Territorial Restriction and Exclusive Dealing Clauses under European Economic Community and United States Antitrust Laws

Luc Pierre Benoit

Juris Doctor

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol1/iss1/3
Territorial Restriction and Exclusive Dealing Clauses Under European Economic Community and United States Antitrust Laws*

Luc Pierre Benoit, Juris Doctor**

THE QUEST

Given man's innate sense of territory1 and the traditionally individualistic nature of his ownership concept,2 demands upon the legal profession for territorial restriction and exclusive dealing systems have predictably been frequent and provocative of countervailing judicial reaction.3 A growing recognition of the potential of vertical restrictions to stimulate interbrand competition while simultaneously reducing intrabrand rivalry has led to a softer judicial line conceding room to a rule of reason in the territorial restriction area, at least as represented by location clauses.4 Similarly, the evolution of quantitative substantiality5 and qualitative substantiality6 tests

---

*Copyright 1978 Luc Pierre Benoit

**Juris Doctor, Loyola University (L.A.) School of Law, Diploma (B.S. in Telecommunications) Zurich State College of Technology; Chairperson, Subcommittee on Technology Transfer Law, Los Angeles County Bar Association; Director, Los Angeles Patent Law Association; in private practice in Pasadena, California.

The author gratefully acknowledges the vast resources of the Los Angeles County Law Library which made this study feasible, as well as the effective help of Earl Weisbaum, Esq., Foreign Law Librarian, the lectures on antitrust law by Professor Phillip Areeda and on EEC competition legislation by Professor Detlev F. Vagts during the 1978 Program of Instruction for Lawyers at Harvard Law School, and the kind assistance of Professor Donald Wilson, law review editors Gordon J. Zuiderweg and Kathy Knox, and students Robert Whitehead and Vrenae Sutphin of Loyola of Los Angeles School of Law. Appreciation is also expressed for the discussions with Roy L. Shults and Ira D. Moekatel in the field of the Subcommittee on Technology Transfer Law, and to Ernest U. Gambaro, Chairperson, Committee on Law and Technology.

1. I regard the territorial imperative as no less essential to the existence of contemporary man than it was to those bands of small-brained proto-men on the high African savannah millions of years ago. I see it as a force shaping our lives in countless unexpected ways, threatening our existence only to the degree that we fail to understand it.


has provided a certain tolerance for exclusive dealing arrangements. Since these tests are, however, far from clear in practical implication and application, while continuing to be of strong interest and concern not only domestically but increasingly transnationally, the Subcommittee on Technology Transfer Law (STTL) of the Committee on Law and Technology of the Los Angeles County Bar Association has embarked on a modest, practice-oriented inquiry into territorial restriction and exclusive dealing clauses for transnational distributorship and licensing agreements. In particular, the STTL has developed an exclusive dealing clause which recently has experienced its inauguration in transnational technology products distributorship agreements in the following form:

Manufacturer and Distributor realize as to the Territory that Manufacturer has only a minor market share for the kind of products subject to this Agreement, that such products require competent assembly and service, backed up by a supply and installation of proper spare parts and components for faultless operation and prevention of injury and environmental pollution, that competitive products are readily available and that no serious obstacles to a formation of new outlets for competitive products exist. In view of these conditions, and as long as they prevail or reoccur, the Distributor will not promote, carry, distribute or install any product, spare part or component other than a product, spare part or component manufactured and/or supplied by Manufacturer, or expressly authorized in writing by Manufacturer by way of exception.

The present study constitutes an endeavor to transfer the STTL efforts to the transnational arena. For this purpose, we shall presently review relevant statutory law and jurisprudence of the European Economic Community (EEC) which represents an increasingly important segment of transnational commerce and trade, given the extent of its current membership, its extraterritorial associations and conventions, its socioeconomic contributions, and its trade partnership with the United States of America (U.S.).

7. C. Hills, ANTITRUST ADVISER § 2.6 (2d ed. 1978).
8. This clause was developed as a result of extensive discussion and deliberation within the STTL. Although not formally adopted by the Subcommittee, the clause will hereinafter be referred to as the "STTL clause."
9. Belgium, Denmark, France, Federal Republic of Germany, Republic of Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom of Great Britain and Northern Ireland.
HISTORICAL SIMILARITIES AND DIFFERENCES

The U.S. antitrust laws and the EEC competition laws arose in the wake of devastating wars: here, the era of industrial expansion and economic power concentration following the American Civil War;10 there, the epoch of reconstruction and unification after cataclysmic World War II.11

By way of comparison to the American experience, World War I, rather than World War II, reflects from a European viewpoint a civil war of sorts within the European cultural community.12 Yet while the American Civil War managed to avoid secession, World War I and its aftermath fortified and, in effect, institutionalized an ongoing polarization along national lines. This result, together with concomitant economic stagnation, fostered intense industrial cartelization which engendered strong support for emerging nationalist moves.13 World War II led to widespread destruction and ruin, exposing major parts of Europe to possible colonialism by leading world powers and to creeping Balkanization.

