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The Law of Unfair Competition in the Member States of the European Economic Community†

Although no specific provision of the E.E.C. Treaty decrees supremacy of the Community's legal order over the legal orders of the Member States, it is the assumed consensus that the Common Market is a supra-national organization and that its law is supreme. Regulation 17 offers the clue; its Article 3 vests the Commission with authority to apply Article 85, and its Article 9 authorizes the Member States to declare an agreement invalid under Article 85(1), even though the agreement would be valid under national law.[1]

National courts were forced to concede that Community law must be divorced from, and be independent of, the law of the Member States, and also that it created rights which had become part of their national laws. This concession recognized that "the Community constitutes a new legal order of international law for the benefit of which states have restricted their sovereign power in specified limited areas and whose subjects are not only the member states but their nationals as well."[2] Inexorably, therefore, this was followed by a decision holding that treaty rights must be given precedence over any conflicting national law.[3]

The Court of Justice first had occasion to express its views in Grundig-Consten. In that case it held that, in any conflict between national law and Common Market law, treaty law must prevail. Thus, the path was opened for the authorities of the E.E.C. to develop a treaty law independent of the cartel traditions of Member States: "Even in the absence

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†This article was prompted by the author's study of the six volumes edited by Professor Dr. Eugen Ulmer, bearing the same title (Das Recht des Unlauteren Wettbewerbs in den Mitgliedsstaaten der Europaeischen Wirtschaftsgemeinschaft).

[1]Regulation 17, Article 9. *See* the Dutch Grundig opinion of the Hague Court of Appeals of 1963, Jacobus Kadee v. Grundig (Nederland) N.V., 1965 COMM. MKT. L. REP., p. 40.

[2]Van Gend & Loos c. L'administration fiscale Nederlandaise, Court of Justice Case No. 26/62, CCH COMM. MKT. REP., Ct. Dec. ¶8008.

[3]Costa v. E.N.E.L., Case No. 6/64, CCH COMM. MKT. REP., Ct. Dec. ¶8023.

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 E.E.C. Treaty obligations."[4]

Thus, the general provisions of article 3 of the treaty establishing the E.E.C. include a directive, that Community activities should embrace the "approximation of . . . municipal law to the extent necessary for the functioning of the Common Market." Articles 100-102 set forth a broad authorization for direct intervention by institutions of the E.E.C. to reconcile the legislative and administrative rules and regulations of Member States when: (a) the existence of a disparity in the legal system of Member States directly affects the establishment and functioning of the Common Market, or (b) distorts conditions of competition within the Common Market.

According to Article 100, the Council, acting by unanimous vote on a proposal of the Commission, and after previous consultation with the Assembly and the Economic and Social Committee, shall issue directives for the "Approximation of Law." (The title of chapter three of the Treaty).

The measures utilized by the various Member States to achieve the intended result may vary in form in accordance with the differences in the constitutions of Member States and in their various laws ratifying the E.E.C. Treaty. Thus, the German law of ratification of July 27, 1957, imposes a duty on the Government to inform the Chamber of every provision of the Community in relation to which active measures of compliance will need to be taken, and in Italy, in the absence of special ratifying law, the directives may be complied with, either by a special law passed to that effect, or by delegation by law of the necessary powers to the Government.

The aims to which the "harmonizing" (or "approximation"—"rapprochement") activity are directed by article 101, have regard solely to those disturbances of competitive conditions in the E.E.C., that are described as "specific distortions" in the Rules Governing Competition, *e.g.*, in exclusive distributorships, mergers, resale price maintenance and so on.

Whenever a Member State proposes to pass a new law or modify an old one so that a "distortion" is to be feared, it is bound to consult the Commission in order to discover probable repercussions on the Common Market. Then, after consulting with other Member States, the Commission will, in turn, recommend the best measures to avoid such a distortion.

[4]Ebb, *The Grundig-Consten Case Revisited: Judicial Harmonization of National Law and Treaty Law in the Common Market* 115 PENN. L. REV. 855 (1967). Feld, *The European Common Market and the World* (1967).

