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THE *GRUNDIG-CONSTEN* CASE REVISITED: JUDICIAL HARMONIZATION OF NATIONAL LAW AND TREATY LAW IN THE COMMON MARKET

LAWRENCE F. EBB †

The decision of the European Court of Justice in the *Grundig-Consten* case [1] in July, 1966 dramatically illustrates the evolving relationship between supranational European Economic Community Treaty law and the national law of the member countries.[2] A series of cases dealing with the legitimacy under the provisions of the Treaty of Rome [3] of exclusive distributorship agreements whose territorial limits are coterminous with the boundaries of member countries has been litigated in recent years before national courts and the EEC Commission. *Grundig* is the first of this series to be adjudicated upon its merits by the European Court.

† Counsel, Overseas Subsidiaries & Investments, General Electric Company. Former Professor of Law, Stanford University. A.B. 1939, A.M. 1940, Harvard University; LL.B. 1943 (1946), Harvard Law School.

1 Etablissements Consten v. Société Union Nationale des Economies Familiales (UNEF), S.A.R.L. Citations and quotations from the Court of Justice opinion, appearing hereafter, have been taken from the English translation published in 2 CCH COMM. MKT. REP. ¶ 8046 at 7618-57 (1966).

2 An earlier, preliminary comment on *Grundig-Consten*, prepared before the Court's ruling, took the form of a paper delivered in March, 1964 at a regional meeting of the American Society of International Law at Syracuse University and published as Ebb, *Common Market Law in Process*, 41 WASH. L. REV. 489 (1966). The present article, while drawing its expository material from its predecessor, takes a fresh look at *Grundig* in the light of the July 13, 1966 decision of the Court of Justice, pertinent data and arguments presented to the Court by the parties and the Advocate General, and other recent developments.

3 Treaty establishing the European Economic Community, signed March 25, 1957, ratified by the member states of Belgium, Germany, France, Italy, Luxembourg, and The Netherlands during that year and effective as of Jan. 1, 1958.

The competitive requirements of Treaty anti-cartel law inevitably impinge upon and interact with private claims of right based upon the national law of trademark, unfair competition and resale price maintenance. The very analysis of the empirical data presented in *Grundig* and related cases, and the pragmatic process of fashioning decisions and judicial remedies in the cases, now force these relationships to be considered more fully and meaningfully by courts, administrators and commentators than was feasible when the Common Market was created. The development of legal standards governing these relationships under the compulsions and stimuli of the empirical process, confers a degree of precision and specificity upon post-litigation drafting of EEC regulations that was lacking in earlier regulations adopted without reference to actual cases.[4] At the same time, the national law of the member countries has undergone some change and growth, and may be on the verge of much greater change—partly because of the direct impact of Treaty standards, and partly because of more subtle internal development and modification of national doctrines in response to the trade liberalization principles of the Common Market. It is the impact of the Rome Treaty on national legal doctrines and the nature of the response that can be anticipated from national courts in applying and reformulating those doctrines that is the special concern of this case-study. This aspect of change may fairly be termed one of judicial harmonization of national law with treaty law.

The *Grundig* case made its way through the Tribunal de Commerce de la Seine (1962),[5] the Paris Court of Appeal (1963),[6] and

[4] *Compare* E.E.C. Regulation No. 17 of Feb. 6, 1962, the first implementing regulation under articles 85 and 86 of the Treaty, as in CAMPBELL, RESTRICTIVE TRADING AGREEMENTS IN THE COMMON MARKET 29 (1964), *with* the Regulation proposed on Aug. 26, 1966 and adopted effective May 1, 1967 on the Application of Article 85(3) of the Treaty to Certain Groups of Bilateral Exclusive Dealing Agreements and Concerted Practices, 2 CCH COMM. MKT. REP. 8273; 1 *id.* at 1819. The Regulation sets forth criteria for determining which types of exclusive distributorships may generally be deemed to be exempt from the Treaty's ban on cartels by virtue of the exemptive provision of article 85(3), see text quoted in note 23 *infra,* and in so doing specifies certain restrictive practices, including those involved in the *Grundig* case, which will not be subject to such exemption. Some of these "non-exemptible" restrictive practices had apparently been identified as such at the time or soon after Regulation 17 was promulgated. However, we know this not from the wording of Regulation 17, but rather from comments contained in an informal "Manual for Firms," the "'Practical Guide' to Articles 85 and 86 of the EEC Treaty and the Relevant Regulations," issued by the Commission on Sept. 2, 1962, 1 CCH COMM. MKT. REP. ¶ 2801, at 1970-71 especially. The new Regulation was proposed the month after the Court's ruling on *Grundig,* with the illuminating explanation that "since the Commission has acquired sufficient experience, particularly on the basis of individual decisions, it is appropriate to issue such a regulation . . . ." 2 CCH COMM. MKT. REP. ¶ 9125, at 8273. See text accompanying note 56 *infra,* concerning the content of these regulations.

[5] Etablissements Consten v. Société "U.N.E.F.," S.A.R.L. (Tribunal de Commerce de la Seine, 1e chambre, Paris, May 21, 1962) (opinion apparently not published, but available at the court).

[6] Société Union Nationale des Economies Familiales v. Etablissements Consten, 2 CCH COMM. MKT. REP. ¶ 8009 (Cour d'appel, 1e chambre, Paris, 1963).

the EEC Commission at Brussels (1964),[7] and was reviewed on appeal by the European Court of Justice at Luxembourg. Oral argument was presented early in March 1966; the German and Italian Governments submitted briefs on behalf of the Grundig position; and the firms of Willy Leissner of Strasbourg and UNEF of Paris presented briefs supporting the views of the Commission. The Advocate General presented Conclusions supporting, in large part, the Commission's reasoning, but urging the court to reverse its holding. The decision of the Court of Justice was handed down on July 13, 1966.

The issues in the proceedings were the validity of Grundig's system of absolute territorial protection of its sales organization under the local law of the EEC country—in this case, France—and under article 85,[8] the anti-cartel provision of the Treaty of Rome, and its implementing regulations. These territorial divisions are based on contractual terms that bar all Grundig purchasers, German and foreign, from exporting or re-exporting, and are further supported by certain national trademark arrangements with each national distributor.

In 1957, the Grundig sales company, Grundig Verkaufs G.m.b.H., entered into a contract with Etablissements Consten designating the latter as sole sales representative[9] for continental France, the Saar and Corsica for radios, tape recorders, dictating machines and television sets manufactured by Grundig. Grundig agreed not to sell, directly

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[7] The Grundig-Consten litigation, as it appeared before the Commission of the EEC, No. IV-A/004-03344, is translated in 1 CCH COMM. MKT. REP. ¶ 2743.

[8] Treaty article 85(1) provides in part:

> The following practices shall be prohibited as incompatible with the Common Market: all agreements between undertakings, all decisions by associations of undertakings and all concerted practices which are liable to affect trade between Member States and which are designed to prevent, restrict or distort competition within the Common Market or which have this effect. This shall, in particular, include:
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> (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
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> (b) the limitation or control of production, markets, technical development or investment; . . .

[9] The commercial relationship dealt with in this article is, technically, that between a manufacturer in one EEC country and his exclusive distributor (a person or firm dealing for its own account) in another. This relationship should be distinguished, generally, from that of the manufacturer and a dependent sales representative, who, for example, may sell on a commission basis. The dependent agency relationship does not raise the same problems of possible violation of the anti-cartel provisions of the Treaty of Rome as those raised in the *Grundig-Consten* situation. See, *e.g.*, the EEC Commission's *Official Notice on Contracts for Exclusive Representation Concluded With Commercial Agents*, 1 CCH COMM. MKT. REP. ¶ 2697 (Dec. 24, 1962). However, the rulings by the Commission and the Court in *Grundig-Consten* characterize the exclusive distributorship arrangement actually involved there by such additional terms as "sole sales representative" and "sole agency agreement." For convenience in paraphrasing or quoting from these opinions, the author has correspondingly used these terms. This explanatory note is inserted in the hope that it will help the reader to recall that, notwithstanding the usage of such conceivably ambiguous terms, *Grundig-Consten* did not involve any dependent agency or "commercial agent" relationship.

or indirectly, to other persons in the territory ceded to Consten. In pursuit of that undertaking, Grundig imposed an export prohibition upon German distributors as well as its distributors in other Common Market countries. Some of these distributors, nevertheless, made deliveries to an unauthorized French importer, UNEF, the defendant in the original action brought by Consten. UNEF in turn sold this equipment to French retailers at prices lower than those asked by Consten, to the detriment of dealers who purchased from Consten. To complete the picture of the territorially protective distribution system, it should be added that Grundig maintains trademark registrations in each of the EEC countries, holding the Grundig mark in its own name. A companion mark, GINT (Grundig International), is held by Grundig in its own name in Germany, but the sole national agent in each of the other countries—Consten in France—holds that mark as a further protection against "parallel" imports by others.[10]

It is noteworthy that the first major controversy over the interpretation of EEC law in the anti-cartel field involves a "vertical" contract, rather than a horizontal combination of manufacturers or of distributors. The vertical arrangement of sole distributorships has belatedly emerged in the United States as a significant issue under the Sherman Act and the FTC Act[11]—witness the recent *White Motor Co.*[12] and *Snap-On Tools*[13] cases. The Italian Government, in opposing the Commission's decision, argued unsuccessfully before

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10 The GINT trademark arrangements are described in detail in note 44 *infra* and accompanying text.

11 See, *e.g.*, Timberg, *Territorial Exclusives*, 56 TRADEMARK REP. 1 (1966); Note, *Restrictive Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962).

12 United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961): summary judgment holding that exclusive distributorships in specified territories constitute per se violations of the Sherman Act. The Supreme Court reversed, 372 U.S. 253 (1963), on the ground that

> the applicable rule of law should be designed after a trial. This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us. . . . [Vertical arrangements] may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking in or staying in business. . . . and within the "rule of reason."

The litigation was concluded, however, by the consent of White Motor Company to the entry of a decree barring it from engaging in any exclusive territorial arrangements. 1964 Trade Cas. ¶ 71,195.

In arguing that the Commission had failed to make an adequate survey of the relevant inter-brand competition and thus had erred in concluding that article 85(1) was violated by the Grundig agreements, Advocate General Karl Roemer cited the U.S. Supreme Court's decision in *White Motor* as a persuasive analogy supporting his thesis. 2 CCH COMM. MKT. REP. ¶ 8046 at 7662.

13 Snap-on Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963).

the Court of Justice that vertical arrangements cannot even be deemed to infringe article 85(1) of the Treaty.[14]

On the other hand, it should not be unduly surprising that an anticartel system put into effect in Europe in 1958 has been preoccupied at the outset of its operations with a type of restrictive practice—related to consumer product distribution arrangements—of scant initial interest to the executors of the American antitrust system. The Sherman Act appeared in the United States in 1890 during a period of public concern about the great trusts and combinations in basic industries such as rail transportation and petroleum. The fact that the United States Department of Justice, the Federal Trade Commission, and the American courts pay some heed today to the problems of vertical distribution agreements, and the existence of economic and social factors which account for that growing interest, should be more significant to the American observer of Common Market developments than the mere fact that the initial concern of the two enforcement groups—comparing 1890 with 1958—is so different. Equally significant is the fact that postwar French and German regulatory law has applied or has been deemed to apply to a variety of restrictive distribution practices, in addition to the problems of monopoly and merger.[15] E.E.C. Regulation No. 17 of Feb. 6, 1962, the first implementing regulation under articles 85 and 86 of the Treaty,[16] spelled out the Commission's concern with exclusive distribution agreements, reportedly at the insistence of the French.[17] Regulation 17 in turn led to the filing with the Commission, in order to obtain its "negative clearance" approval, of some 35,000 exclusive distribution agreements (among them the Grundig-Consten agreement), a fact which helps to account for the early emergence of this problem in litigation before the Commission and the Court of Justice.