Eventually, two of the four occupying powers came to perceive an increasingly precarious position relative to existing and potential superpowers.14 The possibility that Europe would, in a sense, find itself socioeconomically and politically at the level of colonial America was real. Thus, where for generations economic motives had supplied temptation and apparent reason for resorting to war to settle national aspirations, and where war had ceased to be feasible, the recognition gradually emerged that economic motives and resources could serve as safeguards against war on the one hand,15 and virtual colonialism and Balkanization on the other.

In summary, the American Civil War prevented a breakup of an established union and led to a postwar boom characterized by industrial expansion and power concentration, spurring antitrust legislation. World War II, on the other hand, brought Europe instability and a breakdown of systems and presented a danger of relentless colonization for the occupied countries and some of the Allied powers as well. A search for viable solutions led to recognition of a

10. C. Hills, supra note 7, ¶ 1.3.
12. Id. at 1.
14. E. Benoit, supra note 11, at 1 (citing speech by Maurice Faure, French State Secretary for European Affairs, to French Assembly (July, 1957)). See also A. Walsh & J. Paxton, Into Europe 12 (2d ed. 1972) [hereinafter cited as Walsh].
15. Walsh, supra note 14, at 1.
need for peaceful unification initiated by the creation of a common market fostered and maintained by "the establishment of a system ensuring that competition shall not be distorted in the Common Market." These developmental and functional differences must be remembered when comparing U.S. antitrust and EEC competition laws. However, despite these differences, the concept of competition is the key to desired goals and effects in both systems, and as we shall see, is manifested in considerable "conscious parallelism" between EEC and U.S. antitrust laws.

**Statutory Similarities and Differences**

In contrast to the anticompetition scheme of the EEC, the sections of the Sherman Act primarily of interest here are at once laconic and draconic. They have at times sheltered such antipodal manifestations as *Schwinn* and its overruling nemesis *GTE Sylvania*. Corporate executives have also at times been physically incarcerated for having violated the Act.

Statutory counterparts of Sections 1 and 2 of the Sherman Act are found in Articles 85 and 86 of the Treaty of Rome. Articles 85


18. The text of the statutes reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.


21. C. Bane, *The Electrical Equipment Conspiracies* 16 (1973); Sonnenfeld & Lawrence, *Why Do Companies Succumb to Price Fixing?*, 56 HARV. BUS. REV. 145 (1978). "Justice Department statistics indicate that 60% of antitrust felons are sentenced to prison terms." Id. at 145.

22. EEC Establishing Treaty, supra note 16, arts. 85, 86.
and 86, together with their implementing regulations, are self-executing provisions, becoming, without further enactment, part

23. The following text of Articles 85 and 86 is from BII ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW B10070 (1978) and appears to be a more readable translation than the one contained in 298 U.N.T.S. 11.

Article 85

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 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.

Article 86

Any abuse by one or more undertakings of a dominant position within the common 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:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) 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.
of the laws of each Member State ratifying the treaty.\textsuperscript{24}

In the enumeration of agreements between enterprises, decisions by association of enterprises and concerted practices apt to affect trade between the Member States,\textsuperscript{25} Article 85 manifests certain parallels to the "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce"\textsuperscript{26} of Section 1 of the Sherman Act. Although not expressly proscribing concentrations of economic power as such, the Article 86 concept appears to share a broad philosophical underpinning with Section 2 of the Sherman Act dealing with monopolization. As if to avoid many questions left unanswered by the broad brush of the Sherman Act, Articles 85 and 86 illustrate the types of conduct considered conducive to "prevention, restriction or distortion of competition within the common market" or "abuse of a dominant position within the common market or in a substantial part of it."\textsuperscript{27} While territorial jurisdiction under the Sherman Act is defined in terms of "trade or commerce among the several States, or with foreign nations,"\textsuperscript{28} Articles 85 and 86, in an apparent, more narrow reference to territorial jurisdiction, speak about "trade between the Member States."\textsuperscript{29}

