. A licensee cannot be prohibited from using the licensed know-how once the license has expired, but the licensor in that instance can require a royalty for the extended use. Finally, under Article 5(3), know-how cross-licensing agreements will not benefit from the exemption.

One additional Commission promulgation should be noted. The "1979 Notice on Sub-Contracting" allows restrictions on subcontractors which prevent their disclosure of technological know-how, under the rationale that if the possessors of technological know-how cannot be assured of secrecy, they will not utilize smaller contractors. Because of sparse case law, the difference between the application of competition rules to know-how licenses and to other traditional intellectual property rights is difficult to determine. It does appear that, unlike U.S. antitrust policy, the Commission has not applied competition rules more strictly to know-how licenses than to other licenses. Moreover, the Com-

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209 36 Common Mkt. L.R. at 278.
211 *Id.* at art. 2(1)(1).
212 See V. KORAH, COMPETITION LAW OF BRITAIN AND THE COMMON MARKET 270 (3d ed. 1982). If this statement is accurate, it appears that Article 3(11) will also have to be amended.
214 *Id.* at art. 3(10).
215 For an example of a joint venture involving cross-licensing of both patents and know-how, see Re De Laval-Stork V.O.F., 20 Common Mkt. L.R. D 69 (1977).
mission has defined the specific object of know-how rights. This suggests that know-how rights will be treated in a manner similar to other traditional intellectual property rights. If the Commission and Court of Justice decisions in patent licenses are any benchmark, one can expect the application of this process to yield an occasional surprise. The final Draft Regulation on patent licensing, together with future decisions, will determine whether these predictions are accurate.

XIII. The Effect of Article 85(2)

Once an agreement has been found to violate Article 85(1), Article 85(2) treats the agreement as automatically void absent an exemption. This is important to both the parties to the contract and to third parties whose interests may have been affected by the agreement. Questions remain, however. In a license agreement, it is not clear what property interest actually passes from the licensor to the licensee if the agreement is subsequently found void. In addition, if rights were passed, it is uncertain when they dissolve as a result of the operation of Article 85(2). Finally, it is open to question whether causes of action for damages, restitution or even infringement arise if the license agreement is void.218

Common Market law directly applies to the legal systems of member states, creating rights for individuals and undertakings therein. Additionally, Article 9(3) of Regulation 17219 authorizes the national courts to apply Article 85(1). Because the Court of Justice renders most of its decisions in the context of abstract questions posed by national courts, and because of the factors mentioned immediately above, the national courts will decide what effect Article 85(2) has on a license agreement.220 Clearly, Article 85(2) can be used as a shield. This Eurodefense has been raised in many cases throughout the Community,221 and since Community law is supreme, national courts will not enforce agreements or portions thereof that violate Article 85(1).222

Although several factors point to the use of Article 85(2) as a sword, the authority for that use is hardly conclusive. In Garden Cottage Foods v. Milk Marketing Board,223 the English Court of Appeal ruled that an injunction will be issued to prevent an abuse of a dominant position under

218 The author wishes to acknowledge the use of, and benefit from, the ideas of Peter A. Stone, Lecturer of Law, Exeter University, Exeter, England.
219 Christmas Message, supra note 14.
220 It should be noted that Article 87(2)(e) of the E.E.C. Treaty gives the Commission the authority to issue harmonizing directives. The exercise of such authority might be required due to the differing holdings that can be expected from national courts in the application of Article 85(2).
222 If the offending clauses can be severed from the agreement, the remainder of the agreement may be enforced. See Consten & Grundig, 5 Common Mkt. L.R. 418 (1966).
Article 86. In *Camera Care v. Commission*,\(^{224}\) the Court of Justice held that the Commission has the power to order interim measures to prevent serious and irrevocable damage to the party seeking relief. In *Belgische Radio en Televisie v. Societe Belge des Auteurs, Compositeurs et Editeurs* (hereinafter S.A.B.A.M.)\(^{225}\) the Court ruled that Articles 85 and 86 create direct rights for individuals which national courts must safeguard. These cases support the principle that the Community's competition laws do not merely protect the public at large, but also protect individuals and undertakings from the effects of violations of competition laws. Additionally, several texts and articles have taken the position that Article 85(2) can be used as a sword as well as a shield.\(^{226}\)

The law governing any technology licensing agreement will be national law, although not necessarily the national law of a member state. In *Les Ets. A. De Bloos Sprl v. Bouyer S.C.A.*,\(^{227}\) the Court held that an agreement should be given the legal effect attributed to it under the applicable national law. Assuming that Article 85(2) can be used in an offensive capacity, national courts will determine the property interest transferred by any agreement found to be void under Article 85(2).\(^{228}\) The proper law applied to the license agreement may find a failure of consideration,\(^{229}\) requiring the Court to do no more than place the parties in their pre-agreement position. Depending on the law, the concepts of in pari delicto or other estoppel may prevent any recovery of damages, even though the Court recognizes the use of Article 85(2) as an offensive weapon.\(^{230}\)

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\(^{224}\) 27 Common Mkt. L.R. 334 (1980).