Sometimes it may occur that a Member State will not recognize the full consequences of its legislative proposals, or not foresee the possible repercussions on the competitive conditions in the Common Market.[5]

Thus, an outstanding work of comparative law originated from the Commission's need to obtain an "opinion," with respect to the laws of unfair competition of the six Member States of the E.E.C. It was a happy accident that the Max Planck Institute for foreign and international patent, copyright and trademark law of the University of Munich, was indeed the most competent organization for that purpose, and the Commission requested just this institute to render an opinion on the law of unfair competition in the Member States of the E.E.C. This was accomplished in six volumes, which deserve in every respect the highest praise. It is regrettable that the work is incomplete insofar as it covers only the laws of the six Member States, and none of the not so thoroughly developed laws of the Anglo-Saxon countries.

It is remarkable that Professor Ulmer, the editor of the six volumes, almost enthusiastically comes to the conclusion that the dogmatic basis of the six laws is the uniform concept of the term unfair competition, the close relationship between the law of unfair competition and the law of trademarks,[6] and the common root of the law of unfair competition and the cartel (antitrust) law.

In the third chapter of the first volume we find the discussion of the interests which are protected in the law of unfair competition, and it is properly emphasized that it was especially the German law which, through its injunction, was enabled to protect not only the interests of the individual competitor, but also the collective interests of the trade as a whole ("Verbandsklage") and the consumer interest as such.

In the latter respect, American law created a protection through the Federal Trade Commission, which has preponderantly the task of preventing false and misleading advertising. Since the Anglo-Saxon law is not subject matter of the opinion, it was correct when Ulmer said: "The courts are strictest in Germany, the mildest in Italy. The other countries are in the middle with an inclination towards Germany." The law of the United States Federal Trade Commission is very similar to the law in Germany ("class action").

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[5]A. Grisoli, *The Impact of the European Economic Community on the Movement for the Unification of Law*, 26 L. & CONTEMP. PROB. 418 (1961).

[6]Germany and the United States agree in the familiar axiom that the law of trademarks is only a part of the broader law of unfair competition. RG2 120, 328 and numerous other decisions of the German former Supreme Court; U.S.A.: Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 *et al.*

I. Industrial Property and Unfair Competition

Articles 222 and 234, similar to Article 36, declare that the treaty "shall in no way prejudice the system existing in Member States in respect of property," or "rights and obligations arising out of treaties," such as the Paris Convention. Article 90 does not refer directly to industrial property, and merely prohibits the exploitation of "special or exclusive rights" contrary to rules like those in Articles 85 *et seq.*

Finally, Article 106 refers to "invisible transactions," which may not be used to introduce new restrictions on transfers of capital or payments. (This article refers to Annex III to the Treaty which mentions, *inter alia,* authors' royalties, patents, designs, trademarks and inventions and the assignment and licensing of such rights).

On the other hand, the existing systems in Member States are immediately prejudiced if the Common Market, intending to harmonize the laws of the six Member States, creates special laws with respect to trademarks, patents, know-how and unfair competition. Moreover, it is clear under the decisions that the law-enforcement authorities of the Common Market—the Court of Justice and the Commission—will not sanction misuse of trademarks and patents in violation of Articles 85 and 86. Such protection against misuse, for which the United States antitrust law is an important prototype, will not be hampered by Articles 36, 222 and 234; the exemption expressly relates to Articles 30 to 34 only, which deal with quantitative restrictions imposed by Member States on imports and do not pertain to Article 85.

II. "Unfair Competition" as a Legal Concept

A recognition that the meaning of the term "unfair competition," in a technical sense, should be equivalent to the meaning ascribed to it in common parlance will neither clarify its meaning as a legal term nor allow its use as a legal standard. Nor does clarification result from embellishing the term with statements that unfair competition "consists of selling goods by means that shock judicial sensibilities";[7] or that the law of unfair competition is "but a reaffirmation of the rule of fair play."

It aims to effect honesty among competitors by outlawing all attempts to trade on another's reputation—"it gives the crop to the sower and not to the trespasser";[8] or that "fair competition is 'open', 'equitable,' 'just' competition."[9] It serves no useful purpose to evade the task of clarification by

[7]Margarete Steiff, Inc. v. Bing, 215 F. 204 (S.D.N.Y. 1914).

[8]Bard-Parker Co. v. Crescent Mfg. Co., 174 Misc. 356, 20 N.Y.S.2d 759 (Sup. Ct. 1940).