As the Swiss Watch Case\textsuperscript{30} patently demonstrates, the Sherman Act reference to territorial jurisdiction has not been viewed in a confining sense. Rather, such statutory reference must be viewed in terms of concession to constitutional mandate: particularly the commerce clause of the United States Constitution, which cautiously avoids usurpation of intrastate domains by reference to "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."\textsuperscript{31} By way of contrast, such antitrust

\textsuperscript{24} D. Barougos, D. Hall & J. Rayner James, EEC Anti-Trust Law 4 (1975) [hereinafter cited as Barougos].
\textsuperscript{25} EEC Establishing Treaty, supra note 16, art. 85(1).
\textsuperscript{27} EEC Establishing Treaty, supra note 16, arts. 85(1)(a)-(3) & 86(a-d).
\textsuperscript{29} EEC Establishing Treaty, supra note 16, arts. 85(1) & 86, preamble.
\textsuperscript{31} U.S. Const. art. I, § 8, cl. 3: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."
legislation as the United Kingdom Restrictive Trade Practices Act is not applicable to an agreement unless two or more parties carry on business in the United Kingdom.\textsuperscript{32}

Articles 85 and 86 move somewhere between extremes. A condition of Article 85 is that the proscribed conduct must affect trade between Member States.\textsuperscript{33} This can be satisfied without the necessity that parties to an agreement, decision, or concerted practice be domiciled or resident in the Common Market area.\textsuperscript{34} Additionally, Article 85, in contrast to Section 1 of the Sherman Act, has an express built-in flexibility in the form of exemption provisions contained in paragraph 3.\textsuperscript{35} Such flexibility, above and beyond the typical American "rule of reason" approach, inquires whether an agreement, even though substantially restrictive, should nevertheless be tolerated for good business reasons.\textsuperscript{36} Mechanics for implementing the Article 85 scheme are contained in Regulation 17, the first implementing regulation pursuant to Articles 85 and 86 of the Treaty of Rome.\textsuperscript{37}

**EXCLUSIVE DEALING CLAUSES**

Exclusive dealing clauses within the purview of this study are concreteness by the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).
32. Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68 s. 6 (as amended 1968).
35. EEC Establishing Treaty, supra note 16, art. 85(3).
37. EEC Council Regulation 17, 5 J.O. COMM. EUR. 204 (1962). Regulation 17 authorizes the EEC Commission to issue decisions and to rule on the applicability of Articles 85(1) and 86 and on the exemption of Article 85(3). An innovation of Regulation 17 relative to the Treaty of Rome is the power of the Commission to issue negative clearances. These may be obtained by requests which set forth the agreement, decision or practice to be cleared. The Commission may then certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or 86 for action on its part. An exemption under Regulation 17 differs from a negative clearance in that it addresses itself to agreements, decisions or practices which fall under the proscription of Article 85(1), but are exempted under Article 85(3) upon notification to, and favorable decision by, the Commission. Regulation 17 also includes an exemption from the latter notification requirement for enumerated types of agreements. In addition, the Commission's experience with myriads of agreements has been put to good use in the issuance of group exemptions; that is, exemptions of certain classes of agreements by category. See EEC Council Regulation 19/65, 8 J.O. COMM. EUR. 533 (1965); EEC Commission Regulation 67/67, 10 J.O. COMM. EUR. 849 (1967); EC Council Regulation 2821/71, 14 J.O. COMM. EUR. (No. L 285) 46 (1971); EC Commission Regulation 2779/72, 15 J.O. COMM. EUR. (No. L 292) 23 (1972).
clauses which restrain a distributor or licensee from handling competing products. In U.S. antitrust law, such clauses, absent qualifying circumstances, violate Section 3 of the Clayton Act relating to conditions, agreements, or understandings restraining lessees or purchasers from using or dealing in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller. Such clauses are also apt to violate Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Unlike Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act which broadly prohibits "unfair methods of competition in or affecting commerce," Section 3 of the Clayton Act, which does not cover services, expressly conditions its prohibitory language "where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The relative word "substantially" in the latter qualification has led United States courts and the Federal Trade Commission (FTC) to develop so-called "substantiality tests." Since relative expressions naturally have quantitative and qualitative aspects, the need for quantitative and qualitative substantiality tests was perhaps predictable. Since quantities, such as market shares expressed in percentages, are more easily comprehended and handled than qualitative indicators, it was perhaps equally predictable that the quanti-

38. This is narrower than the broad range of agreements and practices to which the expression "exclusive dealing" sometimes has been applied. See Barounos, supra note 24, at 104; J. Rahl, supra note 30, at 208; C. Hills, supra note 7, § 2.2; P. Areeda, Antitrust Analysis para. 552 (1967); Drysdale & Stephens-Ofner, Distributorship and Agency Agreements, 123 New L.J. 728 (1973).

