

1967

Encouraging the Flow of Goods and Know-How among Nations-- The Role of Industrial Property Rights and Antitrust Laws

Robert Goldscheider

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Robert Goldscheider, *Encouraging the Flow of Goods and Know-How among Nations--The Role of Industrial Property Rights and Antitrust Laws*, 18 W. Rsrv. L. Rev. 1618 (1967)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol18/iss5/10>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Encouraging the Flow of Goods and Know-How Among Nations— The Role of Industrial Property Rights and Antitrust Laws

Robert Goldscheider

THE PERIOD since 1892 neatly brackets two developments in the realm of international law which bear directly on approaches to trade and the transfer of technology — the protection of industrial property rights and the passage of laws designed to

THE AUTHOR (B.S., Columbia University, LL.B., Harvard University) is associated with the New York firm of Langner, Parry, Card & Langner, which specializes in foreign patents and trademarks. He was formerly a Fulbright Scholar to Norway and an Official of the International Labour Office in Geneva, Switzerland.

regulate restrictions on free competition. It is recognized that no one factor, either public or private, is of primary importance in shaping the modern, interdependent world economy. While not intending to minimize the significance of the numerous existing national and multinational institutions whose

influence and activities affect this phenomenon, it is nevertheless believed that the two vehicles selected will provide some perspective in considering this general development. During the past seventy-five years, the international protection of industrial property and the antitrust concepts¹ have grown from infancy to widespread acceptance; moreover, their continued significance appears assured in the foreseeable future, although important changes are anticipated if each concept is to retain validity in the rapidly evolving and volatile worlds of the technologically advanced and developing countries.

The major categories of industrial property rights — patents, know-how, and trademarks — individually and in combination provide terms of reference which are almost universally recognized for orderly trade in goods and services embodying one or more of these

¹ The term "antitrust" is used in this article to describe generally the variety of statutes and regulations designed to curtail restrictions on competition and the exercise of monopoly power. When references are made to specific enactments, their scope of application will be described more particularly.

rights, as well as the transmission by license of the inventions, practical technology, and goodwill which these rights respectively symbolize. The antitrust laws, originally almost exclusively a creature of the United States, are also rapidly gaining recognition by governments and multinational organizations elsewhere as a legitimate instrument to promote desirable patterns of trade and investment.

Although starting from different premises, the two concepts are complementary in many ways and frequently exert a direct influence on the extent to which the other may be validly applied. The permissible limits of such exploitation are not only defined by statutes, but also by the judicially developed doctrines of patent misuse, acceptable ancillary restraints, unfair competition, and the rule of reason. These have attempted to strike a balance between the philosophies favoring "forward-looking monopolies," intended to encourage and protect socially desirable developments, and one major aspect of antitrust laws directed against "backward-looking monopolies," which have been described as "business commitments and practices that throttle the emergence of new technology, and the improved manufacturing processes and distribution patterns made possible by the legitimate exploitation of patent and trademark monopolies."²

I. BACKGROUND

Before embarking on this tripartite analysis — involving past, present, and future — certain conceptual definitions would be in order. Patents, know-how, and trademarks differ significantly from each other. The modern patent system, which spans the entire period under scrutiny here, rests on the rationale that patents are exclusive privileges relating to a novel product or process and are granted by a government for a limited term of years as a policy to further the public interest by encouraging research and invention, to induce inventors to disclose their discoveries instead of keeping them as trade secrets, and to promote economic development by providing an incentive for the investment of capital in new lines of production.³

Know-how is a catchall expression, elusive to define. It encompasses a wide variety of unpatented manufacturing processes or

²Timberg, *International Patent and Trademark Licenses and Interchanges: The United States Approach*, in 2 CARTEL AND MONOPOLY IN MODERN LAW 751, 752 (1961).

³*The Role of Patents in the Transfer of Technology to Developing Countries*, U.N. Doc. E/3861/ Rev.1, at 3 (1964).

knowledge concerning the use and application of industrial techniques outside the public domain.⁴ It may constitute a separate body of information or be ancillary to the working of a patent. It may include tangible materials, such as formulae, specifications, written operating instructions, blueprints, patterns, technical records, and manuals. Valuable know-how may also be intangible, such as details of workshop or laboratory practice, technical training and general workers' education, sampling techniques, and the results of personal inspections.

Inherent in the concept of know-how is the fact that the lawful possessor of the information wishes to preserve it from unauthorized publication. This is not to say that all of this information is necessarily secret; nevertheless, the combination of elements involved must not be readily available to someone reasonably knowledgeable in that field of activity. Exclusive ownership is not indispensable to recognition of property rights in know-how. If knowledge is independently acquired by several people, each of whom has preserved such information from publication, they may each derive rights from the information.⁵

Trademarks may be defined as words or symbols, alone and in combination, which distinguish the goods or services of one trader from those of its competitor. Distinctiveness in relation to specified goods is the usual criterion for obtaining registrations of trademarks, which provide the proprietor thereof with certain statutory advantages in proceeding against others who attempt to use confusingly similar marks. The protection afforded trademarks does not trace its beginning to an intent to reward or confer a monopoly right upon the owner thereof; rather, trademarks were originally designed to protect consumers by identifying genuine goods from a particular source, thereby avoiding confusion and deception.⁶ Trademarks do not have an existence independent of the business for goods to which, or in connection with which, they are applied, and unlike patents, trademark protection may last as long as the business continues.

One final observation is needed. The laws that govern industrial property rights, as well as antitrust laws, have usually been

⁴ Ladas, *Legal Protection of Know-How*, 7 PAT., TRADEMARK & COPYRIGHT J. RESEARCH & EDUC. 397, 398 (1963) [hereinafter cited by its new name: IDEA].

