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Common Market in Process: The Grundig Case and the Interplay Between National Law and Treaty Law

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COMMON MARKET LAW IN PROCESS: THE *GRUNDIG* CASE AND THE INTERPLAY BETWEEN NATIONAL LAW AND TREATY LAW

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The delicate problems of the evolving relationship between supranational, European Economic Community Treaty law and the national law of the member countries are dramatically illustrated by the decisions of national courts and the Commission of the European Economic Community in the series of cases dealing with the legitimacy of sole distributorships coterminous with national boundaries of the member countries. The operational context of the actual cases in this field not only constitutes a more dramatic setting than the abstract study of the bare provisions of the Treaty of Rome[1] and its implementing regulations; it also effectively brings to light a broader range of treaty-national-law interrelationships.

The center-piece in this group of sole-distributorship cases is that involving the Grundig radio-electrical equipment enterprise, a complex of companies that manufacture tape recorders, radio and television apparatus, record-players, and other radio-electrical products[2] in Germany and distribute them throughout the EEC area. *The* Grundig case of the day[3] is *Etablissements Consten*[4] *v. Société Union Nationale des Economies Familiales (UNEF), S.A.R.L.*—a case that has made its way through the Tribunal de Commerce de la Seine (1962), the Paris Court of Appeal (1963),[5] and the EEC Commission at Brussels

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[1] 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 (hereinafter cited as Treaty). (Quotations from the Treaty conform to the unofficial translation published by *Publishing Services of the European Communities.*)

[2] Parenthetically, one may note the heavy incidence of consumer electronic product manufacturers in this field of litigation—Grundig, Graetz, Braun, Telefunken, Sunbeam —a testimonial to the growing affluence of the Common Market.

[3] Several *Grundig* cases have been litigated in national courts during the past decade. See, *e.g.,* Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V., Hoge Raad (Dutch Supreme Court), Jan. 12, 1962, 1 Com. Mkt. L. Rep. 205 (1962); Grundig v. Prinz, [1957] GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT, AUSLANDS—UND INTERNATIONALER TEIL 259, (hereinafter cited as GRUR, AUSL.).

[4] The Grundig distributor for France, the Saar and Corsica.

[5] Société Union Nationale des Economies Familiales v. Etablisements Consten, Court of Appeal Paris, First Chamber, Jan. 26, 1963, as translated in CCH COM. MKT. REP. ¶ 8009, p. 7229.

(1964),[6] and is now pending on appeal before the European Court of Justice at Luxembourg. Oral argument was presented before the Court of Justice early in March 1966, and the German and Italian governments submitted briefs on behalf of the Grundig position in this highly controversial and pivotal case.

Briefly put, the issue is whether Grundig's system of territorial protection of its sales organization is valid under the local law of the EEC country—in this case, France—and valid under article 85, the anti-cartel provision of the Treaty of Rome,[7] 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 for continental France, the Saar, and Corsica for radios, tape recorders, dictating machines, and television sets manufactured by Grundig. Grundig agrees not to sell, directly or indirectly, to other persons in the territory ceded to Consten. In pursuit of that undertaking, Grundig imposes an export prohibition upon German distributors, some of whom, however, have made deliveries to the interloping French importer, UNEF, the defendant in the original action brought by Consten. UNEF in turn sells this equipment to French retailers at prices lower than those asked by Consten, to the detriment of those dealers who purchase from Consten. Finally, 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—the Grundig mark

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

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

> 1. The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited: any agreement between enterprises, any decisions by associations of enterprises and any 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, in particular those consisting in:
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> (a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
>
> (b) the limitation or control of production, markets, technical development or investment; . . .

It should be noted that this translation has no official status. Only those versions in the four languages of the EEC are official. Another unofficial translation, accompanied by the official French and German texts, may be found in 1 CCH COM. MKT. REP. ¶ 2005.

being held 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 imports by interlopers.

Analysis of the content and interrelationship of national law (of France and of Germany) and supranational law (of the EEC) in the *Grundig* case is no simple matter, as he who probes will find, and therein lies much of its fascination. To an American observer, the fact 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, is bemusing; the vertical arrangement of sole distributorships has just belatedly emerged in the United States as a significant issue under the Sherman Act and the FTC Act—as witness the *White Motor Co.*[8] and *Snap-On-Tools*[9] cases.[10] And our tribunals are far less convinced of the restrictive impact of such arrangements upon competition than they are of the anti-competitive effect of horizontal arrangements.[11]

Whatever the significance of the issue, on its merits, in the Common Market area, however, the views expressed and the manner of their expression by the national and Treaty tribunals in the *Grundig* and companion cases are most illuminating of the underlying and broader issue of the relationship between national and Treaty law. Moreover, in its present confused and transitional state, national law in certain portions of the fields of trademark, unfair competition, resale

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[8] 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.