The development of the Grundig litigation may be briefly summarized: the Tribunal de Commerce de la Seine held UNEF liable

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[14] See 2 CCH Comm. Mkt. Rep. ¶ 8046 at 7625-26, 7661-65. A broader but equally unsuccessful attack on the decision was launched by the German and Italian Governments, Grundig, Consten, and the Advocate General on the ground that a factual investigation would disclose that all conditions necessary for the grant of an exemption under article 85(3), quoted at note 23 *infra*, were present in this case. *Compare* 2 CCH Comm. Mkt. Rep. ¶ 8046 at 7671-80 *with* the Court's evaluation of this question, *id.* at 7644-49, 7655-57. See also Deringer, *Exclusive Agency Agreements With Territorial Protection Under the EEC Antitrust Laws*, 10 Antitrust Bull. 599 (1965).

[15] See Graupner, The Rules of Competition in the European Economic Community 91-131 (The Hague, Martinus Nijhoff, 1965), and consider particularly the French Decree of June 24, 1958 (No. 58-545), prohibiting refusals to deal in certain circumstances, *id.* at 110-14. See also the Advocate General's Conclusions in *Grundig*, 2 CCH Comm. Mkt. Rep. ¶ 8046 at 7661-64.

[16] See note 4 *supra*; text accompanying note 56 *infra*.

[17] See Graupner, *supra* note 15, at 110.

in damages to Consten for unfair competition, because of wilful disregard of the sole agency agreement of which it had knowledge, and enjoined UNEF from further sales of Grundig products in the Consten distributorship territory; the Paris Court of Appeal reversed the ruling of the trial court, holding that the latter should have stayed the proceedings until UNEF's complaint—filed with the Director General of Restrictive Practices to seek a declaration that the sole distributor agreement was void as an infringement of article 85 of the Treaty [18]—had been passed upon by the EEC Commission.[19]

The Commission's Ruling and Rationale

The EEC Commission thereupon ruled,[20] on the merits, that the Grundig-Consten agreement coupled with the export ban imposed on all buyers of Grundig products, and further supported by the import-ban privileges enjoyed under French law by Consten as holder of the GINT trademark, violated article 85(1) of the Rome Treaty. In the words of the Treaty provision, it found that these arrangements constitute "agreements between enterprises . . . and . . . concerted practices which are likely to affect trade between the member states and which have as their object or result the prevention, restriction or distortion of competition within the Common Market." [21] The major vice of the sole agency agreement in this case was the furnishing of absolute territorial protection, designed to prevent parallel imports into the Consten territory—the French market.[22] The exemptive

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18 See also Société Arlab Import-Export (SARIE) v. Société Union Nationale des Economies Familiales (UNEF) S.A.R.L., 2 Comm. Mkt. L.R. 185 (1963) (Tribunal de Commerce de la Seine, Paris, 1962).

19 The *Grundig* and companion cases all pose interesting procedural questions related to the phasing of action by national tribunals and the EEC administrative and judicial bodies, but this paper does not purport to explore them. For a study of those problems, see Alexander, *The Domestic Courts and Article 85 of the Rome Treaty*, 1 COMM. MKT. L. REV. 431 (1964); Buxbaum, *Incomplete Federalism: Jurisdiction over Antitrust Matters in the E.E.C.*, 52 CALIF. L. REV. 56 (1964); Note, 1 COMM. MKT. L. REV. 223 (1963).

The chronology is interesting from a procedural point of view. UNEF had filed its petition to have the Commission invalidate the agreement on March 5, 1962. The Court of Appeal decision was handed down on Jan. 26, 1963. And, "as a precaution" (1 CCH COMM. MKT. REP. ¶ 2743 at 1863), on Jan. 29, 1963 Grundig filed with the Commission the exclusive distributorship agreements that it had concluded with Consten and others in the Common Market.

20 See 1 CCH COMM. MKT. REP. ¶ 2743.

21 Treaty, article 85(1).

22 The Commission has indicated elsewhere that, in the absence of an export ban imposed upon buyers from the manufacturer or original wholesaler, exclusive distributorship agreements covering national territories may be treated as exempt from the prohibitions of article 85(1) of the Treaty. See, *e.g.*, Communication re Commission Notification No. IV/A-02702, Official Journal No. 165, Oct. 22, 1964, quoted in 2 CCH COMM. MKT. REP. ¶ 9002 (exclusive distributorship given by German manufacturer of cultivators and tractors to Brussels firm for sales in Belgium and Luxembourg, the distributor being free to set its own prices and subject to no restriction on its right to resell—and presumably to do so by re-export—to third parties); and

provisions of article 85(3) [23] were found inapplicable since the Commission concluded that any generalized economic benefits that resulted from the Grundig arrangements were not dependent upon those restrictive provisions that established absolute territorial protection.

The vice perceived by the EEC Commission in the Grundig exclusive distribution arrangements was the imposition upon Grundig's non-French distributors of an agreement not to export from their national territories, plus the equipping of the French distributor with a trademark that was used to hamper imports by parallel importers. Accordingly, the Commission banned "absolute territorial protection" as being "particularly damaging to the realization of the Common Market since it impeded or prevented an assimilation of market conditions in the Common Market for the products covered by the agreement." To keep open the possibility of parallel imports into France, the Commission enjoined Grundig and Consten "from making more difficult or from hampering parallel imports of Grundig products into France by any means whatsoever, including the use for this purpose of the GINT trademark." [24] This does not mean, of course, that Consten is barred from using the GINT trademark in all circum-

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Notification No. IV/A-22491, Official Journal No. 179, Nov. 7, 1964, 2 CCH Comm. Mkt. Rep. ¶ 9004 (exclusive distributorship between French manufacturer and German distributor in one case, and with Belgian distributor in the other, neither agreement containing an export prohibition). Compare the Commission's ruling in the "D.R.U. Blondel case," discussed at note 79 *infra*. The mechanics for assuring that such exclusive arrangements are not subject to article 85(1) where no application has been filed for a "negative clearance" under 85(1) or for an exemption under 85(3), are complicated. See Société Technique Minière v. Maschinenbau Ulm G.m.b.H., Court of Appeal of Paris, First Chamber July 7, 1965, referring a set of questions to the European Court of Justice, which answered them in its opinion of June 30, 1966, 2 CCH Comm. Mkt. Rep. ¶8047. See also comment in 2 CCH Comm. Mkt. Rep. ¶ 9074 and the discussion of new Regulation No. 67/67, in the text accompanying note 56 *infra*.

[23] Article 85(3) provides:

> The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
>
> —any agreement or type of agreement between undertakings,
>
> —any decision or type of decision by associations of undertakings, and
>
> —any concerted practice or type of concerted practice
>
> which helps to improve the production or distribution of goods or to promote technical or economic progress, while allowing consumers a fair share of the resulting profit and which does not:
>
> (a) subject the concerns in question to any restrictions which are not indispensable to the achievement of the above objectives;
>
> (b) enable such concerns to eliminate competition in respect of a substantial part of the goods concerned.

The Commission evaluated the highly-protected sole agency agreements here as impeding, if not preventing, the integration of the national markets into the Common Market, citing the fact that Grundig products sold in France at prices 20% higher than German prices, after deducting customs duties and taxes from the French prices.

[24] 1 CCH Comm. Mkt. Rep. ¶ 2743 at 1868-69.

stances. For example, it could be used as against those selling products not originating from the Grundig factories and falsely labelled "GINT." [25]

The Court of Justice Ruling and the Separability Issue

The Court of Justice, which in general sustained the Commission's findings and rulings, reversed the decision in one particular. The Commission had held that the exclusive distributorship agreement of 1957 and the supplementary agreement on the registration and use of the GINT trademark by Consten violated article 85. The Court ruled that the illicit portions of the 1957 Agreement were separable from the remainder of that agreement, and that the Commission had not furnished sufficient reasons to demonstrate that the entire agreement violated article 85. It may well be questioned whether the Commission had intended to terminate all aspects of the main and supplemental agreements, or, at least, whether it intended to terminate them irrevocably. The Commission emphatically meant to enjoin compliance with those parts of the arrangement that it had identified as constituting absolute territorial protection, but it expressly preserved certain nonrestrictive rights arising out of the agreements, as indicated by the comment quoted in the preceding paragraph concerning Consten's continued rights to use the GINT trademark. Indeed, in defending its ruling before the Court of Justice, the Commission urged that its "finding of a contract's incompatability with article 85, paragraph 1, does not say anything yet on the civil-law validity of individual clauses on which the Commission had made no statements." [26]

As to any broader validation of the agreements, pruned of their illegitimate features, the Commission contemplated that the parties would take the initiative in reforming their agreements in order to perpetuate them: "The parties to the agreement have continued to apply the sole agency agreement, and they have not modified it so that it no longer falls under the prohibition of article 85, paragraph 1, or so that this agreement may be declared exempt under article 85, paragraph 3 . . . ." [27] With the support of the Advocate General, however, Grundig and the German Government urged that the sequence foreseen by the Commission was a "violation of procedural rights," and that the Commission itself should have specified those portions of the contract that it deemed to survive the prohibitions of its decree. Otherwise, it was reasoned, the reformation of the contract to conform

[25] *Ibid.*
[26] 2 *id.* ¶ 8046 at 7665.
[27] 1 *id.* ¶ 2743 at 1868.

with the Commission's decree would be made by a member state tribunal that lacked the expertise of the Commission, thus leading to the possibility of "conflicting decisions on the part of the courts of the different Member States." [28] To require the enterprises concerned to modify their agreement and resubmit it to a second notification proceeding before the Commission would involve unnecessary delay and create unreasonable uncertainty in the interim.[29] It was argued that the Commission should be required to delimit precisely which parts of an agreement are, and which parts are not "relevant" to the anti-cartel provisions—unless it were perfectly clear that "without the expressly discussed parts of an agreement the parties would have declined to retain the balance of it." [30] Underlying this view, which the Court of Justice adopted, may be the fact that under the German anti-cartel law the Federal Cartel Office follows the practice of sanctioning particular contract provisions, while invalidating other sections in the agreement.[31]

On the other hand, it would appear that national contract law, interpreted and applied by national tribunals, will ultimately govern the question of separability and the survival of the distributorship agreement stripped of its illicit provisions. Thus the Court's modification of the Commission's ruling should be viewed as simply intended to compel the Commission to play a larger role in the contract-reformation stage of the process. By being required to indicate more clearly the permissible contents of a reformed contract, the Commission would clarify that portion of the post-decree situation, although the national tribunals, if called upon to do so by one of the parties, presumably would still have to determine whether a contract thus altered remains viable in terms of the intent of the parties. For example, the Commission, in its 1964 ruling, stated that the supplemental trademark agreement could not be validated as an exemption under article 85(3) since it "merely provides an additional means of guaranteeing absolute territorial protection" and for that reason is "too closely connected with the sole agency agreement." [32] Yet the transfer of GINT to Consten, which occurred under the aegis of that supplementary agreement, was deemed valid and Consten retains its rights to the mark so long as it does not exercise import-ban privileges

[28] 2 *id.* ¶ 8046 at 7627.