⁵ *Ibid.*

⁶ See Timberg, *supra* note 2, at 751 n.1 who in turn cites CHAMBERLAIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 56-70, 246-50 (5th ed. 1946) and Brown, *Advertising and the Public Interest*, 57 YALE L.J. 1165 (1948).

national enactments or judicial pronouncements, directed primarily to questions of domestic application. They have nevertheless increasingly exercised an influence in the international sphere by reason of their inherent nature. Thus, while the avowed intent of the patent laws has been to encourage invention in the jurisdiction of the grant, patent monopolies soon exerted a defensive function on the importation of goods which embodied elements falling within the scope of the patent. Trademark registrations were similarly used to restrict imports.

The national patent and trademark laws which were adopted prior to the International Convention for the Protection of Industrial Property executed in Paris on March 20, 1883,⁷ the signatories of which are known as "the Paris Union," and also later laws, seldom contained express discriminations against foreigners, although their capacity to acquire rights of industrial property were often conditioned upon reciprocity.⁸ The Paris Union went beyond this in two important ways: it adopted as a fundamental principle the doctrine of accessibility⁹ and also greatly facilitated the possibility both for inventors to obtain patents and for manufacturers and merchants to register their marks in many countries. This is because it provides, in article 4, that any person who has duly filed an application for a patent or for the registration of a utility model, industrial design, or trademark in one of the member countries of the Paris Union shall enjoy, for purposes of deposit in the other countries, a right of priority. The period of priority for a patent is twelve months, and that relating to models, designs, and trademarks is six months. Thus, inventors and merchants are afforded ample time to apply for protection of their patents and trademarks in other countries of the Union, without being denied such protection by the acts of third parties who might in the interval make similar applications. In the absence of these rights of priority, the requirements of novelty in the various national laws could no longer be met in the case of a subsequent application in a country where the patent

⁷ 25 Stat. 1372 (1887), T.S. No. 55.

⁸ LADAS, *THE INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY* § 9, at 16 (1930).

⁹ International Convention for the Protection of Industrial Property of March 20, 1883, Article 2, the first sentence of which reads:

Persons within the jurisdiction of each of the countries of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to their nationals, without prejudice to the rights specially provided by the present convention. (Translation published by the British Administration in T.S. No. 55).

law provides that earlier publication of the invention, anywhere in the world, is a bar to patentability.¹⁰

This has profoundly affected trade, because the security provided by enforceable industrial property rights in many jurisdictions has encouraged the proprietors of such rights to sell in those countries, and also to invest there, either directly or by granting licenses to others.

The widespread acceptance of the Paris Union,¹¹ which has been one of the most successful international legal arrangements ever concluded, reflects the importance of the Convention's contribution toward the economic unity of the modern world.¹² In addition to its function of regulating national laws, the Union has also contributed to the harmonization of such laws and has even stimulated movements toward multinational schemes for the protection of such rights.

To understand the full impact of the American antitrust laws in fostering trade and investment, one must look beyond their immediate objectives of removing obstacles to interstate and foreign commerce to their more basic philosophy of stimulating development by competition. It is the interaction of these purposes which accounts for the spread of the antitrust concept, both on the national and multinational levels.

II. FOUNDATIONS OF AN INTERNATIONAL BUSINESS FRAMEWORK (1892-1917)

Two major events, which ushered in the modern concepts of the international protection of industrial property and antitrust, occurred just prior to the period under scrutiny; these were the aforementioned establishment of the Paris Union in 1883 and the enactment of the Sherman Act in 1890.¹³ Both represented responses to needs that were recognized in the wake of the scientific and industrial revolutions and the growth of commercial enterprises.¹⁴ During the quarter-century in question, the two events became ac-

¹⁰ *The Role of Patents in the Transfer of Technology to Developing Countries*, *supra* note 3, at 15.

¹¹ As of January 30, 1967, seventy-six nations had adhered to one or more versions of the convention. See BIRPI, *INDUSTRIAL PROPERTY* (Jan. 1967).

¹² Eckstrom, *Industrial Foreign Licensing Agreements*, in *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* 107, 114 (1963).

¹³ Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

¹⁴ See Votaw, *Antitrust in 1914: The Climate of Opinion*, 24 ABA ANTITRUST SECTION 14, 17 (1964).

cepted realities and were also supplemented by measures which strengthened and broadened their application.

A. *The Paris Union*

Since its adoption, the Paris Union has gone through seven revisions, the most recent being at Lisbon in 1958. The second of these revisions, following a Conference at Madrid in 1890-1891, was ratified in that city on June 12, 1892.¹⁵ The Madrid Conference, which was the first such meeting that the United States attended as a member, resulted in several important changes to the original Convention. The Conference adopted unanimously the principle of the independent status of patents, now incorporated into the Convention as article 4, according to which the cancellation or expiration of a patent in one member country of the Paris Union does not lead to the cancellation or expiration of a patent for the same invention in other member countries. The importance of this provision to international investment and licensing is obvious, since it permits a patentee to maintain rights in jurisdictions where it is desired to exploit interesting patents, even if such rights are denied for any reason, or allowed to expire through lack of interest, in another member country of the Union.