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

[10] 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).

[11] The Government of Italy filed a brief in opposition to the EEC Commission decision in Grundig-Consten on the ground that vertical arrangements do not infringe art. 85. On the merits of this question, see Deringer, *Exclusive Agency Agreements with Territorial Protection under the EEC Antitrust Laws*, 10 ANTITRUST BULL. 599 (1965).

price maintenance, and refusal-to-deal practices may, under the influence of the anti-cartel provisions of the EEC Treaty, tend to be reinterpreted osmotically by national courts in the spirit of article 85 even without direct application of article 85. The subtle interactions of evolving national law and evolving Treaty law suggest the further hypothesis that, in the long run, the resultant emergence of dominant legal standards in these fields may be determined less by the outcome of direct frontal national attacks upon or direct national derogations from EEC Treaty law than by the outcome of the less flamboyant process of interplay and synthesis of national and supranational standards. This in turn suggests that the highly controversial and much-discussed decisions of the European Court of Justice and of the Italian Constitutional Court in the *Costa* litigation[12]—the Italian ruling has been described as having "wrought consternation among the jurists of the Community in Brussels"[13]—may be less significant milestones in the evolution of Common Market Treaty law than the forthcoming decision of the Court of Justice in the *Grundig* case and the sequels that will occur in the various national tribunals concerned with that and similar cases.

The rulings of the various courts involved in the *Grundig* case may be briefly summarized: the Tribunal de Commerce de la Seine held UNEF liable in damages to Consten for unfair competition, for wilful disregard of the sole agency agreement of which it had knowledge. It assessed 50,000 francs as damages, and enjoined UNEF from further sales of Grundig products in the Consten distributorship territory. Procedurally, it refused to stay the litigation in the national court pending the outcome of a petition that had been filed by the defendant with the EEC Commission to obtain a declaration that the sole distributor agreement was void as an infringement of article 85 of the Treaty.[14] The Paris Court of Appeals reversed the ruling of the trial court, holding that it should have stayed the proceedings until UNEF's complaint—filed with the Director General of Restrictive Practices—had been passed upon by the EEC Commission.[15] While the intricate

[12] Flaminio Costa v. Ente nazionale Energia elettrica impresa giá della Edison Volta (E.N.E.L.), case 6-64, 10 Recueil 1141 (1964), as translated in CCH COM. MKT. REP. ¶ 8023; see also translation in 2 COM. MKT. L. REV. 197 (1964); Annot., *id.*, at 213 (discussing related *Costa* litigation).

[13] Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 MICH. L. REV. 491, 492 (1965).

[14] See also Société Arlab Import-Export (SARIE) v. Société Union Nationale Des Economies Familiales (UNEF) S.A.R.L., Trib. Comm. de la Seine, June 25, 1962, 2 Com. Mkt. L. Rep. 185 (1963).

[15] The *Grundig* and companion cases all pose interesting procedural questions

procedural aspects of the *Grundig* litigation are not considered here, it is of interest to note in passing that the Paris Court of Appeal, in finding an indissoluble link between proceedings in Brussels and those in the national court, relied expressly upon article 55 of the French Constitution of 1958.[16] That article provides that "treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."[17]

The EEC Commission thereupon ruled,[18] 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, violates article 85(1) of the Rome Treaty. These arrangements constitute a restraint of competition, affecting trade between member states, in that such trade was being caused to develop under conditions different than would otherwise prevail: *i.e.*, in the words of the Treaty provision, these are "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."[19] The major vice of the sole agency agreement in this case was deemed to be those aspects of the agreement regarding absolute territorial protection, designed to prevent imports of the products by parallel importers into the Consten territory—the French market.[20] The exonerative provisions of article 85(3) were

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 COM. 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 COM. MKT. L. REV. 223 (1963).

[16] FRENCH CONSTITUTION, art. 55, translated and published by French Embassy, Press and Information Division (N.Y. 1958).