[29] *Id.* at 7666.

[30] *Ibid.* The Advocate General noted elsewhere in his argument, *id.* at 7681, that the enterprises appeared willing at least in some circumstances to continue the agreement in modified form, citing particularly a separability clause in the exclusive distributorship contract.

[31] Deringer, *Exclusive Agency Agreements With Territorial Protection Under the EEC Antitrust Laws*, 10 ANTITRUST BULL. 599, 607 (1965).

[32] 1 CCH COMM. MKT. REP. ¶ 2743 at 1868.

against genuine Grundig-GINT products. Is Grundig still entitled to retrieve the GINT mark upon termination of the Consten distributorship? Presumably it should be deemed to retain that right; otherwise Grundig may be less agreeable than the Commission to Consten's continued exercise of trademark rights following the decree. Possibly questions of this nature led Grundig to argue that "the opinion of the Commission presents practical difficulties that defy solution." [33] It will be interesting to see how the Commission carries out the Court's mandate, since on argument before the Court it appeared to feel that illegality tainted more than the export ban and the abusive application of the GINT mark. It stated that "considerable difficulties are encountered in any efforts to draw a precise line between the contract provisions that are relevant under cartel law and those that are neutral from the cartel angle, for example, if an impairment of competition results only from the interplay of several clauses." [34]

The Import-Ban Privileges of Trademark Holders Under the National Law of EEC Member Countries

Underlying the basic ruling on the illicit aspects of the supplemental trademark agreement is the fact that the industrial property law of some countries (occasionally bolstered by national customs law) [35] arms the holder of the trademark with the privilege of barring imports of goods labelled with that mark, even though they are "genuine" goods, emanating from the same manufacturer as the goods sold by the trademark-holder. Whether or not French law confers such an import-ban privilege on the holder of a trademark is not perfectly clear, as is indicated by a close scrutiny of the *Grundig-Consten* case. The superficial implication of the rulings discussed below is that, absent article 85, French law would confer such import-ban privileges on those holding the French trademark.

If such broad powers are in fact conferred by trademark law, France is more generous to trademark holders' control over foreign imports than many of the other West European countries. There has been a long-standing conflict between two schools of thought about trademark and unfair competition law—between the "territoriality"

33 2 *id.* ¶ 8046 at 7627. Other contract clauses whose fate under the anti-cartel ruling expressly concerned the enterprises were "the purchase restriction imposed upon Consten [presumably the undertaking not to deal with competing products] and . . . numerous other contract clauses which deal with terms of sales [presumably including the continued exclusivity of Consten's distributorship], terms of delivery, terms of payment, retention of title, guarantee, assumption of risk, applicable law, and jurisdiction of courts." *Id.* at 7665.

34 *Id.* at 7665.

35 See, *e.g.*, EBB, REGULATION AND PROTECTION OF INTERNATIONAL BUSINESS 460-96 (1964).

and "universality" concepts with respect to the rights of exclusive importer-distributors. Case law since World War II has tended to favor "universality," particularly in Germany and Switzerland.[36] In general, the territoriality school views the holder of a registered trademark (or the exclusive-distributor-licensee under the trademark) who imports a product manufactured under a corresponding trademark registered in another country, as entitled to bar others from importing his supplier's genuine foreign-made goods. The universality school, by contrast, regards the world as the domain for the manufacturer-original holder of the trademark in the country of origin of the product, with the result that his trademark rights and privileges are protected only against spurious products in his own and other countries, despite his acquisition of separate national registrations of the trademark in other countries. Correspondingly, his exclusive-distributor licensee or transferee in another country does not possess the right to bar imports by others of the genuine trademarked product. Thus the German Supreme Court recently ruled that the German exclusive distributor of "Maja" soap products (manufactured in Spain), who also held an exclusive license to use the trademark "Maja" registered in Germany by the Spanish manufacturer, could not bar parallel imports of products bearing the corresponding mark.[37]

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[36] Although Switzerland is not an EEC country, its commentary literature and judicial decisions on this question appear to be very influential in the EEC countries.

[37] Judgment of Jan. 22, 1964 (Bundesgerichtshof), in [1964] GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, AUSLANDSUND INTERNATIONALER TEIL [GRUR] 202 (Ger.). See also EBB, *supra* note 35, at 490-93 (reprinting excerpts from SABA, Radio-, Televisions- & Elektro A.G. v. Eschenmoser, 84(IV) *Entscheidungen des Schweizerischen Bundesgerichtes, Amtliche Sammlung* [BGE] 119 (Kassationshofes 1958 (Switz.)); 51 TRADEMARK REP. 141 (1961) (commenting on Philips A.G. v. Radio Import G.m.b.H., 86(II) BGE 270 (Bundesgericht 1960) (Switz.)). If the product were one manufactured separately in the second country, rather than simply imported there, the trademark-holder would be more successful in barring imports of the product from other countries; among other things, variations in product specifications in the factories located in different countries may serve as a reasonable basis for maintaining this territorial right. See, *e.g.*, EBB, *supra* note 35, at 482-87 (reprinting excerpts from Seifenfabrik Sunlight A.G. v. Migros-Genossenschaftsbund & Konsorten, 78(II) BGE 164 (Bundesgericht 1952) (Switz.)); *id.* at 494 (summarizing with comment Istituti Burlando v. Palmolive S.P.A. (Corte di Cassazione 1956) in [1957] RIVISTA DELLA PROPRIETA INTELLETUALE E INDUSTRIALE 71 and in [1957] II RIVISTA DI DIRITTO INDUSTRIALE 358 (Italy)).

For an interesting contrast to the German Supreme Court's decision in *Maja*, see *Survey of Literature*, 2 COMM. MKT. L. REV. 109, 118 (1964) (noting Judgment of Jan. 17, 1964 (Oberlandesgericht, Hamm), in [1964] AUSSENWIRTSCHAFTSDIENST 124, and in [1964] GRUR 636 (Ger.)). In the latter case, the German holder of the trademark *Persil* successfully enjoined a Dutch exporter from bringing "Persil" products into Germany. Article 85 could not properly be invoked against the trademark import-ban privilege, the court asserted, since that article is not directed "against those limitations to interstate commerce which follow from the trademark laws, which are built up according to the principle of territoriality."

As to the scope of the import-ban privilege of the trademark holder under German trademark law, however, the apparent inconsistency between the *Maja* and *Persil* decisions disappears on closer examination. Unlike the *Maja* situation, the holder of the German mark *Persil* was not a foreign manufacturer who also held the cor-

The metaphysical rationales of the two concepts are absorbing and infinitely complex, but they are not a matter of extended concern for the purposes of this article. Those interested in the reasoning of the two schools may probe further elsewhere.[38] What is relevant for this study is the trend toward applying the universality principle to curb the import-ban powers of exclusive distributors within national territories in Western Europe, a striking parallel to the conclusion of the EEC Commission that the Treaty itself, by virtue of article 85, curbs the international trade restrictive efforts of exclusive distributors relying upon national trademark privileges. Indeed, it may well be that the trade-integrating result of the universality principle springs from much the same judicial attitude towards international trade and private restrictive trade practices as the underlying reasoning of those who drafted and those who are now implementing the Treaty.

A potential source of conflict between national and treaty law in the fields of cartel, trademark and unfair competition law may be minimized by virtue of the fact that in at least some of the member countries, the development of national law recently has proceeded along lines paralleling those implicit in Common Market law. It should also be noted, as a further parallel development, that a committee of representatives of the six Common Market countries prepared a Draft Convention on European Patent Law in 1962, and trademark experts in 1964 completed a draft (as yet unpublished) of a convention for a system of European trademarks. It is intended that the Trademark Convention, like the proposed Patent Convention, will result in a Common Market registry for a trademark that would have as its "territory" the whole Common Market area. In effect, this would be a trademark based on the universal principle with respect to inter-country relationships within the supranational area, an area within which exclusive distributor-importers—even under national law con-

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responding mark abroad. Nor was the holder of German *Persil* a mere distributor of a foreign product imported into Germany. Rather, it was the German manufacturer of the product involved. Moreover, there was not even a close relationship between the German and Dutch manufacturers, the Dutch company having obtained possession of the mark in The Netherlands after governmental confiscation of the mark during World War II.

[38] See generally EBB, *supra* note 35, at 460-96; Derenberg, *Territorial Scope and Situs of Trademarks and Goodwill*, 20TH CENTURY COMPARATIVE AND CONFLICTS LAW 419 (Nadelmann ed. 1961); Derenberg, *The Impact of the Antitrust Laws on Trademarks in Foreign Commerce*, 27 N.Y.U.L. REV. 414 (1952); Vandenburgh, *The Problem of Importation of Genuinely Marked Goods Is Not a Trademark Problem*, 49 TRADEMARK REP. 707 (1959); Waelbroeck, *Trademark Problems in the European Common Market*, 54 TRADEMARK REP. 333 (1964). Recent foreign literature is increasingly more abundant. See, *e.g.*, Benucci, *Abuso del Marchio (con particolare riguardo a intese e practiche restrittive della concorrenza)*, 62 RIVISTA DEL DIRITTO COMMERCIALE 251, 272 (1964); Birk, *Die Grenzen des Territorialitätsprinzips Warenzeichenrecht*, 17 NEUE JURISTISCHE WOCHENSHRIFT [N.J.W.] 1596 (1964); Röttger, *Das Territorialitätsprinzip im Warenzeichenrecht*, [1964] GRUR 125.

sidered in isolation—could not bar imports of a product manufactured and affixed with the corresponding trademark in another EEC country.[39]

By contrast, American courts, after an early adherence to the universal view with respect to exclusive distributor-importers,[40] moved to the territorial viewpoint expounded by Mr. Justice Holmes in the *Bourjois* case,[41] apparently under the influence of a very considerable and undoubtedly amply-grounded respect for the power and value of advertising in the American market place. The difference between the American and West European attitudes may be explained by the sheer factor of geographical location. The United States is far removed from most of the industrialized countries from which we import branded products; in contrast the physical closeness of the EEC countries tends towards the creation of a single market in terms of the development of good will in the distribution field. The American viewpoint, however, is far from consistently "territorial," as indicated by the history of ever-changing and ever-ambiguous Treasury Department Regulations with respect to trademark-holder protection against imports in cases where the holders of the foreign and domestic trademark registrations are closely related.[42]

The Supplementary Trademark Agreement: Its Utility and Disutility Under National as Opposed to Treaty Law

In the case at hand, Etablissements Consten had been licensed to use the trademark "GRUNDIG" by the German Grundig distributing company, which owns that trademark in Germany, France, and all other relevant countries. Consten had also been put in possession of the trademark GINT (Grundig International), which had been registered in France in Consten's name with the understanding that at the termination of the exclusive agreement it would assign the GINT trademark to Grundig or allow it to expire. The GINT trademark, as well as the GRUNDIG trademark, is affixed to all appliances manufactured by Grundig, including those sold in Germany, and, we are informed by the EEC Commission, "was introduced by Grundig shortly after it lost a decision in The Netherlands, in December 1956, against a parallel importer." The Netherlands Hoge Raad (Supreme

39 See Ladas, *Recent Trademark Developments in Foreign Countries*, 55 TRADEMARK REP. 689, 699-705 (1965). Whether the European Trademark would be based on the universal or on the territorial principle with respect to the existence or absence of import-ban privileges vis-à-vis imports from outside the Common Market is, of course, quite another question.