\(^{228}\) The proper law of the license agreement will either be chosen by the parties or determined by a national court's application of conflict of law rules. Thus, familiarity with both the Convention of 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 21 O.J. EUR. COMM. (No. L 4) 36 (1978), and the conflict of law rules of potential forums under that Convention, is essential.

\(^{229}\) Consider, for purposes of analogy, that under U.S. law there is a failure of consideration giving rise to rights to revoke the patent license once a patent has been declared invalid. There is in effect an "eviction of patent rights." *See* Troxel Mfg. Co. v. Schwinn Bicycle Co., 465 F.2d 1253 (6th Cir. 1972), *cert. denied*, 416 U.S. 939 (1973); Drackett Chemical Co., 63 F.2d 853 (6th Cir. 1933). As a general rule, a licensee cannot recover royalties paid before a decision of invalidity, *see* St. Regis Paper Co. v. Royal Indus., 552 F.2d 309 (9th Cir. 1977); but a licensee can recover prior royalties when actual fraud in the licensing transaction is shown. *See* U.S.M. Corp. v. S.P.S. Technologies, Inc., 514 F. Supp. 213 (N.D. Ill. 1981), 694 F.2d 505 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2455 (1983); Ampex Corp. v. Memorex Corp., 205 U.S.P.Q. 794 (N.D. Cal. 1980).

\(^{230}\) It is not only the licensor who may be seeking damages. If a court decides that there was no passing of a property interest, it may be argued that the licensee infringed the licensor's rights by, for example, manufacturing under a patent. Thus, the licensor might seek damages for that infringement.
Brasserie de Haecht v. Wilkin-Janssen answered two important questions concerning the application of Article 85(2). The decision established that simple notification to the Commission of a new agreement or practice does not amount to an initiation of a procedure under Articles 2, 3 or 6 of Regulation 17. Thus, national courts are empowered to apply Article 85(2) until a formal decision on the application for an exemption is made by the Commission. National courts were given even greater opportunities to apply Article 85(2) when the Court in S.A. Lancome & Cosparfrance Nederland B.V. v. Elos B.V. & Albert Heijn Supermarkt B.V. held that, even in the case of old agreements, the principles of provisional validity did not apply after a no action letter had been sent by the Commission. Brasserie v. Haecht (II) also established that the nullity provided for in Article 85(2) has retroactive effect. Defendants had argued that the effects of nullity should apply only prospectively. By holding that nullity should apply retroactively, the Court substantially increased the number and variety of Article 85(2) issues.

The precise legal effect of Article 85(2) on claims arising out of a tainted license agreement will be different in each member state. As a result of the Court's decisions, national courts have ample opportunity to apply and construe the effects of the proper law on voided license agreements. These decisions will determine whether Article 85(2) creates an independent right to damages or whether it merely provides the element of illegal conduct that will assist the prosecution of traditional tort and contract claims.

XIV. Article 86

A. General Focus

Article 86 of the E.E.C. Treaty is roughly comparable to Section 2 of the Sherman Act; however, Article 86 does not attempt to govern conspiracies to monopolize. Thus, theoretically, Section 2 of the Sherman Act could be violated much earlier in the development of an undertaking's business maneuvers.

The Commission and Court decisions suggest that five criteria must

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232 "New" agreements are those which were not in existence before the operation of Regulation 17 (the Christmas Message) in 1962. See id. at 302. Also note that with each new treaty of accession there is a different set of dates regarding "old" and "new" agreements for new Community members. Christmas Message, supra note 14.
233 See supra note 30 and accompanying text.
235 Id. at 177. See also Korah, supra note 22.
237 Id. at 304.
238 Regulation 17(4) seems to militate against this theory; however, Lord Denning in "obiter dictum" seems to agree that a violation of Article 85(1) creates a new tort in and of itself. See Application des Gaz S.A. v. Falk Veritas, Ltd., 14 Common Mkt. L.R. 75, 83-85 (1974).
be examined before a violation of Article 86 can be found. These criteria include (1) the relevant product market, (2) the relevant geographic market, (3) the existence of a dominant position within these two markets, (4) an abuse of the dominant position, and (5) an effect on trade between member states. The mere existence of a dominant position, however, without an accompanying abuse of that position, will not violate Article 86. Based on a plain reading, it is easy to conclude that the Sherman Act is concerned with monopoly power, while Article 86 is concerned with the abuse of that power.239

While this distinction seems to indicate that Article 86 is narrow in its focus, it should be recognized that the Commission and the Court’s definition of a dominant position is broad. The actual market shares required to create a dominant position are often less than those required under Section 2 of the Sherman Act.240 The Court has also shown the breadth of Article 86 by focusing not only on effects upon trade patterns, but also on the effects of an undertaking’s actions on the competitive structure within a certain industry.241 The concept of abuse of a monopoly position extends to more than just activities that are prejudicial to competition; it also covers conduct which affects consumers.242 Two other points concerning Article 86 deserve mention: it is not possible to gain an exemption under Article 85(3) from the application of Article 86, and Article 85(2) does not apply to situations where there is a violation of Article 86.