[17] For further discussion of the general question of the superiority of treaty law, see EBB, REGULATION AND PROTECTION OF INTERNATIONAL BUSINESS 698-700, 755-56 (1964); Bial, *Some Recent French Decisions on the Relationship between Treaties and Municipal Law*, 49 AM. J. INT'L L. 347 (1955); Delaume, *Application and Interpretation of Treaties by Internal Courts in Franco-American Relations*, 80 J. DU DROIT INT'L 585 (1953); Deringer, *The Distribution of Powers in the Enforcement of the Rules of Competition under the Rome Treaty*, 1 COM. MKT. L. REV. 30 (1963); Morgenstern, *Judicial Practice and the Supremacy of International Law*, 27 BRIT. YB. INT'L L., 1950, pp. 42, 68-71, 82-92 (1951); Stein, *supra* note 13; Van Panhuys, *The Netherlands Constitution and International Law*, 47 AM. J. INT'L L. 537, 540, 553-58 (1953).

[18] See translation in 1 CCH COM. MKT. REP. ¶ 2743.

[19] Treaty, art. 85(1).

[20] The Commission has indicated elsewhere that, in the absence of an export ban imposed upon buyers from the manufacturer or original wholesaler, exclusive dis-

thought to be inapplicable to the facts of the case, 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.[21] It is this decision that is pending on appeal before the European Court of Justice.

The vice perceived by the EEC Commission in the Grundig exclusive distribution arrangements was the imposition upon other Grundig distributors of an agreement not to export from their national territories plus the equipping of the French distributor with a trademark that was being used to hamper imports by parallel importers. The precise ruling of the Commission, accordingly, 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

tributorship 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 CCH COM. MKT. REP. ¶ 7028 (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 Notification No. IV/A-22491, Official Journal No. 179, Nov. 7, 1964, CCH COM. MKT. REP. ¶ 7031 (exclusive distributorship between French manufacturer and German distributor in one case, and with Belgian distributor in the other, neither agreement containing an export prohibition). The mechanics for assuring such exemption are not always clear, however. See Societé Anonyme La Technique Minière v. Maschinenbau Ulm G.m.b.H., Court of Appeal of Paris, First Chamber July 7, 1965, which has been referred to the European Court of Justice. See comment in CCH COM. MKT. REP. ¶ 9074.

[21] Article 85(3) provides:

> Nevertheless, the provisions of paragraph 1 may be declared inapplicable in the case of:
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> any agreements or classes of agreements between enterprises,
>
> —any decisions or classes of decisions by associations of enterprises, and
>
> —any concerted practices or classes of concerted practices which contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress while reserving to users an equitable share in the profit resulting therefrom, and which:
>
> (a) neither impose on the enterprises concerned any restrictions not indispensable to the attainment of the above objectives;
>
> (b) nor enable such enterprises to eliminate competition in respect of a substantial proportion 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.

imports of Grundig products into France by any means whatsoever, including the use for this purpose of the GINT trademark."[22] This does not mean, of course, that Consten is barred from using the GINT trademark in all circumstances. For example it could be used as against those selling products falsely labelled "GINT," not originating from the Grundig factories at all. Thus the Commission states: "this will not prevent Consten from using its rights in the GINT trademark with regard to third parties, in so far as this does not make it more difficult to engage in parallel imports of Grundig products into the territory covered by the agreement, or does not hamper such imports."[23]

Underlying this ruling and the situation in which it was evoked is the fact that the industrial property law of some countries, or trademark law coupled with customs law,[24] arms the holder of the trademark with the privilege of barring imports into the country of goods labelled with the mark, even though they are "genuine" goods, emanating from the same producer that manufactures the goods sold by the trademark-holder. Inherent in this fact, then, is the possibility of conflict between the privileges conferred by national law and the competitive requirements exacted by the Treaty, under article 85. When confronted by American anti-trust decrees requiring action or inaction in foreign countries with respect to industrial property rights held in those countries, the resistance of the European courts and executive departments to the implementation of such derogations from national patent and trademark rights has been vehement, although not always fully effective.[25] What kind of accommodation of national and Community interests can there be with respect 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

[22] CCH COM. MKT. REP. ¶ 2743, pp. 1868-69.
[23] *Ibid.*
[24] See, *e.g.*, EBB, *op. cit. supra* note 17, at 460-96.
[25] *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, *op. cit. supra* note 17, at 571-77, 586-98, 623-29.

article 85 are intended to be qualified to this extent.[26] Article 36 cites "prohibitions or restrictions in respect of importation . . . which are justified on grounds of . . . the protection of industrial and commercial property" as grounds for exemption of certain trade restrictions from the effect of specified articles of the Treaty. But, as pointed out in a recent article by P. VerLoren van Themaat,[27] Director-General of Competition of the EEC Commission, the exemption relates expressly only to the provisions of 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.