This Conference also voted on the Arrangement of Madrid for the International Registration of Trade Marks which was adopted by a group of countries smaller than the full membership, since it became clear that wider acceptance was not possible. The principal feature of the Arrangement is that persons within the jurisdiction of one of the contracting countries may, in all of those countries, secure protection of trademarks registered in the country of origin by depositing them at the International Bureau for the Protection of Industrial Property.¹⁶

The Madrid Arrangement was originally adopted in 1892 by nine countries; the growth of its membership has been slow, and, at the present time, it numbers only twenty-two adherents.¹⁷ The

¹⁵ LADAS, *op. cit. supra* note 8, § 51, at 91.

¹⁶ *Id.* §§ 428-53. The International Bureau, now located in Geneva, Switzerland, is presently known as the United International Bureaux for the Protection of Intellectual Property (Bureaux Internationaux Réunis Pour la Protection de la Propriété Intellectuelle, or BIRPI).

¹⁷ Austria, Belgium, Czechoslovakia, France (with overseas departments and territories), Federal Republic of Germany, German Democratic Republic, Hungary, Italy, Liechtenstein, Luxembourg, Monaco, Morocco, Netherlands, Portugal, Roumania, San Marino, Spain (and colonies), Switzerland, Tunisia, United Arab Republic, Vietnam and Yugoslavia. See BIRPI, *INDUSTRIAL PROPERTY* (Jan. 1967).

influence of the Arrangement, however, may be said to go beyond its membership, since it serves as a symbol, if not possibly a model, for multinational patent and trademark legislation that is the subject of widespread discussion. The United States has never been a member of the Madrid Arrangement, although the question of its accession has been raised on several occasions, including the present time.¹⁸

Great Britain, a charter member of the Paris Union, also has not joined the Madrid Arrangement. British patents and trademarks have, however, played an important role on the international plane, since it has been possible to extend these rights to many jurisdictions which have been under the hegemony of the British crown. The procedure has been to deposit in the extension country a copy of the British patent (usually within three years after grant) or trademark registration, certified by the British Patent Office or Trademarks Registry, as the case may be. This privilege was, and remains, open to nationals of all members of the Paris Union, since the basic British rights are accessible to them. It will be appreciated that, particularly during the period prior to the First World War when the British Empire was at its zenith, this system had a positive effect upon trade and investment in the many jurisdictions concerned.

The Paris Union grew steadily during its first quarter-century. Following the accession of the United States in 1887, new members were New Zealand (1891), Denmark (1894), Japan (1899), Germany (1903), Mexico (1903), Cuba (1904), Australia (1907), Austria-Hungary (1909), and Morocco (1917). Of the twenty-two member countries at the time, only eight did not take part in World War I. A leading authority commented about the activities of the Union during this period, clearly illustrating the importance attached to it by the member countries:

Not one country denounced the Convention and Arrangements, expressly or impliedly. It is true that these acts did not retain all their effects during the war. But in almost all the countries of the Union, belligerent as well as neutral, several measures were taken to preserve rights of industrial property protected by the Convention. The war was a case of *vis major*, and was treated as such. The measures taken purported to preserve vested rights from forfeiture by the lapse of periods fixed by the law for the performance of formalities or payment of taxes; to revest rights forfeited for failure to comply with legal requirements by reason

¹⁸ See 56 TRADEMARK REP. 289-390 (1966), the whole issue being directed toward the question: "Should the United States Adhere to the Madrid Agreement?"

of the war; and to extend periods of rights of priority during the existence of war. These measures benefited, generally, all foreigners.¹⁹

B. *American Antitrust Law*

The development of the antitrust concept during the period 1892-1917 was an American phenomenon, but the international application of antitrust law today may be directly traced to several events during that time. Perhaps most significant is the fact that section 1 of the Sherman Act²⁰ was clearly established as a vehicle of national economic policy to protect competition. This appeared to some to be at variance with the legislative history of the act as described by Mr. Justice Holmes in his dissent in *Northern Sec. Co. v. United States*:²¹

The court below argued as if *maintaining competition were the expressed object of the act. The act says nothing about competition. . . .* The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the Union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, *not the cessation of competition among the partners*, that was the evil feared.²²

The tendency to regard the Sherman Act as an instrument to maintain competition had already been indicated in *United States v. Addyston Pipe & Steel Corp.*²³ This landmark decision by Judge Taft in the circuit court also gave rise to the so-called ancillary doctrine, by which a contract restraining trade cannot be enforced unless such restriction was merely ancillary to the principal, lawful purpose of the agreement, and necessary to enable the covenantee to obtain the legitimate benefits of his bargain, or to provide protection from the other party unjustly getting such benefits.²⁴ By striking down non-ancillary restraints, regardless of how trivial their effect on competition might be, a guideline was provided for defining the permissible limits to the exceptions industrial property rights constitute to free competition. Professor Brewster terms the significance of the doctrine of ancillary restraints to foreign com-

¹⁹ LADAS, *op. cit. supra* note 8, § 54, at 95-96.

²⁰ 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1964).

²¹ 193 U.S. 197, 403, 405 (1904). (Emphasis added.)

²² *Id.* at 405.

²³ 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

²⁴ *Id.* at 282.

merce "obviously enormous,"²⁵ when applied to restraints accompanying export, licensing, and investment arrangements abroad.

Another decision of lasting significance during this period was *Standard Oil Co. v. United States*,²⁶ from which the beginning of the rule of reason is traced. From an even more basic standpoint, it has been said about the opinion of Mr. Chief Justice White in this case that

the real contribution he made was to establish that the overriding goal of the Act is the protection of competition as a national economic policy.

