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*by Hans Smit**

I. INTRODUCTION

The Treaty creating the European Economic Community,[1] as its Articles 2 and 3 confirm, aims at establishing a common market comprehending all member states within which economic forces will move freely across national boundaries. In pursuit of this goal, the Treaty declares that the free movement of goods, persons, and capital are foundations of the Community.[2]

However, the drafters of the Treaty recognized that the abolition of barriers at the border such as tariffs and quotas would not be sufficient to ensure free movement of goods among member states. They therefore provided for a number of additional measures designed to achieve this goal. Particularly important in this connection are the Treaty provisions that relate to harmonization of member states' laws.[3] The treaty makers realized that differences in the laws of the members states were likely to impede the free flow of goods across national borders and the establishment of a common market. Among the laws they considered in this context were those relating to direct and indirect taxation and those dealing with the protection of industrial and intellectual property.

Since its creation, the EEC has made considerable progress in harmonizing its laws relating to indirect taxation. Under the compulsion of Council Directives,[4] the member states have introduced a harmonized system of added value taxes.[5]

Industrial and intellectual property rights, however, continue to be

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[1] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter the Treaty of Rome].

[2] *Id.* at arts. 12-73.

[3] *Id.* at arts. 27, 99-102.

[4] The Council is the principal legislative body of EEC. *See* Treaty of Rome, arts. 145-154. A directive is a binding order to a member state requiring it to achieve a particular result. *See* Treaty of Rome, art. 189. A directive may specify in elaborate detail the result to be achieved by legislation. *See* H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 189.

[5] H. SMIT & P. HERZOG, *supra* note 4, at 98. But progress in the harmonization of direct taxes remains slow.

the creation of the laws of the member states.[6] A European Patent Convention[7] has been developed, but this Convention is not limited to member states.[8] It provides essentially for one application for a patent in all states that are members of the Convention.[9] A Community Patent Convention, providing for a Community-wide patent, has been drafted, but is not yet in effect.[10] As a consequence, reconciliation of the regimes of intellectual and industrial property rights with the Community goals of free movement of goods, services, and capital throughout the Community has fallen principally to Community institutions. Indeed, in this area, as in others, the Commission[11] and the Court of Justice[12] have played the leading roles, with the Council largely confirming their conclusions.

II. THE CONFLICT BETWEEN NATIONAL INDUSTRIAL AND INTELLECTUAL PROPERTY RIGHTS AND COMMUNITY GOALS

A. The Basic Problem

The essence of all industrial and intellectual property rights is to give the owner the right to prevent competition. It is that right that forms the reward for his inventive or creative efforts. Thus, the owner of a patent may prevent others from manufacturing and marketing the patented product. The owner of a trademark right may prevent others from using the trademark in marketing the same or similar goods, and the owner of a copyright may prevent others from copying his creation.[13]

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[6] *See infra* note 13.

[7] Convention on the Grant of European Patents, Oct. 5, 1973. For the text of this convention, *see* 1 European Patents Handbook 51 (1978), and M. VAN EMPEL, THE GRANTING OF EUROPEAN PATENTS: INTRODUCTION TO THE CONVENTION ON THE GRANT OF EUROPEAN PATENTS 339 (1985).

[8] Ten states had ratified the Convention as of 1983.

[9] For a discussion of this convention, *see* M. VAN EMPEL, *supra* note 7; Bowen & Parry, *European Patent Conventions: The First Convention*, 11 COMMON MKT. L. REV. 105 (1974); Blum, *On the Concept of Patentable Invention under the European Patent Convention*, in Contemporary Industrial Property, 61 (1978); Baillie, *The Present Position of the European Convention*, 6 INT'L. BUS. LAW 53 (1978).

[10] Convention for the European Patent for the Common Market, Dec. 14, 1975, 19 O.J. EUR. COMM. (No. L 17) 1 (1976).

[11] The Commission is the principal executive organ of the EEC. *See* Treaty of Rome, *supra* note 1, at arts. 155-163; H. SMIT & P. HERZOG, *supra* note 4 at art. 155.01-155.24. The Commission has acted in this area primarily by exercising its authority under the regulations issued by the Council in implementation of Articles 85 and 86 of the Treaty, which contain its basic antitrust provisions.