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; curtailed, that is, to the extent necessary to preclude their use by third parties against imports of the same products manufactured or distributed abroad, *i.e.*, imports of the "genuine" product. Would this curtailment of the national-law privileges of the trademark-holder be required by the EEC Commission even if the exclusive distribution arrangements did not expressly exact an undertaking not to export on the part of other purchasers of the product in question? While the *Grundig* case itself involves both factors, the implication of the ruling appears to be that, even if the undertaking not to export 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.

Per contra, what combined national-Treaty-law result would follow if a distribution arrangement in the Common Market involved export-ban agreements but no supporting possession of a trademark registration by the exclusive distributor? On the national law plane, considered apart from the Treaty law, the Dutch cases suggest that—at

[26] See, *e.g.*, OBERDORFER, COMMON MARKET CARTEL LAW 50 (1963); Ehlers, *Export and Re-Import-verbote in Lizenzvertragen aus der Sicht des EWG-Kartellrechts*, GRUR, AUSL. 424-32 (1963), noted at 3 COM. 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 COM. MKT. L. REV. 118 (1964); Maddock, *Know How Licensing under the Antitrust Laws of the United States and the Rome Treaty*, 2 COM. MKT. L. REV. 36, 65-66. See also the ruling of the Oberlandesgericht Hamm in the *Persil* case, *infra* note 34.

[27] *Article 36 in relation to Article 85 and Patent Licensing Agreements*, 1 COM. MKT. L. REV. 428 (1964).

least in The Netherlands—the interloping importer would not be checked on unfair competition grounds.[28] And, if national law in another EEC country might nevertheless be prepared to extend unfair competition concepts to protect the exclusive distributor even in those circumstances, the logic of the EEC Commission's opinion in *Grundig* would indicate that article 85 of the Treaty should be deemed a bar. This conclusion may seem inconsistent with the Commission's ruling in the matter of Grosfillex,[29] where it granted a "negative clearance" to a distribution arrangement of this sort, 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 plastics products and a Swiss distributor, the exclusive territory being the non-EEC country of Switzerland. 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 anyway. Whether or not the Commission was right in its analysis of the restrictive impact of the agreement,[30] its analysis does indicate that it would readily distinguish this situation from a purely intra-EEC arrangement.

Thus far, our discussion of the national law concerning import-ban privileges of trademark-holders has assumed that the EEC countries would uniformly permit their trademark-holders, in the absence of the Treaty, to bar imports of the trademarked product engineered by parallel importers. Is this so? The implication of the rulings in the French courts in *Grundig* suggests that French law at least, absent article 85, would confer such broad powers on those holding the French trademark even in the context of a tight, exclusive distribution arrangement drawn along territorial lines.

If such broad powers would be conferred, France is more generous to trademark holders with respect to foreign imports and more clear-cut about its generosity than is true of many of the other West Euro-

[28] Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V., Jan. 12, 1962, Hoge Raad (Dutch Supreme Court), 1 Com. Mkt. L. Rep. 205 (1962).

[29] See Decision of the Commission of the European Economic Community, March 11, 1964, 3 Com. Mkt. L. Rep. 237 (1964).

[30] See EBB, *op. cit. supra* note 17, 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).

pean countries. A long-standing conflict between two schools of thought about trademark and unfair competition law—between the "territoriality" and "universality" concepts—has been tending to resolution, insofar as the rights of exclusive importer-distributors are concerned, in favor of the universality school, in the decades following World War II, particularly in Germany, Switzerland,[31] and, though in more qualified degree, in The Netherlands as well. In general, the territoriality school views the holder of a trademark, or an exclusive-distributor-licensee under the trademark, registered in a country that imports a product manufactured under the corresponding trademark registered abroad, 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, among others, 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.