40 Apollinaris Co. v. Scherer, 27 Fed. 18 (C.C.S.D.N.Y. 1886); EBB, *supra* note 35, at 461-63.

41 A Bourjois & Co. v. Katzel, 260 U.S. 689 (1923).

42 See EBB, *supra* note 35, at 467-81, and articles cited therein.

Court) had ruled at that time that a Dutch importer-distributor licensed under the GRUNDIG trademark could not ban imports of the Grundig products by others, on the ground that the trademark owner—Grundig—had exhausted its rights to control the distribution of the product once it had put the trademarked products into commerce.[43] To avoid this result, the Grundig enterprise adopted the somewhat elaborate circumvention of registering the additional mark GINT in The Netherlands in the name of the exclusive distributor. It followed the same practice in the other countries to which it exported, on behalf of each of its national distributors.[44] Local rather than absentee ownership of the GINT mark, coupled with the fact that the court simply regarded the Dutch owner as a completely separate entity no matter how close its economic and financial ties with the German manufacturer, led to the application of the territorial principle and to the grant of import-ban privileges.[45]

The very fact that the device of employing a supplementary trademark to be owned by the national distributor had been conceived for the specific purpose of bolstering the distributor's absolute territorial protection under the national law, rather than for the essential trademark purpose of designating the source of origin of the goods (the GRUNDIG trademark being sufficient for that purpose), condemned it in the eyes of the EEC Commission and the court as being patently and essentially a restrictive practice device. Moreover, the restriction took the form of partitioning the Common Market along national boundary lines.

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43 Grundig v. Prins, [1957] GRUR 259.

44 The Conclusions of Advocate General Karl Roemer, presented to the Court of Justice on April 27, 1966, describe the trademark arrangement more fully than do the preceding opinions. Grundig had obtained an international registration for GINT under the Madrid Arrangement of 1891 for the International Registration of Trademarks, but thereafter relinquished the derivative rights which it would otherwise have enjoyed in France (an adherent to the Madrid Arrangement), in favor of Consten. CCH COMM. MKT. REP. ¶ 8046 at 7658, 7668, 7669. On the Madrid Arrangement generally, see 56 TRADEMARK REP. 290 (1966) and EBB, *supra* note 35, at 425-38 (1964). The fact that Grundig had registered the GINT mark under the Madrid Arrangement, rather than simply obtained or authorized distributors like Consten to obtain separate registrations in each national territory, seems fortuitous in this case.

45 Judgment of Dec. 4, 1957, GRUR, 557 (Court of the Hague 1959).

In a subsequent decision, N.V. Technische Handelsonderneming Nibeja v. N.V. Graetz Nederland, 11 Comm. Mkt. L.R. 366, 370-71 (Gerechtshof, Amsterdam 1964), the Gerechtshof ruled that the same principle applied to the transfer of a Dutch trademark by the Dutch branch of a German manufacturer (Graetz K.G.) to a Dutch company, N.V. Graetz Nederland, that had been established by Graetz K.G. and by its sole distributor in The Netherlands. The facts that N.V. Graetz purchased the business of Graetz K.G.'s Dutch branch, including the trademarks, for only 1,000 Dutch guilders, and that there was a "possible close economic cooperation and a common interest" between the German and Dutch Graetz enterprises were deemed not to demonstrate that the establishment of the latter was a "bogus transaction," nor to derogate from its entitlement to exercise import-ban privileges based on its theoretically independent ownership of the Graetz trademark. *Id.* at 371. A similar result was reached by the Court of Appeal in the Hague in Grundig Nederland N.V.

The Import-Ban Privilege Under French Trademark Law; the Clash Between Treaty Anti-Cartel Law and National Trademark Law

Thus, the national trademark law and the Common Market anti-restrictive practice treaty law come into apparent conflict, and where a conflict exists treaty law must prevail. However, the nature and extent of the "apparent" conflict is not clear. The uncertainty results from the fact that Consten brought two different suits in the Commerce Tribunal of the Seine—the first, a suit against the parallel importer, UNEF, claiming unfair competition; the second, against UNEF for infringement of the GINT trademark. No hearing had been held in the trademark action when the Commission made its 1964 ruling.[46] Nevertheless, much of the argument before the Court of Justice was couched in terms implying that the French decision reviewed by the Paris Court of Appeal was grounded on trademark infringement as well as unfair competition.[47] Of course, in view of the Commission's ruling on the relevance of the GINT trademark, the Commission and Court of Justice inevitably had to consider the likely though not established proposition that French trademark law provides for import-ban privileges whose exercise was barred by the Commission's ruling. The fact that the case came before the Court of Justice without a clearcut ruling by a French court on the trademark import-ban question is emphasized by the repeated reference in argument to Italian and Dutch case law on this point,[48] rather than to French precedents. The Italian and Dutch cases were cited as a basis for the surmise that in the instant case the division of the trademark ownership rights between the German manufacturer, Grundig, and the French distributor, Consten, would strengthen the judicial protection accorded to Consten against parallel imports. Grundig had argued that such judicial protection might have been forthcoming in France even if it had retained its ownership of the French mark, GINT—this argument was made in support of the proposition that the agreement covering the transfer to Consten of the GINT mark had not been essential to create the import-restrictive effect of the mark under French law.[49] What basis

v. Ammerlaan, 3 Comm. Mkt. L.R. 373 (Court of The Hague 1964). This device would not have been so successful in Switzerland, where the Swiss Supreme Court refused import-ban protection to the Swiss Philips company even when it held a national registration of the Philips trademarks in its own name. See 51 TRADEMARK REP. 141 (1961). The contrast between the Swiss and Dutch judicial views is well described in Waelbroeck, *Trademark Problems in the European Common Market*, 54 TRADEMARK REP. 333, 348-55 (1964).

46 Decision of the Commission of Grundig-Consten Agreement, 1 CCH COMM. MKT. REP. ¶ 2743 at 1862.

47 See the Conclusions of Advocate General Karl Roemer, 2 *id.* at 7658.

48 See, *e.g.*, 2 *id.* at 7632, 7670.

49 2 *id.* at 7632.

may exist in case law for this extreme territorial reading of French trademark law is not known. But, even if this trademark view were well grounded, it could not make irrelevant to the issue under treaty law the pattern of conduct and the restrictive effect sought and apparently achieved by Grundig and Consten.[50] The Court, in upholding the Commission's ruling on the tainted use of the GINT mark as a restrictive trade practice, simply noted that "Consten's registration in France of the GINT trademark, which Grundig affixes to all of its products, is designed to fortify the agreement's built-in protection against parallel imports with the protection arising out of industrial property law." [51]

Thus, inherent in whatever import-ban privileges a Western European trademark holder may possess is the possibility of conflict between the privileges conferred by national law and the competitive requirements imposed by the Treaty, under article 85. Confronted by American antitrust decrees requiring action or inaction in foreign countries with respect to industrial property rights in those countries, the resistance of the European courts and executive departments to such derogations from national patent and trademark rights has been vehement, although not always fully effective.[52] What kind of accommodation of national and community interests can be expected with regard to private trade restrictions that rest upon import-ban privileges flowing from national trademark rights held by a sole distributor?

At one extreme, the answer might be that such "ancillary" trade restraints, representing time-honored privileges associated with industrial property rights, should be preserved by the treaty makers. Indeed, there is a school of thought that finds in article 36 of the Treaty support for its conclusion that the anti-cartel provisions of article 85 are qualified to this extent.[53] Article 36 cites "prohibitions or restrictions in respect of importation . . . which are justified on grounds of . . . the protection of industrial and commercial property"

[50] See the Conclusions of Advocate General Karl Roemer, 2 *id.* at 7670.

[51] 2 *id.* at 7653.

[52] *Compare* the protest made by The Netherlands' government against a proposed decree involving N. V. Philips, and the reaction of British courts against directives of American courts concerning British-held patents acquired from DuPont, *with* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), all discussed in EBB, *supra* note 35, at 571-77, 586-98, 623-29.

[53] See, *e.g.*, OBERDORFER, COMMON MARKET CARTEL LAW 50 (1963); Ehlers, *Export und Re-Import-verbote in Lizenvertragen aus der Sicht des EWG-Kartellrechts*, GRUR, 424-32 (1963), noted at 3 COMM. MKT. L. REV. 382-83; Hepp, *Les Conventions de License Exclusive au regard des Règles de Concurrence de la C.E.E.*, SOCIAAL ECONOMISCH WERGEVING 85 (1964), commented upon in 2 COMM. MKT. L. REV. 118 (1964); Maddock, *Know-How Licensing Under the Antitrust Laws of the United States and the Rome Treaty*, 2 COMM. MKT. L. REV. 36, 65-66. See also the ruling of the Oberlandesgericht Hamm in the *Persil* case, *supra* note 37.

as grounds for exemption of certain trade restrictions from the effect of specified articles of the Treaty. But, as pointed out by P. VerLoren van Themaat,[54] Director-General of Competition of the EEC Commission, the exemption expressly relates only to articles 30 to 34, which deal with quantitative restrictions imposed by member states on imports, and does not concern article 85 standards of conduct in the Common Market area. Grundig and Consten unsuccessfully cited article 36 in their appeal to the Court of Justice.[55] They were equally unsuccessful in seeking to invoke article 222, which provides that "the Treaty shall in no way prejudice the property system in the Member States."

The approach of the EEC Commission appears to be that, in the case of exclusive distribution agreements that carve out *national* territories for different distributors, the national-law import-ban privileges of trademark-holders should be deemed curtailed by the article 85 strictures against private arrangements that distort the freely competitive market of the EEC. Would this curtailment of the national-law privileges of the trademark-holder be required by the EEC Commission even in the absence of a formal trademark agreement such as that present here? Or even if the exclusive distribution arrangements did not expressly exact from other purchasers of the product in question an undertaking not to export? The *Grundig* case itself involves (a) nationally delineated exclusive distributorships, (b) parcelling out to national distributors territorially defined rights in a trademark common to a multi-country market, (c) a formal trademark agreement, and (d) commitments not to re-export. But the implication of the ruling appears to be that, even if the last two factors were absent, the Commission would regard Consten's trademark rights in France as necessarily limited by article 85 for the same reasons offered in the ruling.