[12] The Court of Justice of the European Communities is the judicial organ of the three European Communities. *See* Treaty of Rome, *supra* note 1, arts. 164-188; H. SMIT & P. HERZOG, *supra* note 4 at arts. 164-01-188.05. In the area here discussed, the Court has exercised its judicial authority primarily on direct appeals from decisions by the Commissions or through reference by national courts pursuant to Article 177 of the Treaty of questions of Community law arising in these areas.

[13] Similar rights of preclusion characterize other intellectual or industrial property rights to

These rights to prevent competition conflict squarely with the goals of the EEC to foster competition and to promote the free movement of goods throughout the Community. Since Community law is supreme, the Community could have taken the position that conflicting national laws should give way.[14] At times, it has been thought that this might be the ultimate solution. However, the Court of Justice, in a series of decisions, has developed a more balanced accomodation that leaves room for national recognition of industrial and intellectual property rights to the extent such rights are not used for partitioning the Community into national segments. It is to the discussion of this case law that this paper is principally devoted.

B. The Accommodation Developed by The Court of Justice

1. *Introduction.* In an early case, *Parke, Davis & Co. v. Probel*,[15] Parke Davis sought to rely on its Dutch patent rights to prevent the importation into The Netherlands of a pharmaceutical product manufactured by others in Italy, where it did not enjoy patent protection. The court held that Parke Davis did not violate Article 86 of the Treaty by relying on its patent rights to prevent the importation of the competing Italian product. Although the court made no reference to Article 222 of the Treaty, which provides that the Treaty "shall in no way prejudice the rules in Member States governing the systems of property ownership," Advocate-General Warner, in his advisory opinion,[16] had argued—contrary to the position taken by the Commission that Article 222 reserved only the member states' rights of eminent domain—that Article 222 sought to preserve the basic elements of property rights, including those derived from patent laws. While the court made no reference to Article

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designs or agricultural creations, including seeds or bulbs. For a treatment of the various industrial and intellectual property rights recognized by EEC member states, *see* H. JOHANNES, INDUSTRIAL PROPERTY AND COPYRIGHT IN EUROPEAN COMMUNITY LAW (1976); A DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY (1978); Reimer, *Copyright Law and the Free Movement of Goods*, 12 INT'L. REV. INDUS. PROPERTY & COPYRIGHT L. 493 (1981); Harris, *Community Law and Intellectual Property*, 19 Common Mkt. L. REV. 61 (1982); Reischl,*Copyright Law and the Free Movement of Goods in the Common Market*, 18 COPYRIGHT 116 (1982); von Gamm, *Copyright License Contracts and Restrictions under the EEC Treaty*, 14 INT'L. REV. INDUS. PROPERTY & COPYRIGHT L. 579 (1983); Reischl, *Int'l. Rev. Indus. Property & Copyright L.* 415 (1983); Doutrelepont, *Les arrêts Coditel face au droit interne et au droit européen*, 103 JOURNAL DES TRIBUNAUX 397 (1984).

[14] To that extent, the situation in the EEC is different from that in the United States where both industrial and intellectual property laws and antitrust laws are of equal status and the one does not necessarily prevail over the other. The supremacy of Community over national law, at least from the perspective of the Community, has been well established since the decision in Costa v. ENEL, 1964 E. Comm. Ct. J. Rep 585, 10 Recueil 1141 (1964), 3 Comm. Mkt. L. R. 425 (1964). On the influence of Articles 36 and 222 of the Treaty of Rome, *see infra*, notes 16, 17, 23.

[15] Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm, 1968 E. Comm. Ct. J. Rep. 55, 14 Recueil 81 (1968), 7 Comm. Mkt. L.R. 47 (1968).

[16] The Court is assisted by Advocates-General who render advisory opinions to the Court in all "cases submitted" to it. On Advocates-General, *see also* Treaty of Rome, *supra* note 1, art. 166; H. SMIT & P. HERZOG, *supra* note 4, at art. 166.01-166.12.