To Chief Justice White, the purpose of the Act was to be the preservation of a system of free enterprise, relying upon the forces of competition to shield the public from the evils associated with monopoly, evils which result from any "undue limitation of competitive conditions," to use the language of the opinion. The broad language of Section 1, coupled with the reserved power of Section 2, he said, would be sufficient to prohibit any kind of private conduct which could be shown to cause those evils.²⁷

This is the concept that has proven contagious and which has inspired a successful transplanting of antitrust doctrine in Europe. It has overshadowed in international significance even the line of decisions interpreting the jurisdiction of the Sherman Act over the foreign commerce of the United States. Indeed, in *American Banana Co. v. United Fruit Co.*,²⁸ the first major decision interpreting the Sherman Act under the foreign commerce clause, Mr. Justice Holmes remarked that "it is surprising to hear it argued" that the act should apply to doings "outside the jurisdiction of the United States and within that of other states."²⁹ This was a strict application of the territorial principle that has been largely distinguished in recent years.³⁰ Until now, if a practice "inhibits a potential contribution to United States export or import capacity, there may be an antitrust problem."³¹

²⁵ BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 5.4.2.1, at 87 (1958).

²⁶ 221 U.S. 1 (1911).

²⁷ Chadwell, *Competition and Section 1 of the Sherman Act — Instant Antitrust or Long-Run Policy?*, 27 ABA ANTITRUST SECTION 60, 61 (1965).

²⁸ 213 U.S. 347 (1909).

²⁹ *Id.* at 355.

³⁰ In *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir. 1956), the foreign commerce jurisdiction was generally considered "to extend to all commerce, even intrastate and entirely foreign commerce, which has a substantial effect of commerce between the states of the United States and foreign countries." *Id.* at 641. See FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS §§ 2.7-8, at 29-32 (1958).

³¹ BREWSTER, *op. cit. supra* note 25, § 7.3.2., at 160.

Two other events relating to antitrust law in the United States prior to 1917 also merit attention. In 1914, Congress enacted both the Clayton Act³² and the Federal Trade Commission Act.³³ The former sought to prohibit specific restricted practices in an attempt to eliminate uncertainty.³⁴ Section 7 of the act concerns mergers between corporations engaged in "commerce," which could include foreign commerce, the effect of which "may be substantially to lessen competition, or tend to create a monopoly."³⁵ This has not yet been applied to foreign commerce, and, at least to date, the Justice Department has apparently not yet decided to inhibit foreign acquisitions of competitors by American corporations.

The Federal Trade Commission has a mandate, with certain exceptions, to prevent "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."³⁶ The Commission, which has concurrent jurisdiction with the Justice Department in dealing with illegal acts under the antitrust laws, combines both investigatory and judicial functions in this area.³⁷

III. IMPACT OF PROTECTIVE LAWS (1917-1967)

The political and scientific events of the past fifty years have tremendously expanded the volume of international trade and investment. A by-product of this has been an increase in the importance of the antitrust and industrial property concepts; these have, in turn, exerted their influence upon the environments in which they have been applied. This may be briefly illustrated in three situations: the post-World War II reconstruction of Europe, the early years of the European Common Market, and the international effort, in which the United Nations has assumed a leading role, to develop the economically backward areas of the world.

A. *Post-World War II Reconstruction of Europe*

International investments in the private sector may be made in a variety of legal forms, which can be progressively changed as economic and commercial relationships develop. If a manufacturer

³² 38 Stat. 730 (1914) (codified in scattered sections of 15 U.S.C.).

³³ 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-77 (1964).

³⁴ See *FUGATE*, *op. cit. supra* note 30, § 13.4, at 289.

³⁵ Clayton Act § 7, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18 (1964).

³⁶ Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1964).

³⁷ See Dixon, *The FTC: The First 50 Years*, 24 ABA ANTITRUST SECTION 29 (1964).

wishes to gain a foothold in a foreign market, this may be done through a sales agent who solicits orders on behalf of the foreign manufacturer in return for a commission. Frequently, it is an enterprising merchant who brings opportunities in his home market to the attention of the manufacturer. If trademarks are applied to the goods and if advertising campaigns are undertaken, the manufacturer will be the beneficiary of the goodwill that may accrue to the marks. If such trademarks already possess some sort of local reputation as a result of publicity in journals, magazines, or other media, this could facilitate the agent's efforts to introduce the products; as the reputation grows, this can have a "snowballing" effect.

As shipments to the foreign market become regular, a distributorship might be considered more appropriate. In this form, the local merchant would purchase and maintain a stock of goods and, depending on the goods, establish a servicing operation.³⁸ This could require the transfer of know-how relating to repair and treatment of the products, as well as the training of personnel. If trademarks are involved, they might appear on the premises and vehicles of the distributor in addition to being affixed to the goods themselves.

A further stage could involve the local seller in manufacturing operations, ranging from repackaging from bulk or encapsulating, to assembly and finishing operations, or even to fully integrated production. Thus, the discussion now focuses on licensing, in which the local manufacturer will be "using," in the technical legal sense, the industrial property rights in his jurisdiction which attach to the products involved as well as the process for making such goods. If the licensee ships goods from his country of manufacture, he would also be using such rights in the export jurisdictions.

Frequently, the licensor holds equity in the licensee; this then falls into the category of a joint venture.³⁹ These take a variety of forms, depending upon the bargaining or financial strength of the respective parties, and the political requirements of the host country. Stockholdings may consist of minority, fifty-percent, or majority interests. Sometimes the licensor holds this equity in addition to the grant of a license, in which event he receives dividends, as well

³⁸ The distinction between a "commercial agent" and "independent merchant" is noted in the Official Notice on Contracts for Exclusive Representation Concluded with Commercial Agents, 1 CCH COMMON MKT. REP. ¶ 2697 (Dec. 24, 1962).