Indeed, in the exercise of its power to make regulations to enforce article 85, the Commission now appears to have no doubt that the mere existence of such trademark arrangements, used to bolster absolute territorial protection for exclusive distributorships, infringes article 85. Regulation No. 67/67, issued by the Commission to be effective as of May 1, 1967, treats certain exclusive distribution agreements as exempt under article 85(3) of the Treaty from the anti-cartel provisions of article 85(1) until December 31, 1972, but this exemption shall apply only if the possibility of parallel imports is provided for "in order that consumers may share in the advantages result-

[54] *Article 36 in Relation to Article 85 and Patent Licensing Agreements*, 1 COMM. MKT. L. REV. 428 (1964).
[55] 2 CCH COMM. MKT. REP. 7654.

ing from the exclusive dealership." The exemption shall not apply when the contracting parties make it difficult to obtain parallel imports, "particularly when the contracting parties exercise industrial property rights to prevent dealers or consumers from obtaining in other areas of the Common Market supplies of the products under contract properly marked and marketed, or from selling them in the contract territory." [56]

Does the Grundig *Decision Turn on the Existence of the Supplementary Trademark Agreement?*

In the instant case, did anything turn on the existence of a supplemental agreement providing for the restoration of the GINT mark to Grundig or for its cancellation on the termination of Consten's exclusive distributorship? The existence of the supplemental agreement emphasized the relationship of the trademark to the system of absolute territorial protection, but it is difficult to see why or how the absence of so explicit an agreement would have made it permissible

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[56] 1 *id.* ¶ 2727, at 1819, 1821.

By contrast, article 4(2)(ii) of Regulation 17 of February 6, 1962, see note 4 *supra*, stated, far more vaguely, that agreements between two enterprises might raise no article 85 problem if the sole effect of the agreement is (a) to restrict resale price or other conditions of trading in the resale of goods obtained by one from the other, or (b) "to impose restraint on the rights of any person acquiring or using industrial property rights" including patents or trademarks. The "Manual to Firms," the Commission's "'Practical Guide' to Articles 85 and 86 of the EEC Treaty," issued September 2, 1962, added the commentary that the resale agreements under article 4(2)(ii)(a) were exempt from compulsory notification to the Commission only "in so far as they do not contain any additional clause involving, for instance, a ban on exports." 1 CCH COMM. MKT. REP. ¶ 2819, at 1970. As for the second category of two-party agreements generally exempt from compulsory notification—license agreements—the Practical Guide commented that this classification would include those "restrictions imposed on the licensee which are inherent in the exercise of the protected industrial property right itself, *i.e.*, which stem from the fact that the licensor is exercising his protected right within the limits prescribed or allowed by domestic law" but "they must be restraints on the exercise of industrial property rights . . . . Restraints which no longer have any real bearing on the exercise of the industrial property right, *i.e.*, which are no longer directly related to its exercise, are not affected" (that is, are not automatically exempted from the compulsory notification requirement), and such non-exempt restraints might exist where the licensee "undertakes not to export to another Member State; undertakes to impose competitive restrictions on his customers." 1 *id.* at 1970-71.

A close comparison of Regulation 17, the Practical Guide, and the draft proposed Regulations of August 26, 1966 demonstrates the progression and clarification in the Commission's thinking on the subject. The Court's decision in Société Technique Minière v. Maschinenbau Ulm G.m.b.H., 2 CCH COMM. MKT. REP. ¶ 8047 (1966), suggests that, even so, some residual problems may remain. An exclusive agreement may give rise to an article 85(1) problem "because of a specific factual situation." *Id.* at 7697. Such a "situation" might, for example, be actual conduct designed to prohibit exports and exclude imports, despite the absence of contractual provisions calling for such conduct. It was argued before the Court in *Maschinenbau* that such restrictive practices "are the very conditions for the existence of an exclusive distributorship and do not need to be spelled out to be imposed on the parties." *Id.* at 7692. Such a course of conduct, if shown to exist, would violate the prohibition contained in new Regulation No. 67/67 against the taking of measures that would block parallel imports.

for Consten to use its possession of GINT as an import barrier. Nevertheless, the extensive arguments presented by the parties and by the Advocate General in his conclusions before the court indicate that they regarded its existence as a key element in the case for one purpose or another. This factor was deemed to bear either on the establishment of a violation of article 85, or on the justification (vis-à-vis articles 36 and 222) of the Commission's injunction barring the use of the GINT mark to curb parallel imports. The presence of the supplemental agreement was also cited by the Court of Justice in these two different contexts as additional evidence of the restrictive purpose of the overall arrangement and as involving overt action by the parties beyond the operation of French law.[57] However, it may be doubted that the Court treated the formal document itself as more than a symbol or makeweight. Even a simple transfer or cession to Consten of the French trademark right in GINT might well have been deemed sufficient to constitute either a "concerted practice" by the parties or an off-shoot of the basic restrictive "agreement" within the meaning of article 85, and hence improper to the extent used to bar parallel imports, in the context of the instant case. The essential factors are: (a) an exclusive distribution network with (or perhaps even without) export-ban undertakings by the various national distributors, (b) the peculiarly strong French doctrine of unfair competition with respect to third parties having notice of an exclusive distribution arrangement and (c) the inherent import-restrictive potential of the mark under French trademark law (a potential which all parties assumed to be present).

European attorneys who have followed the Grundig litigation closely and an independent evaluation of the arguments of the litigants suggest that the point is worth detailed scrutiny. At least some of the European legal fraternity think, in apparent contrast to the Commission's view expressed in Regulation 67/67, that if Grundig and Consten had carefully refrained from entering into any provable agreement on the GINT mark itself, the nature of the ruling, or at least the nature of the decree, would necessarily have been different. If this be so, Grundig and other European manufacturers in quest of absolute territorial protection for national exclusive distributors have a readily available escape clause of some sizable dimensions—an escape clause founded on what to an American appear to be very formalistic grounds. To be sure, the Netherlands court decisions of 1956 and 1962[58] drew an equally formalistic distinction between the status of the German manufacturer who retained the Dutch trademark Grundig

[57] *Id.* at 7654.
[58] See text accompanying notes 43-45 *supra*.

and that of a separate Dutch company which subsequently held the trademark right in its own name. The German manufacturer was denied and the Dutch company was granted import-ban rights under Dutch trademark law. The distinction seems all the more formalistic in those cases because the Dutch corporate trademark-holder might well have been deemed to be the alter ego of the German manufacturer. But such formalistic distinctions, though apparently acceptable with respect to the trademark law doctrines of some countries, are of doubtful significance to the application of treaty anti-cartel law.[59] Dr. Fernand-Charles Jeantet, a European scholar in this field, seems to sense the validity of this proposition in one part of his recent analysis of the *Grundig* and related decisions of the Court of Justice. On the basic finding of a violation of article 85, Dr. Jeantet views the Court as having used an objective, economic-effect criterion in determining the significance of the GINT transfer to Consten. The Court did not confine its evaluation to a single clause (such as the re-export ban commitments) considered in the abstract, but looked at the concrete case as one

> in which absolute territorial protection attained its maximum effectiveness as a result of a combination of factors. These are three in number: the . . . [export-ban clauses], their especially strong effect on French territory by reason of [French] case-law on the reach of exclusivity clauses with respect to third persons who are unfairly competitive . . . and finally the usage made here of the trademark GINT to lock up completely the market as a result of the exclusivity of the trademark right. Thus it is the *result obtained*, of absolute territorial protection, which is condemned, not this or that contractual means considered by itself. . . .[60]

Inferentially, Jeantet seems to regard the transfer of GINT to Consten, in the circumstances of the case, coupled with the use or ability to use the mark to bar parallel imports, as more significant for article 85 than the existence of the supplemental agreement.

59 German anti-cartel law, which stigmatizes certain "agreements" but not (unlike article 85 of the Treaty) "concerted practices," has been subjected to administrative and judicial vacillation as between formalistic and substantive interpretations of "agreements." See EDWARDS, TRADE REGULATIONS OVERSEAS 206 (1966); Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects*, 62 COLUM. L. REV. 1, 15-19 (1962).

60 *Esquisse de la jurisprudence de la Cour de Justice des Communautés sur les accords restreignant la concurrence* [*Outline of the Case-law of the Court of Justice of the European Communities on Agreements Restraining Competition*], in JURIS CLASSEUR PERIÓDIQUE, Oct. 26, 1966, 2029, at § I, ¶ 3. Another portion of the article suggests that the existence of the supplemental agreement was, nevertheless, useful to the Court in overcoming objections that it would otherwise be permitting the Commission to intervene unwarrantedly in industrial property law, an area generally reserved by the Rome Treaty to the jurisdiction of the member states. *Id.* at § I, ¶ 4. See note 67 *infra*.

Grundig and Consten, in their argument before the Court, contended that the Commission had erred in finding that the supplemental trademark agreement constituted an article 85 violation. They argued that the January 13, 1959 document was merely a unilateral declaration by Consten rather than an agreement, and that its content, an assurance that Consten would restore the GINT rights to Grundig or cancel the mark upon termination of the exclusive distributorship contract, could have no influence upon competition in the French market.[61] The Advocate General, in his Conclusions, argued that this difficulty was overcome by the Commission's finding that "the registration of the GINT trademark is based on an agreement of January 13, 1959, which *in part* was reduced to writing, which would indicate that besides the declaration of January 13, 1959, there must exist additional oral (perhaps only tacit) agreements concerning the trademark."[62] His reference to a "tacit agreement" comes close to recognition of a less formalistic view—that, in the full context of the market-fragmentation plan, the existence of the trademark transfer, even without an explicit agreement, must have been intended to bolster that plan. This interpretation of his views is confirmed by the Advocate General's next observation: "This impression is strengthened by the reference in the decision's statement [*i.e.*, the Commission's statement] of reasons as to the origin of the GINT trademark. . . . Furthermore, it cannot be disputed that *concerted* action on the part of the Grundig and Consten companies was indispensable" even to make it possible for Consten to register GINT in its own name.[63] Is there an echo here of the presumptive "per se violation" reasoning adopted by American courts to deal with certain evidentiary problems under the Sherman Act? It is notable that the Court, in finding an article 85 infringement, spoke simply of the re-export undertakings plus "Consten's registration in France of the GINT trademark, which affixes to all of its products"—rather than specifying the supplemental trademark agreement—as "designed to fortify the agreement's [*i.e.*, the basic exclusive distribution agreement's] built-in protection against parallel imports with the protection arising out of industrial property law."[64]

[61] 2 CCH Com. Mkt. Rep. ¶ 8046, at 7630, 7668.

[62] *Id.* at 7668.

[63] *Ibid.*

[64] *Id.* at 7653. By contrast, the Court has held elsewhere, in a declaratory judgment, that the mere existence of a sole distributorship agreement stripped of re-export ban undertakings and other impediments to parallel imports into the country of the sole concessionaire cannot be deemed automatically to infringe article 85(1). In such a case, the application of article 85(1) is dependent on a showing "on the basis of all the objective elements of law or of fact taken together" that there is "a sufficient degree of probability" that the agreement "is capable of partitioning the market in certain products between Member States and of thus rendering the economic interpenetration sought by the Treaty more difficult". Among the factors to be particu-

Although the Court refers elsewhere to the violation as arising out of the basic agreement "as well as from the supplementary agreement on the GINT trademark," [65] it places no emphasis on the existence of the formal "supplementary agreement" in contrast to the existence of the trademark arrangement itself.