[9]United States v. National Garment Co., 10 F. Supp. 104 (E.D. Mo. 1935).

positing a "more 'liberal' or 'modern' concept of unfair competition, and holding that there may be unfair competition, even absent actual or potential competition."[10]

We must therefore evolve a legal standard stable enough to offer the courts a guide, and yet flexible enough to permit the influence of justice and an inherent sense of fair play. The judge must be free to deal with an infinite variety of facts and circumstances without being bound by any hard and fast rule. Otherwise, it is mere lip service to a sound principle to say that courts are able to master cases which are novel, and that "the fact that a scheme is original in its conception is not a good argument against its circumvention."[11]

The plastic concept of unfair competition allows a broad interpretation without being too indefinite, even though, as one court expressed it, sometimes "one can feel the unfairness better than one can express it from the bench."[12] Is the judicial process or legislative action better designed to solve competitive conflicts? The question is not an idle one considering the doubts of many able jurists with respect to the ability of the common-law courts to create, for instance, new property rights.

It is noteworthy that even such traditional statutory law countries as France and Germany, developed an admirable corpus of decisional law in torts and unfair competition, a common law comparable to, and as satisfactory as, that of the traditional common-law countries. The statutory device of European law is a general clause, a norm similar to that of Art. 10 *bis*, paragraph 2, of the Paris Convention.

An E.E.C. law of unfair competition is therefore not urgent and perhaps not even necessary. Article 10 *bis* of the Paris Convention is, like all blanket norms, the basis for judge-made law. Broad discretionary authority, on the basis of the general equity power, is conferred on the courts because the concept of unfair competition "does not admit of precise definition, but the meaning and application of which must be arrived at by . . . the gradual process of judicial inclusion and exclusion."[13] "It vests," as it was properly said,[14] "in the courts' wide judicial discretion in case-by-case adjudication of new private claims that press for recognition and legal security as the economic, technological and cultural life of society progresses."

When it is possible to create judge-made law in a nation with as many different parts as the United States, it should be relatively easy to harmo-

[10]Vogue Co. v. Thompson-Hudson Co., 300 F. Supp. 509, 512 (C.C.A. 6th, 1924).

[11]American Philatelic Society v. Claibourne, 3 Cal.2d 689, 698, 42 P2d. 135 (1935).

[12]Champion Spark Plug Co. v. Champion, 23 F. Supp. 638 (E.D. Mich. 1938).

[13]Federal Trade Commission v. R.F. Keppel & Bros., 291 U.S. 304, 310-312 (1934).

[14]Oppenheim, *The Judicial Process in Unfair Competition Law: A Perspective and a Focus*, 2 P.T.C.J.R. & Ed. (Conf. Supp.) 116.

nize the standards of commercial honesty and fairness of the six Member States, with similar cultural backgrounds and the same experience with international conventions. Therefore, the development of a supra-national law of unfair competition in the Common Market can be safely left to the Court of Justice and the Commission.

III. Trademarks

Certain European countries have attempted to adapt their trademark laws to the new E.E.C. concept. Italy and France, for example, have already adopted a uniform classification-of-goods system, and are presently planning a treaty under which the deposit of a trademark in one country will be deemed to have been made in both. The three Benelux countries have prepared a uniform trademark law; a combination of the proposed Benelux bill, and some provisions of British and Canadian law could perhaps be used as the prototype for an E.E.C. law.

Progress has also been made within the E.E.C.; serious consideration is also being given to an E.E.C. mark. Although a proposed European trademark law[15] was drafted by a committee under the Chairmanship of President de Haan of the Dutch Patent Office during 1962 and 1964, it has not yet been promulgated. In essence, it would establish a uniform E.E.C. trademark law for the supra-national territory of the Common Market premised upon the universal principle with respect to intercountry relationships.

It would provide for centralized registration in a European Trademark Office, except for certain absolute prohibitions on registration. Publication would follow, and provision would be made for the examination of prior or better rights in the crucible of an opposition proceeding, with respect to European marks and all national marks and other designations, thus granting meaningful and far-reaching incontestability to any registered E.E.C. mark. Its owner would be granted a "positive right to use"; there would be some modification of the right to prohibit parallel imports and cancellation for non-use after five years.