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.[32] What is relevant for this study is the interesting fact that the trend towards applying the universality principle to curb the import-ban powers of exclusive distributors within national territories in Western Europe is a striking parallel to the conclusion of the EEC Commission that the Treaty itself, by virtue of article 85, similarly curbs the international trade restrictive efforts of exclusive distributors relying upon trademark

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

[32] See generally EBB, *op. cit. supra* note 17, 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 RIV. DEL. DIR. COMMERCIALE 251, 272 (1964); Birk, *Die Grenzen des Territorialitätsprinzips Warenzeichenrecht*, 17 NEUE JURISTISCHE WOCHENSCHRIFT (N.J.W.) 1596 (1964); Röttger, *Das Territorialitätsprinzip im Warenzeichenrecht*, GRUR, AUSL. 125 (1964).

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 that underlying the reasoning of those who drafted and those who are now implementing the Treaty.

As a corollary, a potential source of conflict between national and Treaty law may be minimized at the outset by virtue of the fact that the development of national law has proceeded recently, in at least some of the EEC countries, along lines paralleling those implicit in the 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 have been working on the drafting of a convention for a system of European trademarks. A working group draft was completed in June 1964. It is intended that the Trademark Convention, like the proposed Patent Convention, should 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 that supranational area, an area within which exclusive distributor-importers—even under national law considered in isolation—could not bar imports of a product manufactured and affixed with the corresponding trademark in one of the other EEC countries.[33]

As previously noted, in the instant case Consten contracted to serve as exclusive importer-distributor of Grundig products for France, the Grundig products being manufactured in Germany. In the reverse set of circumstances, if the internal trademark and unfair competition law of Germany were applied, a German exclusive importer-distributor of products made in France would be unable to assert import-ban privileges based on a license under a German trademark which had been registered by the French manufacturer. The German Supreme Court recently ruled to this effect with respect to a German exclusive distributor of "Maja" soap products imported from Spain, the product being that of the Spanish manufacturer, Myrurgia S.A., which owns

[33] 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 territorial principle with respect to the existence or absence of import-ban privileges vis-à-vis imports outside the Common Market is of course quite another question.

the Spanish and German trademarks.[34] American law, after an early adherence to the universal view with respect to exclusive distributor-importers[35] moved to a territorial viewpoint, as expounded by Mr. Justice Holmes in the *Bourjois* case,[36] apparently under the influence of the very considerable and undoubtedly amply-grounded respect that the Court held for the power and value of advertising in the American market-place. The sheer factor of geographical location that sets the United States far apart from most of the other industrial producing countries from which we import branded products, in contrast with the close physical juxtaposition of the EEC countries which tends towards the creation of a single market in terms of the development of good will in the distribution field, may in part explain the difference between the American and Western European attitudes. The American viewpoint, moreover, is far from consistently "territorial," as indicated by the checkered history of ever-changing and ever-ambiguous Trea-

[34] Judgment of Jan. 22, 1964, Bundesgerichtshof (German Federal Supreme Court), GRUR, AUSL. 202 (1964). See also, EBB, *op. cit. supra* note 17, at 490-93 (reprinting excerpts from SABA Radio, Television & Electro A.G. and Werder & Schmid A.G. v. Eschenmoser, B.G.E. 84 IV 119, Cour de Cassation Pénale (Court of Penal Appeals, Switzerland) (1958)); 51 TRADEMARK REP. 141 (1961) (commenting on Philips A.G. v. Radio Import G.m.b.H., Oct. 4, 1960, Arrêts du Tribunal Fédéral 86 II 270 (Swiss Federal Court)). 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, *op. cit. supra* note 17, at 482-87 (reprinting excerpts from Soap Manufacturer Sunlight A.G. v. Migros-Cooperative Society, B.G.E. 78 II, Bundesgericht (Swiss Federal Court, First Civil Div.) (1952)); *id.* at 494 (summarizing with comment Istituti Burlando v. Palmolive S.P.A., Oct. 20, 1956, Court of Cassation, Italian Supreme Court, reported in RIVISTA DELLA PROPRIETA INTELLETUALE E INDUSTRIALE 71). For an interesting contrast to the German Supreme Court's decision in *Maja*, see *Survey of Literature*, 2 COM. MKT. L. REV. 109, 118 (1964) (noting Judgment of Jan. 17, 1964, Oberlandesgericht (Court of Appeal) Hamm, published in AUSSENWIRTSCHAFTSDIENST 124-25 (1964)). 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 article 85 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 corresponding 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.