The Court discusses the supplementary agreement somewhat more fully in connection with a rather different point, but it may be using the term simply to indicate the existence of some understanding as to the trademark. As previously noted, Grundig and Consten claimed that the Commission had violated articles 36 and 222 in

> declaring that the agreement on the registration of the GINT trademark in France serves to ensure absolute territorial protection for Consten and in thereby prohibiting Consten from invoking rights stemming from national trademark law to prevent parallel imports. More particularly, the plaintiffs [Grundig and Consten] hold that the effect on competition objected to results not from the agreement but from the registration of the trademark under French law, which creates for the holder an original right in the trademark from which, under national law, the absolute territorial protection is derived.[66]

In rebutting this argument, the Court emphasized the abusive trade-restrictive manipulation of the trademark to serve as a means to make it possible to control and prevent parallel imports. It thus distinguished the enjoining of such abuse of trademark rights from the article 222 pledge that the Treaty "shall in no way prejudice the property system in the Member States." To make clear the existence of a competition-distorting abuse of the trademark, the Court emphasized Grundig's indispensable participation in an agreement with Consten to permit the latter to register GINT in its own name in France. But such reference to trademark "agreement" is not necessarily pegged to the written supplemental agreement of January 13, 1959, which, after all, mentions only Consten's obligation to return or cancel the mark at the end of its distributorship. It is keyed, rather, to the overall understanding between Grundig and Consten as to the purpose and effect of the trademark arrangement, as that understanding was discerned by the Court from the very nature of the circumstances

larly taken into account in making this appraisal is "whether the clauses protecting the exclusiveness are rigid or possibilities are left open for other channels of trade in the same product through re-exports and parallel imports." Société Technique Minière v. Maschinenbau Ulm G.m.b.H., CCH COMM. MKT. REP. ¶ 8047, at 7695-96 (1966).

65 *Id.* at 7654.

66 *Ibid.*

of the transaction, given the background of the Dutch *Grundig* decisions.[67]

To be sure, if Consten had merely adopted a trademark of its own that Grundig permitted it to affix in France, and if the mark did not correspond with a like-sounding mark used generally by Grundig outside of France, there would presumably have been no claim by either Commission or Court of an article 85 violation based on trademark abuse. But that procedure would have been very different in intent-and-effect from the GINT arrangement.[68] Applying the intent and effect reasoning still further, the objection to the GINT arrangement as a means to bolster market Balkanization should survive whether or not any portion of the Grundig-Consten trademark accord was reduced to writing. More speculative, but perhaps inherent in this reasoning is the belief of this American observer that the existence of both a network of exclusive distributorships, each confined to a national territory, and a trademark arrangement of the GINT-Grundig type, even in the absence of explicit re-export ban undertakings and a written undertaking to restore the trademark, would be found to infringe article 85 by both the Commission and the Court. Certainly if the Commission found that a distributorship trademark arrangement which included the parcelling out of trademarks among the territorial distributors implied a set of commitments not to re-export, and if by combining the explicit with the tacit agreements it concluded that the trademark-*cum*-exclusive-national-distributorship arrangement provided absolute territorial protection, it would be difficult for the Court to hold such fact-finding unwarranted.[69] The negative implication of the Commission's Regulation of May 1, 1967 [70] is that the Commission might

[67] Dr. Jeantet, in his discussion of *Grundig,* emphasizes this reference to the trademark agreement as enabling the Court to substantiate its claim that the GINT arrangement constituted "fraude à la loi"—that is, abuse of right at trademark law—and as enabling it in its decree to escape the charge that it has "encroached on the domain reserved to the sovereign jurisdiction of the Member States." JURIS CLASSEUR, *supra,* note 60, § I, ¶ 4. Whether or not Jeantet intended to refer technically to the existence of the supplementary agreement, his point would be equally well made by reference to the trademark arrangement as such, without regard to Consten's written declaration.

[68] Another variation of the trademark arrangement, of course, might simply be Grundig's retention of French registration rights in the GRUNDIG and GINT marks, with the local "authorized" distributor being formally or informally licensed or permitted to import and sell the products so marked. Whether or not this would constitute an attempted "agreement" or "concerted action" to misuse the trademarks for added territorial protection, becomes a moot point since many if not all Common Market countries would withhold the import-ban privilege in those circumstances. See, *e.g.,* the Netherlands, German and Italian decisions discussed *infra* at p. 883. French trademark law presumably follows this body of case-law, and, indeed, it was precisely because of this view that Grundig put the GINT mark into Consten's hands in 1959.

[69] Recall the Court's reasoning in *Technique Minière, supra* note 64.

[70] See text accompanying note 56 *supra.*

find that this kind of trade-restrictive conduct violates article 85(1), and that the Regulation would not accord such conduct automatic "class" exemption under article 85(3).

Export Bans Without Trademark Transfers: National Unfair Competition Doctrines

What combined national-treaty-law result would flow from a distribution arrangement in the Common Market accompanied by overt export-ban agreements, without supporting possession of a trademark registration by the exclusive distributor? On the national law plane, considered apart from treaty law, the Dutch cases suggest that—at least in The Netherlands—the parallel importer would not be barred on unfair competition grounds.[71] In the event that national law in another EEC country[72] extended unfair competition concepts to protect the exclusive distributor from parallel imports, even without the trademark support, the logic of the EEC Commission's opinion in *Grundig* would indicate that article 85 of the Treaty should be deemed to override and curtail such a view of unfair competition. This conclusion may seem inconsistent with the Commission's ruling in the *Grosfillex* matter,[73] where it granted "negative clearance" to this kind of distribution arrangement, finding that the arrangement did not violate article 85(1) of the Treaty. In that case, however, the contract ran between a French manufacturer of plastic products and a Swiss distributor, and the exclusive territory was Switzerland, a non-EEC country. The Swiss distributor undertook, *inter alia,* not to resell these or other competitive products in the Common Market area. With respect to the Grosfillex products themselves, the Commission concluded that article 85(1) would not be infringed, on the ground that such resale, involving as it would a recrossing of the customs frontier between the Common Market and Switzerland, would not be commercially feasible. Whether or not the Commission was correct in its analysis of the minimal restrictive impact of the agreement,[74] its analysis does indicate that it would be prepared to distinguish the Grosfillex situation from a purely Common Market arrangement.

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[71] Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V., 1 Comm. Mkt. L.R. 205 (Hoge Raad (Dutch Supreme Court) 1962). See also Ebb, *Common Market Law in Process,* 41 WASH. L. REV. 489, 503-05 (1966).

[72] *E.g.,* France in the instant case, as indicated by the discussion, *infra* p. 880, of the French doctrine of *"opposabilité aux tiers"* under the law of unfair competition.

[73] See Decision of the Commission of the European Economic Community, March 11, 1964, 3 Comm. Mkt. L.R. 237 (1964).

[74] See Ebb, *supra* note 35, at 677-78. See also Fulda, *The First Antitrust Decisions of the Commission of the European Economic Commission,* 65 COLUM. L. REV. 625, 627 (1965).

The 1962 opinions of the French courts in the first Consten suit (which ultimately reached the Court of Justice), and in a similar suit against la Société Willy Leissner at Strasbourg, do not turn upon the ground that trademark rights of the sole distributor were infringed in any technical sense by the parallel imports. Instead, the unfair competition charge that underlay the trial court's injunction against UNEF was based on the broader ground that the parallel importer had unjustifiably injured the sole distributor because it had knowledge of the sole agency agreement and willfully disregarded it. To be sure, the finding of injury was based in large part on the ground that UNEF was unfairly exploiting Consten's trademark rights. However, this finding was cast not in terms of trademark infringement as such, but rather in the broader context of the unfair advantage taken by UNEF of an exclusive importer's obligation "to assure advertising to make a trademark known, a warranty service, [and] post-sale servicing, which perhaps contributes to the good reputation of the mark." [75] By use of this expansive definition of unfair competition, and in the absence of legislation similar to state fair trade laws in the United States which bind "non-signers" of a distribution agreement, the court indicated that it would use its equitable powers in the broadest possible manner to protect a closed system of distribution which it viewed as operating to protect consumers from interloping distributors. Quoting an earlier ruling of the Paris Court of Appeal, the trial court noted that

> if the exclusive [distributor] contract achieved the objective of extensive advertising, sale of the products by a third party constitutes a refusal to recognize the exclusivity and suffices to characterize the competition [as] unfair, and, generally speaking, the case law and the textbooks agree that an act, whereby a person acquires rights knowing that he thereby encroaches upon the vested interest of another, constitutes a tort.[76]

[75] *Accord,* Cie. Française Telefunken S.A. v. Ets. Aubin & Ets. Pucci, summarized in considerable detail in 2 CCH COMM. MKT. REP. ¶ 9088 (Tribunal de Commerce de Marseille 1964).

[76] See also Annot., 1 COMM. MKT. L. REV. 223 (1963). The tort doctrine of interference with contractual relations, as developed in the United States, does not appear generally to have been carried so far as to warrant judicial enforcement of "non-signers" clauses unless the manufacturer of the product were protected by a statutory grant, *e.g.*, under the federal patent laws or under state fair trade laws. *Compare* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 401-05 (1911), *with* Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 187-88, 191 (1936). See OPPENHEIM, UNFAIR TRADE PRACTICES 926 (1st ed. 1950). Justice Holmes, the sole dissenter in the *Dr. Miles* case, would have endorsed the French view emphatically: "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose . . . of their own . . . ." 220 U.S. at 412.

The close spiritual relationship between the French and Holmesian views on unfair competition as permitting private import bans, and the territorial view of

The Advocate General, in his Conclusions presented to the Court, further described the French doctrine of "*opposabilité aux tiers*" under the law of unfair competition, as construed by the highest courts, as going

> extremely far (in contrast to other legal systems) by making it possible to make claims based on unfair competition against third parties who, in spite of knowledge of an exclusive distributorship system, skirt the contractual licensees and purchase goods elsewhere for distribution in the contract territory. Hence, under French law an exclusive distributorship contract, if sufficiently publicized, furnishes in and of itself sufficient possibilities to enforce a territorial protection, and in fact the plaintiffs in this case have also repeatedly and with success availed themselves of those possibilities.[77]

It should be recalled at this juncture that the Court of Justice modified the Commission's ruling by providing that the exclusive distribution system, when stripped of its illicit factors, should be deemed not to violate article 85 unless the Commission furnishes reasons to demonstrate why it considers it necessary to prohibit the agreement as a whole. Upon remand, the Commission could conceivably find such a reason in the fact that a French court might continue to apply the very broad French doctrine of unfair competition (as distinguished from trademark infringement) and, despite the Commission's injunction against Consten's use of the import-ban potential of the trade-

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trademark infringement caused by parallel imports, is strikingly illustrated by Justice Holmes' opinion, speaking for the Court in A. Bourjois & Co. v. Katzel, 260 U.S. 689, 690-92 (1923):

> The plaintiff [A. Bourjois & Co., which had purchased the French company's business in the United States, together with its good will and American trademarks] . . . has spent much money in advertising, &c., so that the business had grown very great and the labels have come to be understood by the public here as meaning goods coming from the plaintiff. . . .
>
> . . . .
>
> We are of the opinion that the plaintiff's [trademark] rights are infringed. . . . Ownership of the goods does not carry the right to sell them with a specific mark. . . . It is said that the trademark here is that of the French house and truly indicates the origin of the goods. But that is not accurate. It is the trademark of the plaintiff only in the United States and indicates in law, and, it is found, by public understanding, that the goods come from the plaintiff although not made by it. . . . It stakes the reputation of the plaintiff upon the character of the goods.