³⁹ See EDITORS OF BUSINESS INTERNATIONAL, OWNERSHIP POLICIES AT WORK ABROAD (1965); NATIONAL INDUSTRIAL CONFERENCE BOARD, INC., INTERNATIONAL SURVEY OF BUSINESS OPINION AND EXPERIENCE, JOINT VENTURES WITH FOREIGN PARTNERS (1966).

as royalties and technical assistance fees. In other cases, the grant of a license to use industrial property rights, the contribution of plant layout and engineering services, and also the provision of machinery, are exchanged solely for equity participation. The ultimate in this type of direct investment is for the original manufacturer to establish a wholly owned subsidiary which exploits the industrial property rights of its parent and, particularly in the case of patents, is sometimes assigned ownership thereof. Many large corporations have established a complex of subsidiaries which function with varying degrees of autonomy, depending on the philosophy of the management.⁴⁰

These were the basic legal forms of conducting business available to private investors and producers in the North American and Western European countries at the end of World War II. All had long been members of the Paris Union and were familiar with the "common currency" which the proper use of industrial property rights provides for trade and the transfer of technology. The destruction wrought by the war led European industry to seek arrangements with American enterprises in order to gain access to their technological knowledge and managerial skills. This, together with the large capital resources made available to these countries through the Marshall Plan and other public financial measures, enabled European industry to reconstruct along the most modern lines and rapidly to re-enter world markets as a potent force.⁴¹

There were also reciprocal inducements for American companies, since the European markets were a fertile area for expansion, the returns from which could help in the recovery of research and development costs. In the years immediately after the war, most of the European countries introduced strict foreign exchange controls in addition to their existing tariff walls. Faced with the practical impossibility of exporting to these areas, American businessmen welcomed the opportunity to participate in these markets by manufacturing locally, thus making available their industrial property rights in the various forms previously discussed.

But goods and technology were not the only American exports at this time. Along with these innovations, many Europeans recognized the positive influence which the antitrust laws had exercised upon American business. The antitrust concept was originally introduced into Germany by military authorities, but "paradoxically,

⁴⁰ *Ibid.*

⁴¹ Iadas, *Problems of Licensing Abroad*, 1965 U. ILL. L.F. 411, 412.

although decartelization was originally designed by the occupying powers to reform the German political and social structure, it became an article of economic faith with the subsequent German administration."⁴²

The 1957 German Law Against Restraints of Competition,⁴³ which was greatly influenced by American antitrust experience, in turn exerted an effect upon the framers of the Treaty of Rome. Moreover, many of the officials presently administering the Treaty provisions relating to competition, received their original training in the German anticartel administration, and also had frequent sojourns in Washington.⁴⁴

B. *The European Common Market*

Articles 85 to 94 of the Rome Treaty are included under the affirmative heading "Rules of Competition"⁴⁵ which reflects an attempt on the part of the framers to complement in the private sector the other Treaty provisions which envisage the removal of quantitative restrictions and tariff barriers within the Community. Article 85(1) lays down the general prohibition against "all agreements between . . . [enterprises], all decisions by associations of . . . [enterprises] and all concerted practices which are liable to affect trade between Member States and which . . . [have as their object or result the prevention, restriction or distortion of] competition within the Common Market";⁴⁶ by way of example, the provision then appears to codify various per se violations under the Sherman Act. Article 85(2) declares the prohibited agreements or decisions to be "null and void."⁴⁷ Article 85(3), which provides the possibility of exemptions from the prohibitions of Article 85(1) to agreements which have been notified⁴⁸ to the Commission of the European Economic Community (EEC), represents a legislated rule of reason.⁴⁹

⁴²Timberg, *United States and Foreign Antitrust Laws Governing International Business Transactions*, in A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 619, 640 (1963).

⁴³[1957] Bundesgesetzblatt 1081.

⁴⁴Schapiro, *The German Law Against Restraints of Competition — Comparative and International Aspects*, 62 COLUM. L. REV. 1, 3-4 (1962).

⁴⁵The Treaty is published in four official languages, French, Italian, Dutch, and German which, respectively, employ the expressions "Les Règles de Concurrence," "Regole di Concorrenza," "Règles Betreffende de Mededinging," and "Wettbewerbsregeln."

⁴⁶1 CCH COMMON MKT. REP. § 2005 (1965).

⁴⁷*Id.* § 2041.

⁴⁸"Notification" is the term used in Regulation 17/62 for the procedure of sub-

Regarding the application of Article 85 to trade and the transfer of technology between member states of the EEC, it has been stated:

Under the Common Market antitrust laws territorial restrictions are definitely a restriction, distortion or prevention of competition within the meaning of Article 85, paragraph 1. One could go even further. Since one of the objections of the Common Market is to do away with artificial trade barriers such as customs duties, import quotas, government subsidies, it is understandable that any other form of privately erected barriers replacing the old ones will be looked upon as fundamentally incompatible with the Common Market. If it is permitted to be said that in the United States the antitrust enforcement agencies and the courts have a "complex," it clearly is one against price fixing. . . . The Common Market's "complex" on the other hand, is one of fear of a resurrection, in whatever form, of trade barriers, especially where they coincide with the geographical territory of the member States. This explains the Commission's hostile attitude against territorial restriction.⁵⁰

Article 85, the implementing regulations thereunder, and the relatively few decisions interpreting them which have thus far appeared, have given rise to a veritable torrent of scholarly commentaries.⁵¹ This is testimony both to the significance of this development of a meaningful antitrust law in Europe as well as to the large number of agreements, decisions, and concerted practices which are affected. As of the beginning of 1967, more than forty thousand agreements had been notified to the Commission,⁵² the majority of which were either exclusive distributorships or licenses of industrial property rights. The full impact of these provisions may not be seen merely from these figures; many enterprises chose to amend their old agreements by removing prohibited restrictions. Furthermore, the guidelines already discernible from the existing jurisprudence undoubtedly influence the preparation of the great majority of new agreements relating to commerce in the Common Market.