[35] Apollinaris Co. v. Scherer, 27 Fed. 18 (C.C.S.D.N.Y. 1886); EBB, *op. cit. supra* note 17, at 461-63.

[36] A. Bourjois & Co. v. Katzel, 260 U.S. 689 (1923).

sury Department Regulations with respect to trademark-holder protection against imports, when the holders of the foreign and domestic trademark registrations are closely related.[37]

Etablissements Consten, in the case at hand, had been licensed to use the trademark "GRUNDIG" by the German Grundig distributing company, which owns the trademark GRUNDIG in Germany, France, and in all other relevant countries. But 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 Court) had, in fact, ruled at that time that a Dutch importer-distributor licensed under the GRUNDIG trademark itself could not ban imports of the Grundig products by others, on the ground that the trademark owner—Grundig—had exhausted its trademark rights to control over the distribution of the product once it had put the trademarked products into commerce.[38] To avoid this result, the Grundig enterprise adopted the somewhat elaborate circumvention, described above, of registering the additional mark GINT in The Netherlands, but 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 the national distributors). Local rather than absentee ownership of the GINT mark, coupled with the fact that the court was either unconcerned about the close relationship between the local Dutch trademark-holder and German Grundig or simply regarded the Dutch owner as a 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.[39]

[37] See EBB, *op. cit. supra* note 17, at 467-81, and articles cited therein.

[38] Grundig v. Prins, GRUR, AUSL. 259 (1957).

[39] Judgment of Dec. 4, 1957 (Court of The Hague), as reported in GRUR, AUSL. 557 (1959). 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).

However useful this device of employing a supplementary trademark to be owned by the national distributor for the purpose of bolstering the distributor's absolute territorial protection under the national law (while simultaneously preserving a companion mark owned by the foreign manufacturer alone), the very fact that it had been conceived for this specific purpose 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 as being patently and essentially a restrictive practice device. Moreover, the restriction took the form of partitioning the Common Market along national boundary lines.

Thus, at this specific point, the national trademark law and the Common Market anti-restrictive-practice Treaty law come into apparent conflict, and Treaty law—if correctly construed by the Commission, subject to the views of the Court of Justice—must prevail. While this represents an "apparent" conflict between French internal law and Treaty law, the nature and extent of the conflict is not clear. Despite the reasoning of the Commission, the 1962 opinions of the French courts in this and related litigation do not seem in fact to have turned upon the ground that trademark rights of the sole distributor were being infringed by the parallel imports in any technical sense. Instead, the unfair competition charge that underlay the trial court's injunction against UNEF was based on the somewhat more general ground that the parallel importer had unjustifiably injured the sole distributor because it had knowledge of the sole agency agreement and wilfully 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 was cast not in terms of trademark infringement as such, but rather in the more general context of UNEF's taking unfair advantage of the obligations of an exclusive importer "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."[40] By use of this expansive definition of unfair competition, in the absence of legislation similar to state fair trade laws in the United States that bind "non-signers" of a distribution agreement, the court indicated that it would use

[40] *Accord,* Cie Française Telefunken S.A. v. Ets Aubin & Ets Pucci, May 13, 1964, Tribunal de Commerce de Marseille, summarized in considerable detail in 2 CCH COM. MKT. REP. ¶ 9088.

its equitable powers in the broadest possible manner to protect a closed system of distribution, which it regards as operating to the benefit of consumers, against any interlopers. 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 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."[41] The additional statement, and indeed constant reiteration by the court, of the fact that the parallel importer continued "surreptitious imports" despite complaints by the sole distributor seems to add little to bolster the complainant's rights under national law.

Another and quite different national-law attitude towards unfair competition with respect to the interloping importer was exhibited by the Dutch Supreme Court (Hoge Raad), in *Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V.*[42] In reversing a lower court's injunction against the interloper, the Dutch court found it unnecessary to pass on claims that Grundig's exclusive

[41] See also Note, 1 COM. 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 (1950). 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 trademark infringement caused by parallel imports, is strikingly illustrated by Holmes' opinion, speaking for the Court in A. Bourjois v. Katzel, 260 U.S. 689, 689-92 (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, etc., so that the business has 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.