39. 15 U.S.C. §§ 1, 2, 14, & 45 (1976). The text of Section 3 of the Clayton Act is as follows: It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.


tative substantiality test would be developed prior to the qualitative substantiality test; this, indeed, is now a historical fact in the body of U.S. antitrust decisional law. 42

According to the quantitative substantiality test, exclusive dealing contracts which foreclose competition in a substantial share of the relevant market are unlawful under Section 3 of the Clayton Act. 43 Since Section 5 of the Federal Trade Commission Act 44 contains no such substantiality qualification, one author has suggested that the FTC might be able to "issue orders against exclusive buying arrangements used in foreign commerce on very slight evidence of competitive impact." 45

The FTC pioneered the qualitative substantiality test 46 which was subsequently adopted by the United States Supreme Court. 47 That qualitative test looks to evidence of actual or probable economic effect upon competition resulting from an exclusive dealing arrangement. In a similar vein, the celebrated Jerrold Electronics case 48 arrived at a limited exception in favor of tying arrangements relied on by new industries of uncertain success and technologically delicate equipment. 49 Exceptions in this area have also been recognized when restrictions are aimed at protecting the public and the manufacturer's goodwill. 50

In GTE Sylvania, and in the context of nonprice vertical restrictions, the Court clearly overrules the landmark Schwinn 51 concept as to per se violation in favor of a "rule of reason" approach. 52 Although dealing with location clauses, 53 the Court expresses broad policy considerations. The Court's reference to a manufacturer's

---

42. For a discussion of the history and nature of the substantiality tests, see C. Hills, supra note 7, at 85-92.
45. J. RAHL, supra note 30, at 210.
49. Tying arrangements typically are aimed at compelling the acquisition or use of a less desirable product along with an attractive product. Since tying arrangements often have the effect of excluding competing products, similar considerations have been applied to tying and to exclusive dealing arrangements. See P. AREEDA, supra note 38, at 568, 634.
52. 433 U.S. at 58.
53. This is a type of territorial restriction clause in which the distributor can only sell from a specific location.
direct responsibility for the safety and quality of its products\textsuperscript{54} and the Court's willingness to adopt a rule of reason in the complex area of interbrand and intrabrand competition\textsuperscript{55} justifies the assumption that the same approach should be used for exclusive dealing clauses.

As a result of these considerations, the STTL exclusive dealing clause\textsuperscript{56} was developed. The parameters of the qualitative and quantitative substantiality tests and other conditions of judicial authority\textsuperscript{57} must be carefully noted as to the applicability of this type of exclusive dealing clause. As a rule, the proposed clause should not be used in horizontal situations.\textsuperscript{58} Use of the clause should be accompanied by an appropriate antitrust escape clause to permit convenient updating of the agreement as the law or the facts change.

In many parts of Europe, tradition renders it an act of disloyalty for an exclusive distributor to handle products competing with the subject matter of the distributorship contract.\textsuperscript{59} The Court of Justice of the European Communities, however, has held that such national prohibitions are not controlling if incompatible with Common Market law.\textsuperscript{60}

While the Treaty of Rome does not expressly parallel Section 3 of the Clayton Act, nevertheless, Claytonesque language is found in Article 85(3)(b).\textsuperscript{61} In particular, exclusive distribution agreements, including those restraining the distributor from acquiring competing goods may, in a vertical setting, be eligible for exemption, subject to certain safeguards, under Article 85(3).\textsuperscript{62}

Although not concerned with clauses excluding the handling of competing goods, implementing Regulation 17\textsuperscript{63} deals specifically with the related subject of specialization agreements in the manufacture of products.\textsuperscript{64} A specialization agreement exists when parties mutually agree not to produce each other's products. In Re Jaz-