In this connection, it appears that restraints upon the use of patents and know-how which fall within the scope of the respective

mitting agreements, decisions, or concerted practices to the EEC Commission for purposes of obtaining exemptions under Article 85(3). See *ibid.*

⁴⁹ *Id.* § 2051 (1965).

⁵⁰ De Keyser, *Territorial Restrictions and Export Prohibitions Under the United States and the Common Market Antitrust Laws*, 2 COMMON MKT. L. REV. 271, 297-98 (1964).

⁵¹ See bibliographies, books, periodicals, and articles listed in 2 CCH COMMON MKT. REP. § 9901 (1966).

⁵² Personal recollection of the author.

rights or which are reasonably ancillary thereto, will be permitted⁵³ and that territorial restrictions within the Common Market based solely on patent rights will be recognized. The same will probably not be true with respect to trademarks. There is a line of decisions in European countries which did not permit exclusive distributors to bar the entry into their territory of genuine goods bearing the same trademarks,⁵⁴ whether trademark licenses will be treated differently is an open question.

There is a persuasive argument that one effect of Articles 85 to 94, as well as the various national laws designed to foster competition, will be the elimination of inefficient producers who have traditionally been protected, thus speeding the growth of larger economic units in Europe.⁵⁵ The growth of European enterprises is being encouraged by governments and the Community leaders in the belief that the greater resources which such enterprises will thus be able to devote to systematic research will remove the major handicap impeding sophisticated European scientists and engineers from matching the technological achievements of their American counterparts.⁵⁶

C. *The Work of the United Nations and Others*

As the European economy has recovered and prospered, the nations of the North Atlantic Community, individually, in their regional organizations, and as well as by virtue of their membership in the United Nations, have turned increasing attention to the problem of modernizing the so-called "developing countries."⁵⁷

⁵³ See the Official Notice on Patent Licensing Agreements, 1 CCH COMMON MKT. REP. J 2698 (Dec. 24, 1962).

⁵⁴ *Prins v. Grundig*, International GRUR 259 (1957) (Netherlands); *Philips A. G. v. Radio-Import GmbH*, 86 II BGE 270 (1960) (Switzerland); *Maja Soap*, Aussenwirtschaftsdienst des Betriebs-Beraters 203-06 (July 1962) (Germany). See Ladas, *Antitrust Law in the Common Market With Special Reference to Industrial Property Agreements*, 23 OHIO ST. L.J. 709, 740-41 (1962); Ladas, *Foreign Territorial Arrangements and the Theory of Exhaustion of Trademark Rights*, 55 TRADEMARK REP. 820 (1965).

⁵⁵ See Adelman, *An Economist Looks at the Sherman Act*, in 27 ABA ANTITRUST SECTION 32, 38 (1965).

⁵⁶ Address by Mr. Lachmann, Annual Public Conference of the Patent, Trademark, and Copyright Research Institute, June 18, 1965, reported in 9 IDEA (CONFERENCE NUMBER 1965) 180, 185 (1965).

⁵⁷ The U.N. World Economic Survey 1965-Part 1 defines the developing countries as "all countries and territories . . . [of Latin America and the Caribbean area], Africa (other than South Africa), Asia (other than Mainland China, Cyprus, Japan, Mongolia, North Korea, North Vietnam and Turkey)." U.N. WORLD ECONOMIC SURVEY 8, U.N. Doc. E/4187/Rev.1 (1966).

This has proven to be an infinitely more complicated task than the reconstruction of Europe, involving cultural and climatic hurdles every bit as formidable as the wide economic gap that exists. The United Nations has recognized that industrial property rights can exert an important influence on the development process.⁵⁸ In 1961, the General Assembly requested the Secretary-General to prepare a report on the effects of patents on the economies of the developing countries, including "an analysis of the characteristics of patent legislation . . . taking into account the need for the rapid absorption of new products and technology, and the rise of the productivity level of the economies."⁵⁹ The resulting study, entitled *The Role of Patents in the Transfer of Technology to Developing Countries*,⁶⁰ emphasized the fact that patents cover only a portion of the required information and realistically could only be considered together with know-how. The report also recognized the importance of granting patents to nationals and residents of the developing countries as a means of "encouraging and rewarding invention and technical progress,"⁶¹ but it termed ownership by foreign patentees "the real issue."⁶²

The enforceability of industrial property rights is generally considered to be one of the numerous "facts of life" if private investment is to be attracted. In many countries, in all stages of development including some of the most highly industrialized nations of Europe, a large majority of patents is owned by foreigners.⁶³ If investments are made with a view to exercising such patents, the advantages of the introduction of new ideas, import savings, possible exports of finished goods, and tax revenue to the host country generally outweigh the expense of remitting royalties abroad. If a patent in such a country is intended to be merely a blocking monopoly and is not worked, no royalty remittances result, and the host country has remedies to avoid this abuse. It is therefore submitted that foreign ownership of patents in developing countries is

⁵⁸ See the series of Reports of the Secretary-General, entitled *The Promotion of the International Flow of Private Capital*, originally requested in G.A. Res. 824 (1954). Of particular interest is the fifth such Report, *The Role of Enterprise-to-Enterprise Arrangements in Supplying Financial, Managerial and Technological Needs of Industrial Enterprises in Developing Countries*, 39 U.N. GAOR, U.N. Doc. E/4038 (1965).