[77] 2 CCH COMM. MKT. REP. ¶ 8046 at 7657, 7672 (Court of Justice of The European Communities, Hearing of Apr. 27, 1966). See Markert, *Les contrats d'exclusivité en droit allemand de la concurrence*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN, Jan.-Apr. 1966, 66, at 74. The German courts appear to apply unfair competition concepts against "outsiders" in similar fashion. See, *e.g.*, Judgment of June 14, 1963, 40 BGHZ 136, reported *sub nom. In re* "Braun" Elec. Razors, 3 Comm. Mkt. L.R. 59, 72-75 (1964), with which, however, should be compared *In re* Vat 69 Whiskey, 5 Comm. Mkt. L.R. 74, 76-79 (Oberlandesgericht Düsseldorf 1964). The latter decision advocates applying a far less stringent doctrine against outsiders in cases involving only interference with a manufacturer's sales network, in contrast with cases involving interference with a resale price maintenance system.

mark itself, permit Consten to enjoin imports of Grundig products by parallel importers. However, it seems unlikely that a French court would consider itself empowered to give so wide a scope to the unfair competition doctrine in the circumstances of this case, particularly in the light of the substance of the ruling by the Court of Justice. Even Grundig, in urging the Court to sustain the exclusive distribution agreement stripped of objectionable elements, conceded that approval should be conditioned on the discontinuance of the undertaking to prevent parellel imports.[78] The Court's actual ruling, while obscure on this point, probably should be viewed as tacitly incorporating such a condition, or as sanctioning the Commission's imposition of such a condition.[79]

Accommodation of Resale Price Maintenance Law and Treaty Anti-Cartel Law

One final level of conflict between national and treaty law in the *Grundig* litigation remains to be noted. Under German national law, resale price fixing, which is allowed to manufacturers of branded goods, when properly registered with the German Federal Cartel Office, cannot be enforced against nonsigners unless the initiator of the distribution arrangements has set up a systematic and comprehensive system of protection. Where exports are involved, the system

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[78] 2 CCH COMM. MKT. REP. at 7657.

[79] In its decision of July 8, 1965, in the *D.R.U. Blondel* case (Diepenbrock en Reigers N.V. ["D.R.U."] and Etablissements Blondel S.A.), the E.E.C. Commission went even further than this in finding a violation of article 85(1). D.R.U., a Dutch manufacturer of household products, gave an exclusive distributorship for France to the French firm Blondel. No re-export ban commitment was given by Blondel (and, if we can assume that other exclusive distributorships were granted for the other E.E.C. countries, no other such commitments appear to have been exacted). No transfer of the French registration of the D.R.U. trademark appears to have been made to Blondel. Despite the availability of the broad French doctrine of unfair competition as a possible prop for absolute territorial protection, the Commission found expressly that "Blondel has not placed its contract in opposition to a third party and declares that it has no intention of doing so." REVUE TRIMESTRIELLE DE DROIT EUROPÉEN, Jan.-Apr. 1966, p. 159 [the translation is that of the author]. However, the Commission found that an undertaking by D.R.U. not to deliver to France other than to Blondel "thereby preventing any French enterprise other than Blondel from purchasing D.R.U. products directly from it" constituted a substantial enough restraint on would-be third party traders of these trademarked products to infringe article 85(1). On the other hand, the Commission found this to be a relatively mild restraint particularly because D.R.U. had not undertaken to refrain from indirect deliveries to the concessionary area and because "its distribution system does not prevent third parties established in this zone from being able to obtain these products in a manner other than from the sole distributor, and the parties have not tried to obtain absolute territorial protection by preventing parallel importation by other means." *Id.* at 161. Sales prices in France were not higher than in the country of origin, and the restraints were minimal. Accordingly the Commission exercised its discretion under article 85(3) to exempt this arrangement from the prohibition of article 85(1). The rule of the case appears to be codified in article 1 of the new Regulation No. 67/67 on "group exemptions," effective as of May 1, 1967. More generally, the lesson of the case, not surprisingly, is that a restraint in an exclusive distributorship system may be deemed substantial enough to infringe 85(1) but so minimal and innocuous as to warrant exemption under 85(3).

must necessarily include contracts providing for bans on re-export of the product from one national territory to another.[80] These contractual arrangements, to be enforceable, must be *lückenlos, i.e.*, "closed", or free of loopholes. If the export-ban assurances in EEC trade are held to violate article 85 of the Treaty, they are obviously ineffective, and conceivably could render the comprehensive system of private territorial controls more luckless than *lückenlos*. Indeed, in the *Braun Electric Razors* case, a German appellate court decided that a private system of price and trading restrictions that included export-ban clauses was not comprehensive because of its belief that the re-export prohibitions violated article 85. The German Supreme Court, on appeal, found this a premature conclusion, on the ground that the re-export prohibitions in that case were still presumptively valid despite article 85.[81] But it refused to decide what the legal consequences would be under German national law if the export prohibitions were declared to be void under article 85 by competent authorities. Nevertheless, it is difficult to believe that the doctrine of *Lückenlosigkeit*, as a prerequisite to entitlement to resale price maintenance in Germany, would or could persist unaltered in content in the face of the Court of Justice decision upholding the Commission's ruling in the *Grundig* case. The seeds of change in the internal law may well have been sown in the *Maja* case.[82]

Accommodation of National Trademark and Unfair Competition Law With Treaty Anti-Cartel Law

One may also foresee, even before a European Trademark Convention becomes effective, changes in domestic trademark and unfair competition principles in response to the affirmance of the *Grundig* ruling and the issuance of the new Regulation. Precise reformulations of national law may well vary among the EEC countries: some may trim their doctrinal revisions to exempt products of their EEC partners from import bans; others may adopt more sweeping reformulations.

We have surmised that the sheer transfer of a French trademark held by a German manufacturer to an exclusive distributor in France, when the mark is affixed to all of the German products sold in Europe, even in the absence of export bans imposed on other dis-

[80] See, *e.g.*, Judgment of June 14, 1963, 40 BGHZ 136, reported *sub nom. In re* "Braun" Elec. Razors, 3 Comm. Mkt. L.R. 59 (1964); *In re* "Agfa-Optima" No. 2, 3 Comm. Mkt. L.R. 87, 2 CCH COMM. MKT. REP. ¶ 8020 (Oberlandesgericht Munich 1964); Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V., 1 Comm. Mkt. L.R. 205, 212-15 (Hoge Raad (Dutch Supreme Court) 1962).

[81] Judgment of June 14, 1963, 40 BGHZ 136, reported *sub nom. In re* "Braun" Elec. Razors, 3 Comm. Mkt. L.R. 59, 76-78 (1964).

[82] See note 37 *supra* and accompanying text.

tributors and without a supplemental agreement to retransfer the trademark at the end of the distributorship, would be deemed by the Commission and the Court of Justice to infringe article 85 because of its potential nationalistic compartmentalizing of trade in the trademarked product. If this speculation is well founded, what room is left within the national trademark law of the Common Market countries for the trademark holder's privilege of banning imports of the "genuine" trademarked product by parallel distributors?

In a typical distribution network situation, the local trademark is owned either by the foreign manufacturer or by the local distributor. When it is owned by the foreign manufacturer himself (with a license or other form of authorization running to the local distributor), the national trademark law of most if not all Common Market countries had come to regard the manufacturer-trademark-owner, even before *Grundig,* as lacking an import-ban privilege. The rationale for denial of import-ban privilege to the manufacturer is either that he has exhausted his trademark right with the first sale of the product in or from the country of manufacture, or that no consumer deception as to source of the goods can occur with respect to him.[83] If the foreign manufacturer put title to the local mark in the hands of the local distributor, case-law, at least in The Netherlands and Italy, would have permitted the distributor to exercise import-ban privileges before the Commission and Court of Justice decisions in *Grundig.* After *Grundig,* no such privileges can be deemed to flow from national trademark law in any EEC country because of the pre-emptive impact of EEC Treaty law, at least in situations affecting commerce within the Common Market. Under the reasoning of the Commission and the European Court in *Grundig,* it is difficult to see how any national distributor importing from another Common Market country and armed with exclusive distributor rights and trademark title in any EEC country, could exercise import-ban rights or privileges without affecting EEC trade.[84]

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[83] Clearly this is so at least in Germany, see the *Maja* case, discussed in the text accompanying note 37 *supra;* The Netherlands, see the 1956 *Grundig* case, discussed in the text accompanying notes 43-45 *supra;* and Italy, see the *Colgate-Palmolive* case, at note 42 *supra,* and especially the dictum of the court in [1957] II Rivista Di Diritto Industriale 358 at 361:

> When the same person owns a trademark which he has registered in more than one country, the fact that the goods, after the trademark has been lawfully affixed, are brought from one country to the other is irrelevant from the point of view of trademark protection. The exclusive right may not conceivably be violated in such a case, since the mark which appears on the imported goods is the authentic trademark of the enterprise which owns the exclusive right in the country of importation.

[84] The German manufacturer of *Persil* detergents could continue to bar imports of goods made by an unrelated manufacturer in Holland under the same mark, as

One real but very limited possibility for effective continuance of a Grundig-like distribution system may exist. If the manufacturer wishes to go to the trouble, it may establish its own subsidiaries in each of the EEC countries as the exclusive national distributors, and permit these subsidiaries to hold title to the trademark locally as in the case of GINT. Such an arrangement might be legally permissible for two major reasons. First, national trademark law may permit the local subsidiary, despite its close connection with the foreign manufacturing parent, to exercise an import-ban privilege. As to this point, recall the Dutch decision on the local Graetz distributing subsidiary, as contrasted with Swiss trademark law.[85] And, secondly, with respect to Treaty cartel law, it has been argued that the wording of article 85(1), which bans restrictive agreements between "enterprises" and "associations of enterprises," does not interdict such agreements as between a parent and a subsidiary company because the companies constitute merely a single enterprise.[86] But this contention has not been resolved by the administrative or judicial organs of the Community under the Treaty of Rome. Even assuming that a network thus organized could accomplish, without violating article 85(1), the compartmentalizing objectives as the existing Grundig system cannot, it would require the manufacturer to set up his own sales subsidiaries throughout Europe. It was presumably to avoid this necessity and its attendant administrative and other burdens that Grundig has relied largely on independent distributors. It has not been doubted that a manufacturer, if it were willing to do so, could go one step further and establish a reasonably effective distribution network operated within a single integrated corporate structure.[87]

Accommodation of National and Treaty Law When the Product Is Imported From Outside the Common Market

Suppose the EEC country distributor and the parallel traders have imported the trademarked product from outside the Common Market.

permitted by the German appellate court in the case cited in note 37 *supra*. But, it will be recalled, no international distributorship arrangement existed there as between the German and Dutch enterprises, and the holding of the German trademark was not as a result of agreement with the Dutch manufacturer.