\begin{itemize}
  \item \textsuperscript{54} 433 U.S. at 55 n.23.
  \item \textsuperscript{55} Id. at 52 n.19.
  \item \textsuperscript{56} See text accompanying note 8 supra. Although set forth as a single clause, the conditions listed in said clause may be implemented in suitable "whereas clauses."
  \item \textsuperscript{57} See notes 48-55 supra and accompanying text. Also note particularly that the GTE Sylvania Court has reiterated the per se illegality of price restrictions. 433 U.S. at 51 n.18.
  \item \textsuperscript{58} See Antitrust Guide for International Operations, U.S. Dep't of Justice, Antitrust Division (Release of Jan. 26, 1977), Case J at 46.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} EEC Establishing Treaty, supra note 16, art. 85(3)(b).
  \item \textsuperscript{62} See BAROUNOS, supra note 24, at 55.
  \item \textsuperscript{63} EEC Council Regulation 17, supra note 37.
  \item \textsuperscript{64} Id. art. 4(3)(c).
\end{itemize}
Peter, a French clock manufacturer, Jaz, and a German clock manufacturer, Peter, agreed that Jaz was to produce a range of electrical clocks to the exclusion of Peter, while Peter was to produce a range of mechanical clocks to the exclusion of Jaz. Each party was also appointed the other's exclusive distributor in its respective territory. Exemption was granted on a finding of resulting improvement of distribution, production, and technical progress. Such liberality in dealing with horizontal arrangements would appear to justify an expectation that vertical arrangements involving an exclusion of competing products should find approval upon a showing of an improved distribution of goods free from dispensable restrictions and elimination of competition in respect of a substantial part of the products in question.

A special situation exists in the area of agreements of minor importance. In a rough analogue to the quantitative substantiality test, the Commission has stated that an agreement between producers or distributors avoids Article 85(1) prohibitions when the market share of the goods in the particular Common Market area does not exceed five percent with respect to identical or equivalent goods. To satisfy this quantitative test, the total annual turnover of the parties must not exceed 15 million units of account or, in the case of commercial undertakings, 20 million units of account. The Commission also emphasizes that the stated quantitative test is not absolute, but that restriction of competition may be perceptible though the specified limits are not reached. Agreements exceeding the stated limits may conceivably affect trade between Member States and competition only insignificantly and consequently may not fall within the provisions of Article 85(1). In short, the Commission may pair its quantitative test with a qualitative test, thereby paralleling, in effect, the substantiality tests of U.S. antitrust law.

66. The conditions of Article 85(3) were therefore satisfied.
69. Id. A unit of account has been set as the equivalent of 0.88867088 grams of pure gold, subject to future modification.
70. Id.
71. See text accompanying notes 41-47 supra.
granting, *inter alia*, a group exemption to agreements which impose an obligation on exclusive dealers not to manufacture or distribute, for the duration of the contract or one year after its expiration, goods which compete with the goods to which the contract relates.\(^\text{73}\)

Such a group exemption must be considered within its regulatory context. For instance, the group exemption of Regulation 67/67 does not apply to agreements between more than two parties,\(^\text{74}\) mutual exclusive dealing contracts between manufacturers of competing goods,\(^\text{75}\) or situations wherein contracting parties encumber the procurement of similar goods by intermediaries or consumers from other dealers within the Common Market.\(^\text{76}\) Parties may create such difficulties by abusing industrial property rights such as patents\(^\text{77}\) or by relying upon yet other rights.\(^\text{78}\) In the *bête noire* Béguelin case,\(^\text{79}\) the Court of Justice voided an exclusive distribution agreement under Article 85(1) despite attempted reliance on such "other rights" as French national legislation against unfair competition.\(^\text{80}\)

Regulation 67/67 applies only where an agreement covers less than the whole of the Common Market.\(^\text{81}\) Exclusive dealing agreements for the entire Common Market still must be dealt with by individual exemption.\(^\text{82}\) Under Regulation 67/67, the group exemption may be withdrawn if goods subject to an exclusive distributor contract have no competition in the particular territory or where the exclusive dealer arbitrarily overprices or refuses to sell the particular goods.\(^\text{83}\)

By way of summary, the STTL clause\(^\text{84}\) addresses itself to conditions of concern in both U.S. and EEC antitrust systems. Therefore, it does appear to stand a good chance of being acceptable not only in the United States, but also in the European Economic Com-

---

73. Id. art. 2(1)(a).
74. Id. art. 1(1).
75. Id. art. 3(a).
76. Id. art. 3(b).
77. Id. art. 3(b)(1).
78. Id. art. 3(b)(2).
80. Id.
81. Reg. 67/67, supra note 72, art. 1(1)(a).
83. Reg. 67/67, supra note 72, art. 6.
84. See note 8 supra and accompanying text.
munity, subject to applicable provisions dealing with exemptions, either automatic or specifically granted, or with negative clear-
ances.

By way of caveat, the proposed exclusive dealing clause should not indiscriminately be removed from the context of a distributor-
ship. For instance, considerable caution should be exercised in transferring this clause to any patent license agreement. The same courts which readily recognize exclusive agencies in various commercial contexts strictly prohibit attempts by a patent licensor to restrict a licensee to the patented and licensed product.