⁵⁹ G.A. Res. 1713, 16 U.N. GAOR Supp. 17, U.N. Doc. A/5100 (1961).

⁶⁰ U.N. Doc. E/3861/Rev.1 (1964).

⁶¹ *Id.* § 306.

⁶² *Id.* § 307.

⁶³ ROBBINS, *INDUSTRIAL PROPERTY RELATIONS WITH THE LESS INDUSTRIALIZED NATIONS: AN ATTORNEY'S VIEW* 194-95 (1965).

not merely a "necessary evil," but also has many potential advantages.

Consistent with this view, the Secretariat of the Paris Union, now known as BIRPI,⁶⁴ published in 1965 a Model Law for Developing Countries on Inventions, which includes detailed commentaries by the framers about the proposed text. This effort, which may be said to have been inspired by the earlier work of the United Nations,⁶⁵ provides a number of safeguards to host countries which, if equitably administered, should be acceptable to legitimate foreign investors. With particular regard to the encouragement of investment and licensing, there are provisions relating to the protection of technical know-how, including a declaration that use, disclosure, or communication thereof without consent of the owner would be unlawful.⁶⁶ There is provision for compulsory licenses for non-working product and process patents declared to be of vital importance for the defense or economy of the host country or for public health.⁶⁷ There are also requirements that license agreements, or certain categories of them which involve payment of royalties abroad, shall be approved by a specified government authority, "taking into account the needs of the country and its economic development."⁶⁸

Although it may be considered that the developing countries are not properly a place for antitrust laws since these economies frequently cannot support more than one enterprise in a particular field, the spirit of the *Addyston Pipe* case and Article 85 of the Rome Treaty can be seen in section 33(1) of the Model Law which provides: "Clauses in license contracts or relating to such contracts are null and void insofar as they impose on the licensee, in the industrial and commercial field, restrictions not deriving from the rights conferred by the patent."

BIRPI has also recently completed a draft model law relating to trademarks in developing countries, in recognition of the contribution of these rights in encouraging commercial relationships and investments.⁶⁹ Local manufacture of a variety of industrial and

⁶⁴ See note 16 *supra*.

⁶⁵ Ladas, *Comments on the Model Law for Developing Countries on Inventions*, in *STUDIES IN LAW AND ECONOMIC DEVELOPMENT* 116, 118 (1966).

⁶⁶ MODEL LAW FOR DEVELOPING COUNTRIES ON INVENTIONS §§ 53-57 (1965) [hereinafter cited as MODEL LAW].

⁶⁷ MODEL LAW §§ 34-44.

⁶⁸ MODEL LAW § 32.

⁶⁹ See Offner, *Draft Model Law for Developing Countries on Marks, Trade Names,*

consumer products in such countries is frequently unrealistic, and the only way in which such goods could be introduced would be by importing them through sales agents and distributors. In time, a national or regional market may be created which would warrant local production, in which event patents and know-how would come into play. Until then, and also subsequently, trademarks and the registration thereof perform their functions of protecting consumers from deception, while permitting prompt enforcement of rights against anyone who attempts to market goods or services with confusingly similar markings or appearance.

IV. TRENDS TOWARD WIDER REGIONAL AND GLOBAL ARRANGEMENTS (1968-1992)

The past ten years have witnessed the birth and growth of a number of new international, multinational, and regional organizations, and it may be expected that industrial property rights and antitrust doctrines, which have been factors influencing and being influenced by these developments, will be responsive to the new conditions being created.

In addition to the breaking down of national political barriers, a new type of enterprise, the international corporation, has become an increasingly important reality. Such companies, regardless of their original place of incorporation, reach out everywhere in the world for markets, techniques, ideas, personnel, and products. This development is accelerated by the continuing technological revolution. Scientific advances in transportation and communication, automation, and new materials and processes, which not only require huge expenditures on research and development but also are not necessarily confined to any specific locality, have compelled companies to seek technology everywhere, and to market the products which result from it as widely as possible.⁷⁰ The effective and enlightened regulation of such international corporations can no longer be handled by national legislation. Therefore, if the law is realistically to reflect its environment, more regional and even global jurisprudence may therefore be expected.

Returning to the example of the European Common Market, it may be expected that the influence of Article 85 as an instrument

Indications of Source, and Unfair Competition — An Appraisal, 56 TRADEMARK REP. 831 (1966).

⁷⁰ See EDITORS OF BUSINESS INTERNATIONAL, *THE CONCEPT OF THE INTERNATIONAL CORPORATION* (1964).

to limit private barriers affecting international trade will grow in accordance with the expanded membership of the Community. Thus, the EEC rules of competition are already contemplated to apply to Greece as a result of its Association Agreement with the Community.⁷¹ It may be expected that the same situation will eventually prevail with regard to Turkey and the association of the eighteen states comprising the African and Malagasy Union,⁷² as well as Nigeria, all of whom have negotiated a special status with the Community. Even more significant would be the acceptance to full membership of Great Britain, which would be expected to be followed promptly by the accession of several other European countries; this would nearly double the application of the principles of Article 85 of the Rome Treaty. It could even be envisaged that these antitrust rules might be extended to many of the members of the British Commonwealth as a condition for their participation in some Community affairs.