Future proposals may find it necessary to adapt the proposed European law to the Madrid Arrangement for the international registration of marks, and to respond to the Council's wish for "harmonization of such laws, regulations and administrative rules of the Member States as directly affect the establishment or operation of the common market."[16]

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[15]Froschmaier, *Progress Toward the Proposed Conventions for a European Trademark*, 6 IDEA 483 (1963).

[16]Art. 100; also Art. 3(h).

The need for a single Common Market trademark law is not presently as immediate as the need for a uniform system to protect trademarks. Without such a system, trademarks cannot be assured of comparably equal treatment in all Member States, and conflicting rights may arise in the same mark. To encourage the free flow of goods and the economic integration visualized by the Common Market, it would seem propitious to put spurs to the effort to establish a uniform trademark system.

IV. Antitrust Law

1. Special Character of the ECM Antitrust Law

As experience has taught, especially in the antitrust field, broad principles of law are easier to express than to apply in particular cases; we have also learned that, in course of time, judge-made law must be created to implement and enforce those broad principles. In this respect there is essentially no difference between common-law countries and those with statutory traditions. The classical distinction between common-law countries and countries with statutory traditions has gradually disappeared.

One of the most important events in modern law occurred when Article 1382 of the French *Code Civil* created a *carte blanche*, like Article 10 *bis* of the Paris Union, for the law of torts and directed courts to decide cases on the basis of experience and morality. This was the beginning of the common law of Europe. Many countries followed suit, *e.g.*, German Law Against Unfair Competition §1, Swiss Civil Code Article 1.

True, under Article 87, the Council of E.E.C. is authorized to promulgate regulations with respect to Articles 85 and 86, but how will they be construed and enforced? There is probably no area within the purview of Articles 85 and 86, in which an attorney could venture a prediction upon which his client could confidently rely.

One readily recalls the excitement generated by Timken, pertaining to international market divisions and ancillary trademark licensing agreements,[17] and by Guerlain, holding an international distribution agreement, to be in violation of the antitrust laws and the "spirit" of the Tariff Act, and thereby making the sales organization of an international concern fair game for international price cutters.[18] In like context, one can cite the confusion created by conflicting judicial interpretations of the doctrine, that a patentee violates the antitrust laws if he exploits his patent by artificially expanding the scope of the patent grant through price-fixing, licensing or exclusive dealing agreements, and the like.

[17]Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).
[18]United States v. Guerlain, Inc., 155 F. Supp. 77 (S.D.N.Y. 1957).

The antitrust law of the Common Market, as compared with the antitrust laws of the United States and of the European nations, is a hybrid. Although its heritage could be attributed, in one sense, to the United States experience, in another it could be just as validly traced to the German law against restraint of competition. In reality, however, the two developments were essentially inconsistent. American law had a purpose which was not only economic but political and German law necessarily reflects its cartel-oriented ancestry.

There is a considerable difference between the respective antitrust-law goals of the Common Market and in the United States. The primary goal of the Common Market is the development of a customs union, by the abolition of customs duties within the Community with the final result of an economic and political union. At its core, union is the impulse for, and the underlying theory of, Common Market ideology. The United States is, in fact and in law, already a union of its component states.

In a certain sense, the concept of union was not entirely unfamiliar to the Member States of Common Market. They already had two things in common: their adhesion to the Paris Convention and their membership in the Madrid Arrangements. However, those unions were of no value with respect to the formation of supra-national law. The guiding theory of the Conventions was and still is nationality, each country protects trademarks, be they the trademarks of its own nationals or—by way of reciprocity—the trademarks of nationals of member countries, according to its own national law, in practice and procedure. The primary benefit of the Conventions is that the member countries thereby became adjusted to cooperation in an international atmosphere.

The Common Market is presently, at best, an emerging economic union, a unified interstate market among the member states. Assessed against the values of the motivating union concept, the preservation of competition is a secondary value. True, the premise that competition is a healthy stimulus to economic development is the gift from the United States. Accordingly, Article 85(1) of the Treaty declares that all acts "designed to prevent, restrict or distort competition within the Common Market or which have this effect," shall be prohibited "as incompatible with the Common Market," or, more pointedly, with the perfection of the merger and integration of the several national markets within the Common Market.

The Rome Treaty, which is more the constitution than an economic law of the Common Market, is more modest in its expectations from free competition, it contains no *per se* violations, and its Article (85)3 posits a very reasonable statutory "rule of reason." The Treaty is not predicated upon any abiding or implicit belief in the merits of free competition, but on a political ideal which grew out of the history of the participant states.