The narrow judicial attitude in the context of licensing agree-
ments appears to reflect a consideration of all patents as "monopolies." Such attitudes are sometimes uncritically adopted in textbooks. However, as one leading authority has noted, patent antitrust issues are not necessarily a specialized mystery unrespon-
sive to basic antitrust principles. A plea for equal "rule of reason" treatment of license agreements concerning patents along with distri-
butorship agreements concerning product line exclusivity will hopefully fall upon sympathetic judicial ears. As mentioned above, such is not the current attitude in the United States.

The EC Commission has declined to apply Article 85(3) provi-
sions to a noncompetition clause in a license agreement, where such clause in the context of the particular agreement was considered to contribute neither to an improvement of the production or distribution of goods nor to a promotion of technical or economic progress. Based on the language of Article 85(3), however, an exemption should be allowed with respect to clauses restricting a licensee from handling products competing with the subject matter of the license as long as certain conditions are met. First, such an exclusive dealing clause should be conducive to improvement of production or distribution of the particular goods or to promotion of technical or economic progress. Secondly, it must be shown that the particular

85. Id.
87. See Stedman, Patents and Antitrust Law in C. Hills, supra note 7, at 430.
88. P. Areeda, supra note 38, ¶ 400.
89. See McCullough v. Kammerer Corp., 166 F.2d 759, 765 (9th Cir. 1948) (Bone, J. dissenting).
91. EEC Establishing Treaty, supra note 16, art. 85(3).
92. Id.
exclusive dealing clause does not give rise to the "possibility of eliminating competition in respect of a substantial part of the products in question."\(^93\)

A further problem in licensing is posed by the fact that many patent and other industrial property licenses are of a horizontal nature, typically between different manufacturers. Even when running from an inventor to a manufacturer, licensing agreements do not fit neatly into a recognized vertical pattern.\(^94\)

**TERRITORIAL RESTRICTION CLAUSES**

Given historical facts\(^95\) and current aims,\(^96\) clashes between territorial restriction endeavors and antitrust laws are inevitable. In the United States, matters peaked in the *Schwinn* decision in which Mr. Justice Fortas hurled the anathema of *per se* violation at territorial restrictions between manufacturers and distributors.\(^97\) In *Schwinn*, the Court expressly held that "where a manufacturer *sells* products to his distributor subject to territorial restrictions upon resale, a *per se* violation of the Sherman Act results."\(^98\) The Court expanded that rule to encompass situations where a manufacturer had parted with dominion over goods or had transferred risk of loss to another.\(^99\) The European Economic Community similarly employs an assumption-of-risk approach as the decisive criterion to distinguish between commercial agents and independent traders. A commercial agent, except for the usual *del credere* guarantee,\(^100\) does not by the nature of his functions assume any risk resulting from the transaction.\(^101\) The Commission exempts from the prohibitions of Article 85(1) contracts made with commercial agents who undertake, within a specified Common Market area, to negotiate transactions on behalf of an enterprise, to conclude transactions in the name and on behalf of an enterprise, or to conclude transactions in

---

93. *Id.* art. 85(3)(b).

94. See AOIP/Beynard, *supra* note 90, for an agreement between a self-employed inventor and a *société anonyme*. The Commission held such inventor to be an "undertaking" within the meaning of article 85. 19 O.J. EUR. COMM. (No. L 6) 12 (1976), 17 COMM. MKT. L.R. D22 (1976).

95. See text accompanying notes 10-15 *supra*.

96. See text accompanying note 16 *supra*.


98. *Id.* at 379.

99. *Id.* at 382.

100. A *del credere* guarantee is a guarantee of the customer's credit by the sales agent.

their own name and on behalf of that enterprise. This exemption presupposes, of course, that the particular agent refrain from acting as an independent dealer. The Court of Justice has upheld this dichotomy between independent dealers and commercial agents.

If, in the contract between principal and reseller, the principal retains the risk of loss, that contract falls outside Article 85(1) prohibitions. The reseller may then "in principle be treated as an auxiliary organ forming an integral part of the [principal’s] undertaking, who must carry out his principal’s instructions and thus, like a commercial employee, forms an economic unit with this undertaking." A reseller accepting the risk of loss is thus considered an independent dealer, rendering his contract, express or implied, subject to Article 85. By way of contrast, it is no longer safe under U.S. antitrust law to rely on technical legal distinctions between an agent and independent distributor. In fact, the GTE Sylvania Court held a distinction between sale and nonsale transactions insufficient to justify the application of a per se rule in one situation and a rule of reason in the other. Considering the Supreme Court’s extensive reliance upon economic factors, including the delicate matter of interbrand and intrabrand competition in returning to the rule of reason in GTE Sylvania, there may be no remaining antitrust advantage in consignment or agency arrangements as contrasted with distributorship appointments. Factors relevant to the rule of reason, rather than the form of the manufacturer-reseller relationship, now govern the question of compliance with, and violation of, U.S. antitrust law in the territorial restriction area. Factors potentially justifying vertical restrictions include promotion of interbrand competition, attraction of competent and aggressive resellers to manufacturers of new products or in new markets, provision of requisite service and repair facilities, increased consumer product safety and more effective warranty service.