222, its ruling accords with Advocate-General Warner's analysis.[17]

The *Parke Davis* decision brought a measure of relief to those who feared that the Treaty might have put an end to intellectual and industrial property rights insofar as they related to intra-Community trade. Those fears had been given some substance by the court's decision in *Consten SARL and Grundig Verkaufs-GmbH* v. *Gommission*.[18] In that case, Grundig had sought to protect its distributor in France from exports made from West Germany by persons who had bought the Grundig products from West German distributors. Grundig had attempted to provide this protection in two ways. First, it had required its West German distributors not to sell its products to others than retailers in West Germany; second, it had suggested to its French distributor that it obtain in France the rights to the trademark "Gint" which it affixed to all of its products in addition to the Grundig mark. It was thought that the French distributor could prevent imports on two grounds: first, on the ground that the parallel importer[19] committed a tortious act by knowingly benefiting from a breach of contract by the West German distributor who sold the product to him[20]; and second, on the ground that the parallel importer infringes upon the French distributor's trademark by selling the product under that trademark in France. The court rejected both contentions. It held that the agreement preventing the West German distributor from selling to the parallel importer violated Article 85 of the Treaty and that a trademark could not be used to prevent the interpenetration of national markets that the Treaty sought to achieve.

The decision in the *Grundig* case was necessarily taken in the context of the facts presented, but it led to renewed questions as to the extent to which national intellectual and industrial property laws survived the Community rules on unfettered competition and free movement of goods. In time, the Court of Justice answered these questions, both in regard to intra-Community commerce and in regard to commerce with non-member states.

2. *Intra-Community Commerce.* For intra-Community commerce, the Court of Justice firmly established the rule that the owner of an intellectual or individual property right may not use his right, either unilaterally or in concert with others, to partition the Common Market into national segments. It has based this rule both on the antitrust provisions and on the provisions on the free movement of goods of the Treaty.

The principle that a trademark owner may not, through licenses

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[17] On this decision, *see also* H. SMIT & P. HERZOG, *supra* note 4 at art. 222.04.

[18] Consten SARL and Grundig-Verkaufs-GmbH v. Commission, 1966 E. Comm. Ct. J. Rep. 299, 12 Recueil 429 (1966), 5 Comm. Mkt. L.R. 418 (1966). 5 Comm. Mkt. L.R. 418 (1966).

[19] This is the term usually employed to denote the importer who does not obtain the product directly from the manufacturer.

[20] To ensure that this action would lie, Grundig created a so-called "closed" distribution system, under which it obligated all of its distributors to sell only to approved customers. Thus, a non-approved customer would necessarily know that any sale to it constituted a breach of contract.

granted to licensees in member states, partition the Common Market and that his licensees may not prevent imports of products put on the market in other member states by other licenses was confirmed in *Sirena v. Eda*[21] In this case, the Italian licensee of an American trademark owner sought to prevent importation into Italy of cosmetics produced in West Germany by the German licensee. The court ruled that reliance on the trademark right for this purpose would contravene Article 85 of the Treaty, which prohibits agreements affecting interstate commerce that restrain competition. The court also discussed the possible impact of Article 86 forbidding abuse of a dominant position within the Common Market. It noted that a trademark owner did not necessarily have a dominant position, that this depended on whether he had the power to prevent effective competition in a substantial part of the relevant market composed of the trademarked product and all similar substitutable products, and that the higher price level of the trademarked product is not necessarily indicative of abuse of a dominant position.

The court's reservations on the latter point made clear that the antitrust provisions could not provide the basis for precluding reliance on an intellectual or industrial property right in a case in which the owner of the right acted unilaterally and did not have a dominant position in the relevant market. It was not long before such a case reached the court. In *Deutsche Gramophon* v. *Metro-Grossmarkte*,[22] the German owner of a copyright sought to prevent importation from France into West Germany of sound recordings it had sold to its French subsidiary. The court noted that Article 85 might be inapplicable because of the absence of "the elements of contract or concert contemplated in that provision." It also reiterated its observations on Article 86 from its *Sirena* decision. Since Articles 85 and 86 might be inapplicable, the court ruled that the principles stated in the second part of the Treaty under the title of freedom of movement of goods provided the guiding rationale. In support of this ruling it cited Article 5, paragraph 2, and Article 3(f) of the Treaty, which provide that member states shall "abstain from any measures which could jeopardize the attainment of the objectives of this Treaty" and that the system of free competition established in the Common Market must not be distorted. The court thus held that reliance by the German copyright owner to prevent the importation of its own sound recordings from France into West Germany would be contrary to the rules providing for the free movement of goods within the Common Market.

The court rejected the argument that Article 36 of the Treaty required a different conclusion. Article 36 provides that the provisions of Articles 30 to 34 on the free movement of goods "shall not preclude

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[21] Sirena S.r.l. v. Eda S.r.l., 1971 E. Comm. Ct. J. Rep. 69, 10 Comm. Mkt. L.R. 260 (1971).