Nevertheless, it is the hope of the Member States of the Treaty, and especially of those who have been charged with the administration of the Common Market, that the successful development of the customs union will insure more competition between the business firms within the E.E.C., and more competition with those firms in countries outside the E.E.C. To this end, all artificial or government aids, differences in taxation or in laws affecting business should be eliminated.

Conversely, all artificial obstacles to mergers should be removed to counteract the dominant position of a competitive and financially powerful firm from a non-member country. The aims of the E.E.C. competition policy are as follows: (1) Opening domestic markets by eliminating all measures that are equivalent in effect to customs duties or which otherwise restrict trade, such as licensing systems, discrimination arising from government monopolies, and market-sharing cartels; (2) Abolition of all internal frontiers and frontier controls, especially by eliminating different tax burdens imposed on enterprises in the Member States; (3) Elimination of distortions of competition resulting from State aids; (4) Elimination of distortions of competition which arise from differences in the laws of the Member States affecting business, such as tax laws, corporation law, patent and trademark laws and laws against unfair competition.[19]

In this context, it is apposite to note that the most important decision of the Commission of the Court of Justice in Grundig-Consten[20] defended the idea of the union. That decision protected its goals against private forces which, by restrictive agreements, sought to negate the effects of the lowering of trade barriers between the member countries. It held that any act "incompatible with the idea of a Common Market"—the territorial division of markets—"constitutes a division between one national market of an E.E.C. country from the market of another E.E.C. country [which will] be prohibited in almost every case and . . . dispensation under Article 85(3) will be very difficult if not impossible to obtain." It was even a surprising thought of the Commission that "parallel imports" were considered beneficial because they served to correct economically unjustifiable price differences between Member States, thus advancing the goal of achieving a Common Market.

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[19]Von der Groeben, Competition Policy in the Common Market and in the Atlantic Partnership, 10 Antitrust Bull 125 (1965); Address to the European Parliament, Strassbourg, of June 16, 1965 (Publication Services of the European Communities 8158/5/VI 1965/5, CCH COMM. MKT. REP. ¶9036).

[20]Consten and Grundig-Verkaufs-GmbH v. E.E.C. Commission, Court of Justice Cases Nos. 56/64 and 58/64, July 13, 1966 CCH COMM. MKT. REP. ¶8046. For comments, see Newes, *The European Commission's First Major Antitrust Decision (Grundig-Consten)*, 20 BUS. LAW. 431, 436 (1965); Fulda, *The First Antitrust Decisions of the Commission of the European Economic Community*, 65 COL. L. REV. 625 (1965); Newes, *Exclusive Distributorship Agreements in the Common Market* 22 BUS. LAW. 533 (1967).

The dominant concept of United States antitrust law-protection of the public interest—also appears in the Common Market treaty. But there is a decisive difference. The American approach is based upon the assumption that the public has an interest in the preservation of free competition. The treaty's concept is a bit more concrete. As noted in Grundig-Consten, Consten's margin of profit was greatly in excess of the profit margins of other distributors, and the Commission therefore concluded that consumers would not equitably share "in the resulting profits" as required under Article 85(3) for the granting of an exception.

2. Antitrust Law and Trademark Law

The possibility of conflict between national trademark law, and the antitrust provisions of the E.E.C., first became manifest in Grungid. In that case, it will be remembered, the Commission ordered Grundig and Consten to refrain from any further use of the Grundig trademark GINT, in a manner that would restrict "parallel imports" into France—the only ostensible purpose for which GINT was used; the trademark—an industrial property right—was the "legalistic tool" by which the distributor—Consten—attempted to monopolize a national market for products covered by the trademark.

The Commission emphasized that the GINT mark was not required to advise consumers with respect to the origin of the goods—the typical trademark function—because the GRUNDIG trademark would have been sufficient for that purpose. As the opinion of the Court of Justice pointed out, although the E.E.C. Treaty was not intended to affect national industrial property rights, it did prohibit any use thereof which would be inconsistent with or contrary to the overall purpose of the Treaty. The Treaty having been designed to create a unified common market, any contractual arrangement or agreement involving the exercise of an industrial property right, in a manner which contravened the purpose of the Treaty would be violative of the provisions of Article 85.