[42] Jan. 12, 1962, Hoge Raad (Dutch Supreme Court), 1 Com. Mkt. L. Rep. 205 (1962).

distributorship system violated article 85 of the Treaty. It found that inquiry unnecessary, however, only because it held that unfair competition did not result when the Dutch defendants purchased these products from German wholesalers, whom they knew to be subject to an export-ban contract with Grundig, and imported them into The Netherlands for resale, despite the existence of a sole distributorship agreement between Grundig and the plaintiff. While such conduct might, under certain unspecified circumstances, be contrary to the "duty of care" required in the law from a buyer towards a manufacturer, the court decided that no such special circumstances existed in this case merely because of the existence of the export-ban provision nor because of the sole distributorship agreement. While the Dutch Supreme Court studiously avoided reference to article 85 of the EEC Treaty, since its ruling rested on national law itself, one wonders whether it may nevertheless have been swayed by the defendants' argument that, to consider their

> behaviour unlawful in relation to Grundig would amount to an undeserved protection of sales policy, a protection which is contrary to current social opinion, as well as being prohibited by Articles 85 to 89 of the EEC Treaty. With regard to the same Articles, the Court of Appeal failed to take account of... [the fact] that, although Articles 85 and 86 contain only directives and/or principles for the policy to be adopted by the Governments of member-States, these directives and/or principles should be taken into account in determining whether [the defendants'] behaviour towards Grundig is contrary to the duty of care required by the law in their public relations with Grundig.[43]

It is of interest to note that in a subsequent attempt to secure Dutch judicial protection for the Grundig distribution system, in *Grundig Nederland N.V. v. Ammerlaan*,[44] before the Court of Appeal in the Hague, the Grundig sole distributor, a wholly-owned subsidiary of German Grundig, relied on the import-ban privileges inherent in the Grundig trademark in The Netherlands, which had been transferred to it by its German parent. The success of the action on trademark grounds, rather than those of unfair competition unrelated to the trademark, suggests once again the crucial importance of the trademark feature of Grundig's exclusive distribution system, and

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[43] *Id.* at 215.

[44] Grundig Nederland N. V. Ammerlaan, Feb. 20, 1963, Gerechtshof Te 'S-Gravenhage (Court of Appeal, The Hague), 3 Com. Mkt. L. Rep. 373 (1964).

emphasizes its importance in the case now pending before the European Court of Justice.[45]

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, even as against non-signers, when properly registered with the German Federal Cartel Office, cannot be enforced unless the initiator of the distribution arrangements has set up a systematic and comprehensive system of protection, including contracts providing for bans on re-export of the product from one national territory to another.[46] 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.[47] 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 if the Court of Justice upheld 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 discussed above.[48] Simi-

[45] See to the same effect N.V. Technische Handelsonderneming Nibeja v. N.V. Graetz Nederland, June 28, 1962, Gerechtshof, Amsterdam, 3 Com. Mkt. L. Rep. 366 (1964).

[46] See, *e.g., In re* "Braun" Electric Razors (KZR 5/62), June 14, 1963, Bundesgerichtshof (German Federal Supreme Court), 3 Com. Mkt. L. Rep. 59 (1964); *In re* "Agfa-Optima" No. 2 (case 6 U(K) 2/63), May 30, 1963, Oberlandesgericht (Court of Appeal) Munich, 3 Com. Mkt. L. Rep. 87 (1964), 2 CCH COM. MKT. REP. ¶ 8020; Grundig Radio-Werke G.m.b.H. v. Technische Handelsonderneming Nibeja N.V., Jan. 12, 1962, Hoge Raad (Dutch Supreme Court), 1 Com. Mkt. L. Rep. 205, 212-15 (1962).

[47] *In re* "Braun" Electric Razors (KZR 5/62), June 14, 1963, Bundesgerichtshof (German Federal Supreme Court), 3 Com. Mkt. L. Rep. 59, 76-78 (1964).

[48] See note 34 *supra,* and accompanying text.

larly, one might also foresee corresponding changes in domestic trademark and unfair competition principles in response to any affirmance of the *Grundig* ruling, even before the coming into effect of a European trademark convention, although the precise reformulations of national law might well vary as among the EEC countries. Some, for example, might trim their doctrinal revisions to exempt products of their EEC partners from import bans; others might adopt more sweeping reformulations.

At least in the anti-cartel area, the history of 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. One may venture the speculation that the drama of the evolutionary process will be found, in the long run, to exist in this subtle interplay and in the tacit absorption of Treaty standards by national law rather than in any knock-down drag-out confrontation and combat between clearly-defined Treaty law and clearly-defined national law.