[22] Deutsche Grammophon v. Metro-Grossmarkte 1971 E. Comm. Ct. J. Rep. 487, 10 Comm. Mkt. L.R. 631 (1971).

prohibitions on restriction on imports . . . on grounds of . . . the protection of industrial and commercial property." The court ruled that, "[A]ssuming that a right akin to a copyright can be covered" by the terms "industrial and commercial property," Article 36 did not permit the German copyright owner to rely on his right for the purpose pursued. Repeating an analysis already advanced in the *Sirena* case, the court said that "while the Treaty does not affect the existence of the rights recognized by the laws of a Member State in the matter of industrial and commercial property, the exercise of such rights can, however, be subject to the prohibitions set forth in the Treaty."

The court's analysis would appear subject to criticism in at least two respects. Article 5, paragraph 2, of the Treaty imposes on the member states an obligation to abstain from adopting measures at odds with the objectives of the Treaty. It does therefore not contain self-excuting provisions that directly displace otherwise applicable national law. However, the court has in other instances read provisions that are in terms directed only at the member states as creating directly applicable provisions of Community Law[23] and at least some of the provisions contained in Articles 30-34 of the Treaty are cast in the self-executing mode.

More serious is the deficiency in the court's analysis of Article 36. The court's distinctions between the existence and the exercise of a right is entirely artificial. A right has substance only to the extent it can be exercised. Its exercise can therefore not be separated from its existence. Any limitation on the exercise of a right by the Treaty necessarily sets limits on the right itself. Moreover, the distinction made by the court contributes in no way to the resolution of the problem. For it does not explain to what extent the Treaty limits the exercise of intellectual and individual property rights. The answer to that question must therefore be found in some other fashion.

Whatever the deficiencies in the court's reasoning, the conclusions it reached appear properly to accomodate national and Community interests. The upshot of the court's decisions is that the owner of an intellectual property right may not use his right, either unilaterally or in concert with others, to prevent the importation into another member state of products that it or its licensee has brought on the market in another member state.

In two decisions, the court carried this rule at least two steps further. In *Hoffmann La Roche & Co. A.G.* v. *Centrafarm*, it ruled that the owner of a trademark in West Germany could not prevent the importation into West Germany of its product purchased by the importer in Great Britain, even though the importer, who had bought in bulk, had

[23] *See e.g.*, Defrenne v. Sabena, 1976 E. Comm. Ct. J. Rep. 455, 18 Comm. Mkt. L.R. 98 (1976).

repackaged the product.[24] And in *Centrafarm* v. *American Home Products Corp.*, it ruled to the same effect, even though the importer had purchased the product in bulk when it bore one, and had repackaged and sold it under another, of the plaintiff's trademarks.[25]

All of the cases discussed thus far involved attempts by the owner of an intellectual or industrial property right or by his licensee to prevent imports by a third party into one member state of products put on the market of another member state by the plaintiff or with the latter's consent. In the *Maize Seed* case, the court considered whether the owner of the right could properly agree not to export himself to the member state for which it had given an exclusive license and to obligate himself not to license others in the assigned territory. It held that these restrictions in what it called an "open" exclusive license did not come within the reach of Article 85. It distinguished them from those appearing in a "closed" exclusive license, which prevents imports by third party parallel importers. Although the decision that the restrictions in an open exclusive license do not come within Article 85(1) appears subject to criticism and it would have been preferable to exempt them under Article 85(3), the court's decision appears fairly to accommodate the interests of the licensor and licensee and those of the Community. It also makes clear that industrial and intellectual property rights may be used to prevent some imports from other member states and that they are therefore not entirely subordinated to the Treaty provisions on antitrust and free movement of goods.[26]

The basic thrust of *Maize Seed* was confirmed in the *Coditel II* case[27] where the court held that a contract by which the owner of the copyright for a film had granted an exclusive right to exhibit that film in the territory of a member state was not, as such, subject to the provisions contained in Article 85. The practical effect of this decision was to permit the Belgian copyright licensee to prevent the showing of the film by the defendant Belgian cable television company who had picked up the film from the air when it was being broadcast in West Germany by the German licensee.

While in *Terrapin (Overseas) Ltd.* v. *Terranova Industrie C.A. Kapferer & Co.*,[28] the court confirmed its original holdings in *Parke Davis*

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[24] Hoffman-La Roche & Co. v. Centrafarm, 1978 E. Comm. Ct. J. Rep. 1139, 23 Comm. Mkt. L.R. 217 (1978).