85 See note 45 *supra*.

86 *Compare* OBERDORFER, GLEISS & HIRSCH, COMMON MARKET LAW 2, 3, 13-16 (CCH 1963), *with* EUROPE'S RULES OF COMPETITION 80, 85 (Business International 1966). See generally GRAUPNER, *supra* note 15, at 11; Duwel, *Signification du Mot "Enterprise" dans le sens de l'article 85 du Traité C.E.E., à propos d'accords entre sociétés mères et filiales et filiales entre elles*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 400, July-Sept. 1966; Schapiro, *The German Law Against Restraints of Competition—Comparative and International Aspects*, 62 COLUM. L. REV. 1, 11 (1962).

87 See, *e.g.*, the opinion of the Court of Justice in *Grundig*, making clear that such an operation would not run afoul of article 85(1), at any rate. 2 CCH COMM. MKT. REP. ¶ 8046, at 7651.

Is there any reason to believe that national trademark law would still confer upon the exclusive distributor, and that Treaty anti-cartel law would permit him to enjoy, import-ban privileges that the *Grundig* ruling bars if the product emanates from another EEC country? The *Grosfillex* ruling of the Commission [88] subjects an exclusive distributorship, granted by an EEC manufacturer to a Swiss distributor, to an export ban to protect the EEC manufacturer from re-import into the Common Market. In such special circumstances, treaty law would doubtless permit a French manufacturer-trademark-owner to invoke against re-imports from Switzerland the protection of the French unfair competition law and whatever trademark import-ban protection may exist under French national law. But this is a very narrow exception. If the same French manufacturer is also utilizing an exclusive distributorship network in the Grundig manner, within the Common Market area, he would be unable to invoke French trademark or unfair competition law to assure his own absolute territorial protection vis-à-vis re-imports from other Common Market countries.

If the *Grosfillex* situation is reversed, and manufacturers outside the Common Market export to exclusive national distributors in EEC countries, will the trademark import-ban privileges of the distributors (assuming they have been vested with the local trademarks) be broader under the national trademark law because the parallel importer's source of supply of the trademarked product is a nonEEC country? Treaty anti-cartel law would apparently permit the drawing of such a distinction (assuming that *Grosfillex* has survived *Grundig*). But would the courts choose to preserve under national trademark law a privilege so narrowly confined that its perpetuation would smack of trademark as well as nontariff trade discrimination against the world outside the Common Market? With the permissible scope of the trademark import-ban so sharply curtailed by treaty law, the courts must re-interpret legislative intent embodied in trademark and unfair competition statutes to determine whether the legislature, in the absence of any specific new legislative pronouncement, would wish to perpetuate so truncated a privilege, and one whose application would involve judicial schizophrenia.

Moreover, it is unlikely that a foreign manufacturer would provide absolute *national* territorial protection to one, and only one, exclusive distributor within the Common Market. More likely, such a manufacturer would rely not simply on one national distributor but on two or more exclusive distributors within that area, the distribution

[88] Discussed in the text accompanying note 73 *supra.*

areas being defined by reference to national boundaries. *Grundig-Consten* and Regulation No. 67/67 would then appear to be as applicable as if the basic source of supply were a manufacturer situated within the Common Market.

Consideration of the structure of the distribution system for British whisky, as disclosed by recent European judicial opinions, may help sharpen the issue. Vat 69, a Scotch whisky, is exported to an exclusive distributor in Germany who, like similar distributors in other countries, has exclusive marketing rights in his own national territory, and is subject to a re-export ban. Unauthorized distributors, however, have imported Vat 69 into Germany from The Netherlands and South America.[89] The authorized distributor sought unsuccessfully in German courts to enjoin interference with the exclusive sales network. The German courts refused to apply unfair competition remedies against strangers to the contractual arrangements, even in the period preceding the Court of Justice decision in *Grundig*.[90] In the post-*Grundig* period, German courts will presumably be no more receptive to pleas for the invocation of unfair competition protection against imports in these circumstances, whether the goods originate inside or outside of the Common Market.

Will their attitude be different if a trademark right is involved? In the actual *Vat 69* case, the German trademarks were still held by the Scotch manufacturers, and hence could not—consistently with the doctrine of the *Maja* case—be the basis under German law for protection against imports from any country. Assume, however, that the Scotch manufacturers were now to follow the Grundig pattern and transfer the German trademarks to the sole distributor in Germany. Treaty law under *Grundig* should preclude use of national trademark privileges as a basis for barring the flow of Vat 69 into Germany from The Netherlands, or from any other EEC country. Would German courts nevertheless enjoin parallel imports of Vat 69 from South America even though they would not ban imports from EEC sources? Since South American shipments could be rechanneled through Dutch merchants, the only result of obtaining a German injunction in those circumstances, if one could be obtained, might be to embark upon a round-robin of litigation in other EEC jurisdictions.

89 Other cases show variations on the same theme: imports of Scotch into France from a parallel exporter in England, Société B.A.P. v. Société Madimpex, 2 CCH Comm. Mkt. Rep. ¶ 9075 at 8160 (Commerce Court of the Seine 1964); and from a parallel exporter in Denmark, Pierre Rivière & Cie., S.A. v. Maison du Whisky, 2 CCH Comm. Mkt. L. Rep. ¶ 9075 at 8160 (Commerce Court of the Seine 1963).

90 *In re* Vat 69 Whisky, 5 Comm. Mkt. L.R. 74 (Oberlandesgericht, Düsseldorf 1964).

The strong German insistence upon the prerequisite of *Lückenlosigkeit*, previously noted in the resale price maintenance area, extends to unfair competition law with respect to the protection of a manufacturer's sales network.[91] This in itself might dissuade German courts from extending trademark import protection in so fragmented a manner to a system so far from foolproof.

Great Britain's formal application for adherence to the European Economic Community, presented in May, 1967, suggests a further dimension to the problem. If Britain ultimately becomes a member of the Common Market, its trade with the original six members of the EEC will be directly and fully subject to the article 85 prohibition on restrictive practices affecting "competition within the Common Market." Correspondingly, Regulation No. 67/67 of May 1, 1967 then would apply by its terms to British-German trade. Absolute territorial protection for an exclusive distributorship, including the assertion of import-ban privileges that might otherwise exist under trademark rights, clearly would be banned not only with respect to distribution of Vat 69 Scotch in Germany but also, conversely, with respect to Grundig products in Britain.

A more difficult question will be posed if a manufacturer outside the Common Market designates a single distributor to cover the entire EEC area, exacts an undertaking not to re-export from that area and transfers to the distributor national rights to a common trademark in each of the EEC member countries. The manufacturer may utilize a set of exclusive agreements similar to those in the *Grundig-Consten* case, but the areas to which they apply would be countries outside of the Common Market, plus the EEC as a whole. If this ban on parallel imports into the EEC area and on re-exports from it to third-country areas were enforceable, competition within the Common Market would be reduced, but in terms that relate primarily to the flow of products between the Common Market and the outside world, rather than exports from one member country to another. Will Treaty anti-cartel law and national trademark and unfair competition law protect the sole EEC distributor against parallel imports into the Common Market area? The EEC Commission has not yet answered this question. The *Grosfillex* ruling is suggestive, but by no means determinative. The substantial distortion of the flow of imports into the Common Market, engendered by the provision of absolute territorial protection of that Market by an outside manufacturer, has a far greater potential for causing a restriction on or

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91 See *id.* at 78-79.

distortion of competition as among the member States than was likely to be the case in *Grosfillex.*

The fact situation disclosed in *United States v. Holophane Co.,*[92] is instructive and illustrative, though more extreme. A British company entered into patent and trademark agreements with a French company in 1921, licensing the latter to manufacture and sell prismatic glassware under the "Holophane" trademark in Western European countries, including France, Belgium and Italy. The French company undertook to ban exports from the licensed countries to other areas, and the British licensor undertook to prevent exports of Holophane products into France or the other licensed countries. Presumably Germany and the Netherlands were isolated as protected distribution areas. Under *Grundig-Consten* and Regulation No. 67/67 such an agreement would infringe article 85(1). If the Holophane agreement is still alive today, however, it may have been modified to expand the French company's territory to include the whole Common Market area, while letting stand the export restrictions as between the British and French companies. Among the questions raised by such an arrangement are: would it be permissible under Regulation No. 67/67? If not barred by that Regulation, would it be an improper restriction on trade under the broader provision of article 85(1)? Should the EEC Commission be concerned about international cartel agreements between an enterprise within, and one outside, the Common Market when the restrictions on trade do not apply expressly as between one member State and another, although they may be presumed to have an effect upon the inter-State trade? The phrases "trade between the Member States" and "competition within the Common Market" sound inherently more limited in applicability than, in a different geographical context, the Sherman Act's reference to "commerce among the several States, *or with foreign nations.*" Even so, if an international cartel arrangement of the type here described has demonstrable impact on trade and competition within the Common Market, the EEC anti-cartel provisions should be applicable.[93]

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92 119 F. Supp. 114 (S.D. Ohio 1954).

93 For a variety of speculative commentary on these issues, see, *e.g.*, GRAUPNER, THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY 37-47, 126-31; OBERDORFER, GLEISS & HIRSCH, COMMON MARKET CARTEL LAW 17, 23-24; Eeckman, *L'Application de l'article 85 du Traité de Rome aux ententes étrangères à la C.E.E. mais causant des restrictions à la concurrence à l'intérieur du Marché Commun*, in REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ, 1965, 499-528; Kruithof, *The Application of the Common Market Anti-Trust Provisions to International Restraints of Trade*, 2 COMM. MKT. L. REV. 69, 72-76 (1964). The EEC Commission has asserted jurisdiction over "agreements to which firms from non-member countries are parties, insofar as they are liable to affect trade between Member States." EEC Manual for Firms, part II, § III, para. 2, as in CAMPBELL, RESTRICTIVE TRADING AGREEMENTS IN THE COMMON MARKET 160 at 178 (1964).

The Role of the National Judiciary in Harmonizing National and Treaty Law

At least in the anti-cartel area, progress in the development of EEC Treaty law involves a great deal of potential development and change in national law, and reflects a process of interplay between treaty and national law. The role of the national judiciary in interpreting national legislation and legal doctrines against the background of treaty law will be most important. Constitutional law in some EEC countries, for example Article 55 of the French Constitution of 1958, expressly provides for the superior authority of treaty provisions over national law. Even in the absence of an explicit statement of treaty supremacy, and even before coming squarely to grips with the problems of treaty violation, it seems likely that national courts will increasingly construe internal law so as to avoid risks of conflict with EEC treaty obligations, whenever the ambiguous or changing state of the local law permits such interpretation. One may venture the speculation that the drama of the evolutionary process will be found, in the long run, in this subtle interplay and in the absorption of treaty standards by national law, by a process of judicial (in default of legislative) harmonization, rather than in confrontation and combat between clearly-defined treaty law and clearly-defined antithetical national law.