B. Intellectual Property Rights and Article 86

The acquisition and exercise of intellectual property rights can be important to both the Commission and the Court when determining whether an abuse of a dominant position has occurred,243 because their possession and use may prevent other undertakings from challenging the dominant position of the proprietor of these rights. Mere possession of a monopoly right under a patent, however, is not enough to establish a dominant position.244 Bellamy and Child believe that in order to establish a violation of Article 86 there must be a showing that “one or more patents held by the undertaking have positively and significantly impeded other companies from producing and selling products using the same or similar technology.”245

239 But see United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (a definition of monopoly power for which some showing of anticompetitive conduct is also required).
243 See C. BELLAMY & G. CHILD, supra note 20, at 175-76.
244 Parke, Davis & Co. v. Probel, 7 Common Mkt. L.R. 47, 58-59 (1968).
245 C. BELLAMY & G. CHILD, supra note 20, at 177.
Only a few cases applying Article 86 contain a discussion of its effect
upon intellectual property rights. In *Re Eurofima*246 the largest purchaser
of rolling stock in the Common Market invited tenders for the develop-
ment and manufacture of a new series of railway cars. The contractors
submitting tenders were required to convey unlimited rights to any pat-
ents that were obtained as a result of such development and manufac-
ture. The Commission held that for a firm in a dominant position to
require such a transfer of rights in patents would be a violation of Article
86. Such a requirement would have allowed Eurofima to grant third
party patent licenses without compensating the developer of the pat-
ented process. Bidding contractors, however, would have been permitted
to grant Eurofima a limited user-right license.

The Court in *S.A.B.A.M.*247 applied Article 86 to copyrights.
S.A.B.A.M. was a Belgian copyright society which managed and ex-
pected the copyrights of its members. The Court determined it to be in
a dominant position. The standard form contract, which S.A.B.A.M. re-
quired all authors and composers to execute, contained a compulsory
assignment, with no distinction between the various forms of exploita-
ton. The assignment covered all present and future copyrights of the
member, and it continued for an extended period after the member left
the society. The Court determined that such conditions were not abso-
lutely necessary for the fulfillment of the society’s purpose, and that these
conditions consequently unfairly infringed on the exercise of the
copyright.

The practitioner should be aware of a few other cases where Article
86 has been applied. In the merger case of *Re Continental Can Co.*,248 the
Commission analyzes in detail the factors that can lead to a decision that
an undertaking holds a dominant position. A similar Court of Justice
analysis appears in *United Brands Co. & United Brands Continental B. V. v.
Commission*.249 In that case, an undertaking which held a dominant posi-
tion in a raw material market violated Article 86 by refusing to supply a
previous customer, solely because the supplier decided to enter into pro-
duction itself.250 Article 86 has also been applied when exclusive supply
agreements coupled with loyalty rebates were used to prevent purchasers
from seeking supplies from other suppliers.251

XV. Conclusion

Intellectual property rights are affected not only by the Commu-

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246 12 Common Mkt. L.R. D 217 (R.P. Supp. 1973). This proceeding was terminated before a formal Commission decision was given.
nity's formal competition rules, Articles 85 and 86, but also through the application of the principles of exhaustion and common origin. In most of the decisions, the goal of obtaining single market integration seems to be the prime focus of both the Commission and the Court. As a result, these decisions frequently lack the economic analysis one might desire in cases applying Community law to important transfers of technology.

The Community's initial laissez-faire philosophy towards restrictions in patent licenses, as exhibited in the "Christmas Message," gradually changed. The cases from Burroughs to Beyrard illustrate the development of this progressively more restrictive application of Article 85(1). Many of the transfers of technology involved in these cases were allowed only after a rule of reason was applied under Article 85(3). It was not until the Maize Seed case that a rule of reason was applied under Article 85(1).

On the whole, the Community's competition policy has not created an atmosphere in which the European business community is certain that their agreements to transfer technology will ultimately be upheld under Community law. It is hoped, however, that the Maize Seed case is a harbinger of things to come. A full-time application of a rule of reason under Article 85(1), with its concomitant process of economic balancing, would greatly aid in the creation of a more reassuring climate for technological and industrial development.