The Court properly concluded that no trademark use should be permitted to violate the antitrust laws. It is, however, erroneous to assume that the propriety of a trademark use is to be tested only under the technical trademark law. Every trademark use must be assessed in light of the superior law against unfair competition, of which it is a part. No trademark use can be tolerated if it is designed to implement or effectuate a pattern of restraint of trade.

(It is, therefore, unfortunate that the majority of the IAPIP (AIPPI)[21]

[21]International Association for the Protection of Industrial Property (Association Internationale pour la Protection de la Propriété Industrielle).

Venice Congress of 1969, in its study of the unification of the rights of trademarks, approached the problem of unauthorized importation of trademarked products from the aspect of trademark law only, ignoring the law of unfair competition).

Perhaps the most famous example is the Timken case.[22] In that case, manufacturers in different countries used the mark to control the channels of trade, by dividing the world into exclusive marketing areas.

Grundig-Consten posed quite a different problem. The prevention of "parallel imports" was essentially a stratagem to protect an exclusive distributor against intrabrand competition and it is highly debatable whether this is, in fact, an unreasonable restraint of trade. The result might well depend upon the view of the court in the jurisdictional area—which in the Grundig case was neither France nor Germany but the Common Market—with respect to the power it would be willing to grant a manufacturer over his distribution system. There are basically two views: one rests upon the purely technical trademark aspects; the other ignores the trademark technicalities, and is concerned with the right of a manufacturer of trademarked goods to control its distribution to the eventual consumer.

Under the first approach, the argument proceeds upon two correlative theories—the doctrine of territoriality and the doctrine of "exhaustion." A national trademark law only grants territorial protection to the trademark which serves to inform the public of the origin and nature of the trademarked goods. Once the goods have been put into circulation, this exclusive right to the mark is "exhausted," "used up," or "consumed," unless others thereafter tamper with the goods as branded.

The second approach is purely economic. Recognizing that the trademark owner, by advertising, has effectively established the goodwill of his trademark, and that such goodwill may be essential to the sales success of "his" dealers. Therefore, the owner should be entitled to have his efforts rewarded by reserving such control as he deems advisable over the distribution of his goods, even to the extent of fixing the resale price thereof to the ultimate consumer.

The first view is too narrow; it is confined to the trademark problem, and to the fact that the manufacturer misused his trademark to secure some international protection for his distribution system. The legal problem is merely that of trademark infringement, and it is axiomatic that no remedy will lie if the public is not deceived. But that is not the essence of the case; the essence is to protect the distributors of the manufacturer against competition.

[22] *Supra*, note 17.

The doctrine of territoriality is equally superfluous; in a long line of European cases the problems of parallel imports were considered under the doctrines of territoriality and universality. The doctrine of exhaustion is not only superfluous but very debatable.

The second view puts the trademark issue into proper perspective by treating it as incidental; the more significant issue is whether the manufacturer has a reasonable basis for the protection of his distribution system, and this is predominantly an antitrust-law problem. The manufacturer may attempt to do so by the use of a trademark, or by invoking the doctrine that the parallel importers' interference with his underlying contractual relationship with his distributor, constitutes unfair competition. In Grundig, the Court was unduly influenced by the fact that the consumer was hurt because he could not buy Grundig products at a price lower than that charged by Consten. This should not have been decisive; the products were not necessities and the manufacturer was not a monopolist.

In similar vein, the legality of a resale price-maintenance system should not be viewed from its trademark aspects. In Grundig, the Commission held such price fixing to be incompatible with the underlying purposes of the Common Market. Here we have a genuine conflict between the law of the Common Market and the law of Member States, in which resale price maintenance has been sanctioned.

The Commission's view was not surprising; a similar trend is evident in the United States, although resale price-maintenance is legal and enforceable in many states. Prior to Grundig, the German Supreme Court[23] assumed that resale price-maintenance would not be violative of Article 85(1).

Whatever the economic and political merits of the E.E.C., the science of comparative law in the field of unfair competition owes to the Rome Treaty and the Commission's initiative a work of supreme excellence.

[23]Bundesgerichtshof, Judgment of June 14, 1963, 40 BGHZ 136 in re Braun Electric Razors, 3 COMM. MKT. L. REV. 59 (1964).