It will be interesting to see if Article 85 will treat an international corporation as one enterprise or, assuming it has organized a variety of subsidiaries and affiliates, as several enterprises. To date, the Court of Justice of the EEC has refused to pierce the corporate veil; it has tentatively given its answer by interpreting Article 85 "to respect the internal organization of an enterprise."⁷³ It is submitted that the larger concept must ultimately be recognized. This may prove to be the province of Article 86 of the Rome Treaty, which prohibits actions "by one or more . . . [enterprises which] take improper advantage of . . . [a] dominant position."⁷⁴

The increasing volume of transatlantic commerce also raises the question of collaboration between the antitrust authorities of the United States and their European counterparts. The Department of Justice has established a liaison office in Brussels with the apparent intention of forming some cooperative link with the Directorate General of Competition of the EEC, but the latter has, thus far, pointedly eschewed any such collaboration in enforcement. In this

⁷¹ See EEC art. 238, 1 CCH COMMON MKT. REP. § 5344.16 (1965).

⁷² Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somalia, Togo, and Upper Volta. Treaty Establishing the African & Malagasy Office of Industrial Property, signed in Libreville, Gabon, on Sept. 13, 1962.

⁷³ *Government of the Republic of Italy v. Council & Comm'n of the EEC*, 2 CCH COMMON MKT. REP. § 8048 (EEC Ct. Justice July 13, 1966).

⁷⁴ 1 *id.*, § 2101.

connection, an Advisory Committee to the United States Agency for International Development has stated:

We recommend that the United States Government, working through its bilateral treaties of establishment, through the mechanisms provided by the OECD, or through other appropriate means, widen and strengthen its collaborative practices with other governments in the antitrust field. Wherever the activities of such governments seem likely to raise the problem of multiple standards and jurisdictional conflict in the application of antitrust policies, a major objective of the collaboration would be to reduce the uncertainty of the businessman concerning the jurisdictional authority and antitrust standards which would apply in his overseas activities.⁷⁵

It is also likely that an antitrust concept similar to the philosophy of Article 85 will emerge in other regional organizations, to reflect the need to promote the free flow of goods throughout these areas.

In the field of industrial property, the "ultimate goal" has been described, by the President's Commission on the Patent System to be "the establishment of a universal patent, respected throughout the world, issued in the light of, and inventive over, all of the prior art of the world, and obtained quickly and inexpensively on a single application, but only in return for a genuine contribution to the progress of the useful arts."⁷⁶

Consistent with this, the Paris Union has traditionally worked toward the harmonization of the industrial property legislation of its members, and a trend which may be expected to continue has already begun toward multilateral legislation. The "Office Africain et Malgache de la Propriété Industrielle"⁷⁷ has begun functioning and, aside from dividing among its members the cost of administering the system, affords registrants protection in a sufficiently large area to be realistic from a production and distribution standpoint.

Other regional arrangements may be expected, possibly with transitory provisions, which would permit the concurrent continuation of national legislation in the field. This is the approach taken

⁷⁵ REPORT OF THE ADVISORY COMMITTEE ON PRIVATE ENTERPRISE IN FOREIGN AID, FOREIGN AID THROUGH PRIVATE INITIATIVE 24 (1965).

⁷⁶ U.S. REPORT OF THE PRESIDENT'S COMMISSION ON THE PATENT SYSTEM, "TO PROMOTE THE PROGRESS OF . . . USEFUL ARTS" IN AN AGE OF EXPLODING TECHNOLOGY 55 (1966).

⁷⁷ Created under Article 1 of the Accord Relating to the Creation of an African and Malagasy Office of Industrial Property, done at Libreville, Gabon, on Sept. 13, 1962 on behalf of Cameroon, Central African Republic, Congo (Brazzaville), Ivory Coast, Dahomey, Gabon, Upper Volta, Madagascar, Mauritania, Niger, Senegal, and Chad.

in the Draft Convention relating to a European Patent Law,⁷⁸ intended initially for adoption by the six member states of the EEC. This text has remained dormant, due to political difficulties, since its publication in 1963. A similar text relating to trademarks has also been prepared,⁷⁹ but the publication thereof has been postponed until the fate of the patent convention is settled. The main problem facing these arrangements concerns membership by non-Community countries and accessibility to the European patents (and presumably trademarks) by foreigners.

The Paris Union may also be expected to change. In the first place, the accession of the U.S.S.R. in 1965 may be a forerunner of greatly increased trade and technological exchanges with the countries of Eastern Europe. In addition, the administration of BIRPI is expected to be considerably formalized by the addition of various advisory bodies, with the view of eventually launching a new organization to be known as the International Industrial Property Organization (IPO) which may ultimately become a specialized agency of the United Nations.⁸⁰ Another new organization, the United Nations Industrial Development Organization (UNIDO), established in 1966,⁸¹ may also be expected to direct attention to industrial property rights as they are applied to the developing countries.

Great as has been the development of the interdependent world economy during the first three quarters of the century under review, the demographic and scientific forces now in motion may be expected to accelerate change even further in the years to come. Having matured into well-established international legal institutions, industrial property and antitrust regulations should play an increasingly important role in helping to focus and channel these creative energies into responsible achievement so as to meet global needs and aspirations.

⁷⁸ See 2 CCH COMMON MKT. REP. ¶ 5501 (1965) (for an English translation of the Convention, see ¶¶ 5503-5724).

⁷⁹ *Id.* ¶ 5501, at 4606.

⁸⁰ See Ladas, *Proposed Reorganization of the Paris Union and the International Industrial Property Organization*, 56 TRADEMARK REP. 817, 824 (1966).

⁸¹ G.A. Res. 2152 (1966).