In the European Economic Community, Article 85(3) provides flexibility beyond the American "rule of reason." This is illus-

102. Id.
106. 433 U.S. at 54-57.
107. Id. at 57.
108. C. Hills, supra note 7, § 2.22.
110. See note 36 supra and accompanying text.
trated by the SABA ruling\textsuperscript{111} wherein the Commission approved certain restrictive clauses on a finding that the distribution system, as a whole, resulted in manufacturing and sales efficiency ultimately beneficial to the consumer.\textsuperscript{112} In instances of a weak market position, the Court of Justice has held even an exclusive distributorship providing for absolute territorial protection as exempted from Article 85(1) prohibitions.\textsuperscript{113} Nevertheless, territorial restriction clauses in exclusive distributorship agreements should still be considered at least potentially violative of Article 85.\textsuperscript{114}

The "agreement-of-minor-importance" approach together with the Commission's related quantitative and qualitative tests are also of importance here.\textsuperscript{116} Moreover, with particular reference to exclusive dealing agreements, Regulation 67/67 exempts from Article 85(1) agreements involving only two enterprises and in which one party agrees to supply only to the other party certain goods for resale within a defined area of the Common Market. Exempted also are arrangements in which one party agrees with the other to purchase only from that other party certain goods for resale, or where the latter two sets of provisions are combined, for mutual supply and purchase for resale.\textsuperscript{117} Such an automatic group exemption applies only if there are no restrictions on competition beyond certain restraints as to competing goods\textsuperscript{117} or extraterritorial solicitation of customers, establishment of branches, or maintenance of distribution facilities.\textsuperscript{118} A territorial restriction clause, based upon the premises implicit in the STTL exclusive dealing clause\textsuperscript{119} should, in a vertical setting, be permissible not only in the United States, but also in the Common Market, especially if the particular distributorship agreement imposes no prohibition upon sales outside the contractual territory.

\textsuperscript{112} Id.
\textsuperscript{114} EEC Establishing Treaty, supra note 16, arts. 85(1)(b) & (c).
\textsuperscript{115} See discussion accompanying notes 68-70 supra.
\textsuperscript{116} Reg. 67/67, supra note 72, arts. 1(1)(a)-(c).
\textsuperscript{117} Id. art. (2)(1)(a).
\textsuperscript{118} Id. art. (2)(1)(b). The above mentioned reservations concerning agreements between more than two parties, mutual exclusive dealing contracts between manufacturers, difficulties of intermediaries and consumers in obtaining goods, exercise of industrial property and others rights, and agreements covering all of the Common Market are of relevance here. See text accompanying notes 74-82 supra.
\textsuperscript{119} See note 8 supra and accompanying text
An inhibition of parallel imports and use of industrial property rights to partition national markets must particularly be avoided within the European Economic Community. The EEC has declared national patents, trademarks and copyrights ineffective when their use stifled the Common Market goal of free flow of goods across national boundaries. The Court of Justice of the European Communities has held that national trademark rights cannot be exploited for the purpose of isolating the market of a Member State within the European Economic Community. In a European extension of the exhaustion of rights principle, the Court of Justice has held that the exercise of patent rights by a patentee in a Member State to prevent the sale of a product first sold in another Member State by the patentee or with his express or implied consent is incompatible with EEC rules relating to the free circulation of goods. With respect to copyrights, the Court of Justice confirmed that a manufacturer of phonograph records may not exercise an exclusive right granted by legislation of a Member State so as to prevent the marketing in that state of products sold by that copyright owner or with his consent in another part of the Common Market.