[25] Centrafarm v. American Home Products Corp., 1978 E. Comm. Ct. J. Rep. 1823.

[26] Nungesser v. Commission, 1982 E. Comm. Ct. J. Rep. 2015. For a commentary on these decisions, and the conditions imposed by the Court for the permissibility of the practicer, *see* H. SMIT & P. HERZOG, *supra* note 4 at art. 85.61; Korah, *Exclusive Licenses of Patent and Plant Breeder's Rights under EEC Law after Maize Seed*, 28 ANTITRUST BULL. 699 (1983); Hawk, *Patents Under EEC Competition Law*, 53 ANTITRUST L.F. 737, 749-55 (1985).

[27] Coditel v. Cine-Vog Films, 1982 E. Comm. Ct. J. Rep. 3381, cf Comm. Mkt. L.R. 328 (1982).

[28] Terrapin (Overseas) Ltd. v. Terranova Industrie C.A. Kapferer & Co., 1976 E.Comm. Ct. J. Rep. 1039, 17 Comm. Mkt. L.R. 620 (1976).

v. *Probel* that the owner of an intellectual or industrial property right may prevent the importation into the member state in which it owns the right of infringing products produced by an unrelated person in another member state, it also extended its ruling that such an owner may not prevent the importation of a product put on the market in another member state with his consent to the case in which the imported product was not put on the market under the protection of the intellectual or industrial right involved. In *Merck & Co., Inc. v. Stephan BV*,[29] the court ruled that Merck could not, on the basis of its patent right, prevent the importation into The Netherlands of a pharmaceutical product it had put on the market in Italy, where the product enjoyed no patent protection.

As a result of these decisions, at present, in intra-Community commerce, the position of intellectual and industrial property rights under the Treaty is reasonably clear. The owner of such a right may rely fully on his right to prevent any importations by any person who did not obtain the infringing product from the owner or his licensee. However, when the owner or his licensee has put the product on the market in a member state, he may not rely on his right to prevent its importation into another member state.[30]

B. Commerce With Non-Member States

The Treaty provisions, as construed by the court, thus leave considerable freedom of operation to national intellectual and industrial property rights in regard to products moving in intra-Community commerce. Their scope of operation is even greater in Community commerce with non-member states. Three decisions of the court are of particular significance in this context.

E.M.I. Records Limited v. CBS United Kingdom Limited[31] involved attempts by EMI to prevent CBS from marketing in the Community gramophone records under the His Master's Voice label. CBS owned this trademark in the United States. EMI owned it in the member states of the EEC. The question put to the court was whether EMI could rely on its trademarks to prevent their importation by CBS into the Community. The court answered this question in the affirmative. It held that the provisions on the free movement of goods in Articles 30-34 governed only intra-Community commerce and were not applicable to commerce with non-member states. It ruled, accordingly, that EMI could rely on its trademarks to prevent CBS's imports even if this would in effect be equivalent to imposing a restriction on the flow of goods that would not

[29] Merck & Co. Inc. v. Stephan B.V., 1981 E. Comm. Ct. J. Rep. 2063; 32 Comm. Mkt. L.R. 463 (1981).

[30] No consideration is given here to question of whether the Treaty provisions in effect impose an exhaustion doctrine when the product is put on the market of one member state and the owner seeks to prevent its resale within that same state.

[31] E.M.I. Records, Ltd. v. EBS United Kingdom, Ltd., 1976 E. Comm. Ct. J. Rep. 811; 18 Comm. Mkt L.R. 235 (1976).

be permissible in intra-Community commerce. It also declared irrelevant in this context whether the EMI trademarks had a common origin with that of CBS. Finding that neither the rules providing for free circulation within the Community of products imported into a member states nor the provisions on the common commercial policy required a different conclusion, it ruled that a proprietor of a trademark in all member states could exercise his right to prevent the importation of similar products bearing the same mark coming from a non-member state.