More than a decade ago, one American author expressed the view that judicial doubts regarding proper restraints in connection with know-how licenses arguably result from a suspicion that such licenses "may easily serve as a convenient dodge for the cartel-minded firm." The bona fides of a know-how license, however, might be ascertained on the basis of the value of the know-how licensed. The more general opinion of commentators, subject to some caution, is that provisions permissible in a patent license

120. See EEC Establishing Treaty, supra note 16, art. 36, which sanctions industrial property rights, but not their use for arbitrary discrimination or disguised restriction on trade between Member States.
122. Adams v. Burke, 84 U.S. 453 (1873); Keeler v. Standard Folding Bed Co., 167 U.S. 659 (1896). The principle is actually grounded in the common law traditional hostility to encumbrances attached to chattels that had passed into commerce. See also P. Areeda, supra note 38, at 446-47.
126. Id.
should, *mutatis mutandis*, be fit for a know-how license.\(^{127}\) Limitations on territory of manufacture, safe as to patents and trademarks on a nonexclusive basis, however, have been designated as doubtful in the context of a know-how license.\(^{128}\)

Apart from the specific Article 36,\(^{129}\) broad provisions in Articles 85 and 86 may apply to industrial property matters. Some agreement, decision by associations of enterprises, or concerted practice is required for Article 85 to apply.\(^{130}\) Thus, in the *Parke Davis* case, the Court of Justice emphasized that the existence of patent rights is not affected by Article 85 and 86 prohibitions.\(^{131}\) The exercise of such patent rights was also held outside the scope of Article 85(1) limitations in the absence of any agreement, decision, or concerted practice.\(^{132}\) Moreover, the mere exercise of these rights would not fall within Article 86, absent an abuse of a dominant position.\(^{133}\) Notwithstanding *Parke Davis*, the Court of Justice has been quick to find agreement sufficient to bring into play Article 85(1).\(^{134}\)

In the United States, where assignment of patent rights for "any specified part of the United States" is specifically permitted by statute,\(^{135}\) illegal restraints have been found when patentees, in effect, divided the market between themselves and a licensee or between competing licensees.\(^{136}\) In the context of industrial and intellectual property licenses, contractual language should arguably allow a dealer to exercise independent business discretion in determining whether to sell the product, the proper place of sale, and the potential customer.\(^{137}\)

---

129. EEC Establishing Treaty, *supra* note 16, art. 36. See also note 120 *supra* and accompanying text.
137. P. Sperber, *Intellectual Property Management* 8-30 (1978). See also Girard,
CONCLUSION

Patent and other industrial property rights have fared worse than distributorship agreements in both antitrust systems herein considered. This may be consonant with the old fear of monopoly concentration which engendered American antitrust law in the first place, and the quest for a breakdown of national barriers through transnational competition which prompted EEC competition laws in the second.

Exclusive dealing and territorial restriction clauses should be approached with great caution, not only in the United States, but also in the European Economic Community. Under U.S. antitrust law, exceptions to a sweeping prohibition of exclusive dealing and territorial restriction clauses are founded on special circumstances, including typically a relatively small market share and such factors as a judicial or administrative desire to facilitate new entries, foster interbrand competition, and promote consumer safety and satisfaction.

In the European Economic Community, exceptions are, to a large extent, legislative and regulatory, manifesting an effort to provide a certain flexibility within a framework of predictability. Given the particular historical background and perceived goals, distribution of goods in the European Economic Community has received early attention and is subject to certain group exemptions. Where a group exemption is unavailable, an individual exemption or negative clearance may be pursued on the basis of various competitive factors, including generally those mentioned in the preceding paragraph with respect to U.S. antitrust law.

---

138. See text accompanying notes 86-94 and 120-37 supra.
139. See text accompanying note 10 supra.
140. See text accompanying notes 15, 16 and 21 supra.
142. EEC Establishing Treaty, supra note 16, arts. 85, 86.
143. See text accompanying notes 46-55 and 109 supra. See also the excellent commentaries of Richard A. Givens, Laura P. Worsinger, Elizabeth Head, James T. Halverson and William T. Lifland in MARKETING AND DISTRIBUTION, REGULATIONS AND RESTRAINTS (Practicing Law Institute, Corporate Law and Practice, Course Handbook Series No. 284 (N.Y. 1978)) 9-98 and 129-50, with particular emphasis on 24-30 and 90-96.
144. See EEC Establishing Treaty, supra note 16, art. 85(3); EEC Council Regulation 17, supra note 37, art. 4 § 2, and text accompanying notes 35-37, 61-83 and 110-118 supra.
145. See text accompanying notes 10-15 supra.
146. See Regulations 19/65, 67/67, 2779/72, supra note 37, and text accompanying notes 74-83 and 116-18 supra.
147. See note 37 and text accompanying notes 66-71 supra.
No single contractual provision can realistically apply to all exclusive dealing and territorial restriction problems which potentially could arise under United States or European Economic Community laws. However, it is hoped that the exclusive dealing clause provided herein will gain acceptance under both sets of laws, and will be useful to attorney and business persons in both the United States and Europe.