This ruling was reaffirmed in *Polydor Limited and RSO Records Inc.* v. *Harlequin Record Shops Limited*,[32] involving the importation of records of the "Bee Gees" from Portugal into the United Kingdom. The records had been marketed by Polydor's licensee in Portugal, and Polydor sought to prevent their importation into the United Kingdom by relying on its trademark. The Court held it could do so, even though Portugal had concluded an agreement with the Community which provided in terms, identical to those used in the Treaty for intra-Community trade, that quantitative restrictions on imports shall be abolished and that prohibitions based on industrial and commercial property rights shall not be used as disguised restrictions on trade between the contracting parties. The court ruled that the agreement with Portugal did not establish the kind of community the EEC Treaty created among the member states and that therefore its rulings in regard to intra-Community trade were inapposite.

In *Keurkoorp B.V.* v. *Nancy Kean Gifts B.V.*,[33] the court addressed a question not raised in the *EMI* and *Polydor* cases, but that was most likely to arise. That question is whether the owner of an intellectual or industrial property right may use his right to prevent infringing imports from another member state, when the goods have been put on the market of the exporting member state by or with the consent of the owner of the right or his licensee. In *Keurkoorp*, the plaintiff, the Dutch owner of a design right on a bag under the Uniform Benelux Law on Designs sought to use this right to prevent importation from a member state of bags of the same design. Both the bags of the plaintiff and those of the defendant had been manufactured in Taiwan. The court ruled that, at the present stage of development of the Community, member states were free to adopt laws protecting designs of the kind at issue and that these laws came within the terms "industrial and commercial property" used in Article 36 of the Treaty. It further held that the owner of such a design right could not rely on it to prevent imports into the member state in which he owns the right of products put on the market in another member state with the consent of the owner or by a person economically dependent on the owner.

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[32] Polydor Ltd. and RSO Records Inc. v. Harlequin Record Shops Ltd., 1982 E. Comm. Ct. J. Rep. 329; 33 Comm. Mkt. L.R. 677 (1982).

[33] Keurkoorp B.V. v. Nancy Kean Gifts B.V., 1982 E. Comm. Ct. J. Rep. 2853.

The cumulative effect of these three decisions would appear to be that the owner of an intellectual or industrial property right in one or more or all member states may rely on his right to prevent imports from non-member states, even if the products sought to be imported have been put on the market of the non-member state with the owner's consent. However, once a product from a non-member state has been put on the market in a member state, the owner of an intellectual or individual property right cannot rely on his right to prevent its import into the member state in which he owns the right if the product was put on the market of the exporting member state with his consent or by someone dependent on him.

These decisions do not address whether the owner of an intellectual or industrial property right in a member state may rely on his right to prevent imports from another member state of products that have been put on the market of the exporting member state without his consent by a third party. However, the *Parke Davis* and *Terrapin* decisions would appear to warrant the conclusion that reliance on intellectual or industrial property rights for that purpose is not prohibited by Community Law.

C. *The Patent Licensing Group Exemptions*

The court's case law was recognized and confirmed in the Group Exemption of the Commission, which was issued on July 23, 1984, after considerable preparatory work. Exclusive patent licenses of the "open" kind are declared not covered by Article 85(1).[34] Indeed, the Group Exemption does permit limited forms of restrictions on the licensee that are designed to discourage parallel imports.[35] In other respects, however, the exemption does not apply when the rights licensed are used to prevent or render more difficult parallel imports.[36]

The Group Exemption deals with many other aspects of patent licensing. Since these do not relate primarily to cross-border commerce, they are not discussed here.

III. CONCLUSION

Initial fears that the provisions of Community law on competition and the freedom of movement of goods and services might spell the end of national intellectual and industrial property laws have been proved unfounded. The Court of Justice has reconciled effectively the conflicting aspirations of Community law and national intellectual and industrial property laws. The latter remain fully effective, as long as they are

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[34] Council Directive 2349-84, 27 O.J. EUR. COMM. (No. L219) 15 (1984) [hereinafter Directive 2349-84]. This took effect on January 1, 1985. *See also* Hawk, *Patents Under EEE Competition Law*, 53 Antitrust L.J. 737 (1985).

[35] Directive 2349-84, *supra* note 34.

[36] *Id.*

not used directly to restrain the competition and free movement of goods among member states. They are completely unaffected by the provisions of the Treaty insofar as they relate to imports into the Community from non-member states.

Transplantation of the EEC regime in this respect to the relations between the United States and Canada would therefore produce entirely acceptable consequences. Indeed, the solutions achieved by the Community and its Court of Justice would appear so well balanced and felicitous that the United States and Canada would do well to adopt them, even if they could not agree upon full economic integration in other respects.