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E GARCIA DE ENTERRIA	SIR GORDON SLYNN
C GULMANN	C W A TIMMERMANS
F G JACOBS	G VANDERSANDEN

Abbreviations

AC	Appeal Cases
A&E	Adolphus & Ellis
AETR	Accord européen relatif au travail des équipages des véhicules effectuant des transports internationaux par route (also ERTA)
AFDI	<i>Annuaire français de droit international</i>
AG	Aktiengesellschaft
AJDA	<i>L'Actualité juridique—Droit administratif</i>
All ER	All England Law Reports
AJCL	<i>American Journal of Comparative Law</i>
AJIL	<i>American Journal of International Law</i>
ASIL	American Society of International Law
Ann Eur	<i>Annuaire européen</i> (European Yearbook)
Ann Suisse DI	<i>Annuaire suisse de droit international</i>
AOW	<i>Algemene Ouderdomswet</i>
Art	Article
Aust YIL	<i>Australian Yearbook of International Law</i>
AWD	Aussenwirtschaftsdienst des Betriebs-Beraters
AWW	<i>Algemene Weduwen-en Wezenwet</i>
BCLC	Butterworths Company Law Cases
BGB	Bürgerliches Gesetzbuch
BGBI	<i>Bundesgesetzblatt</i>
BGE	Entscheidungen des Schweizerischen Bundesgerichtes
BGH	Bundesgerichtshof
BISD	Basic Instruments and Selected Documents (GATT)
BJE	<i>Bulletin des juristes européens</i>
BKA	Bundeskartellamt
BLEU	Belgo-Luxembourg Economic Union
BPIL	<i>British Practice in International Law</i>
BVerfg	Bundesverfassungsgericht
BYIL	<i>British Year Book of International Law</i>
CA	Court of Appeal
Camb LJ	<i>Cambridge Law Journal</i>
CAP	Common agricultural policy
CBNS	Common Bench, New Series
CCH	Commerce Clearing House
CCT	Common customs tariff

CDE	<i>Cahiers de droit européen</i>
CET	Common external tariff
Ch	Chancery Division of the High Court
Chap	Chapter
Cie	Compagnie
CJ	Chief Justice
CLP	<i>Current Legal Problems</i>
CLR	Commonwealth Law Reports
CMLR	Common Market Law Reports
CML Rev	<i>Common Market Law Review</i>
Cmd (Cd, CmdCm)	Command Paper
COCOR	Comité de Coordination
Comm	Commission Documents
Co Rep	Colle's Reports
COREPER	Committee of Permanent Representatives to the European Communities (abbreviation of comité des représentants permanents)
Crim App R	Criminal Appeal Reports
Crim L Rev	<i>Criminal Law Review</i>
CS	Court of Session
DA	<i>Deutschland-Archiv</i>
DET	<i>Droit européen des transports</i>
DLR	Dominion Law Reports
D & R	Decisions and Reports
DTI	Department of Trade and Industry
DVBl	<i>Deutsches Verwaltungsblatt</i>
EAEC	European Atomic Energy Community
EAGGF	European Agricultural Guarantee and Guidance Fund
EAT	Employment Appeal Tribunal
(EC) Bull	<i>Bulletin of the European Communities</i>
ECE	Economic Commission for Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	<i>European Competition Law Review</i>
ECMT	European Conference of Ministers of Transport
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECU	European Currency Unit
EDF	European Development Fund
EEC	European Economic Community
EFTA	European Free Trade Area
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch

EHRR	European Human Rights Reports
EIB	European Investment Bank
EIRR	European Industrial Relations Reports
EL Rev	<i>European Law Review</i>
EMF	European Monetary Fund
EP (or PE) doc	European Parliament document
EPCA	Employment Protection Consolidation Act
ERM	Exchange Rate Mechanism
ERTA	European agreement concerning the work of crews of vehicles engaged in international road transport (also AETR)
ESF	European Social Fund
ETL	<i>European Transport Law</i>
ETS	European Treaty Series
EUA	European unit of account
EuGRZ	<i>Europäische Grundrechte-Zeitschrift</i>
EuR	<i>Europarecht</i>
Euratom	European Atomic Energy Community
Eur Ct HR	European Court of Human Rights
Europe Bulletin	Daily Bulletin produced by Agence Europe, Brussels-Luxembourg
EVst	Einfuhr-und Vorratsstelle
Ex	Exchequer Cases
FA	Finanzamt
FAO	Food and Agriculture Organisation
FEOGA	Fonds européen d'orientation et de garantie agricole (European agricultural guidance and guarantee fund)
GATT	General Agreement on Tariffs and Trade
GG	Grundgesetz
GmbH	Gesellschaft mit beschränkter Haftung
GVBl	<i>Berlin Gesetz-und-Verordnungsblatt</i>
HA	High Authority of the ECSC
HC	House of Commons
HC Deb	House of Commons debates
HL	House of Lords
HL Deb	House of Lords debates
HMSO	Her Majesty's Stationery Office
HRLJ	<i>Human Rights Law Journal</i>
HRQ	<i>Human Rights Quarterly</i>
HR Rev	<i>Human Rights Review</i>
HZA	Hauptzollamt

ICJ Rep	International Court of Justice Reports
ICLQ	<i>International and Comparative Law Quarterly</i>
ICR	Industrial Court Reports
ILO	International Labour Organisation
OLM	<i>International Legal Materials</i>
IMF	International Monetary Fund
Ind JIL	<i>Indian Journal of International Law</i>
IR	Irish Reports
IRLR	Industrial Relations Law Reports
JBL	<i>Journal of Business Law</i>
JCMS	<i>Journal of Common Market Studies</i>
JCP	<i>Jurisclasseur périodique</i>
JDI	<i>Journal du droit international</i>
JLS	<i>Journal of Legal Studies</i>
JO	<i>Journal officiel</i> (des Communautés européennes)
JORF	<i>Journal officiel Republic Français</i>
JT	<i>Journal des Tribunaux</i> (Belgium)
JWTL	<i>Journal of World Trade Law</i>
KB	King's Bench
KG	Kommanditgesellschaft
KSE	<i>Kölner Schriften zum Europarecht</i>
LGDJ	Librairie Générale de Droit et de Jurisprudence
LIEI	<i>Legal Issues of European Integration</i>
Lloyd's Rep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQ Rev	<i>Law Quarterly Review</i>
MB	<i>Moniteur Belge</i>
MEP	Member of the European Parliament
MLR	<i>Modern Law Review</i>
MP	Member of Parliament
n	footnote
NATO	North Atlantic Treaty Organisation
NILQ	<i>Northern Ireland Law Quarterly</i>
NILR	Northern Ireland Law Report
NJW	<i>Neue Juristische Wochenschrift</i>
NLJ	<i>New Law Journal</i>
NQHR	<i>Netherlands Quarterly of Human Rights</i>
NV	Naamloze Vennootschap

OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Co-operation
OHG	Offene Handelsgesellschaft
OJ	<i>Official Journal</i> (of the European Communities)
OJLS	<i>Oxford Journal of Legal Studies</i>
Pas	<i>Pasicrisie</i>
PC	Privy Council
PCIJ	Permanent Court of International Justice
PE (or EP) doc	European Parliament document
PLC (or plc)	Public Limited Company
Proc ASIL	<i>Proceedings of the American Society of International Law</i>
PL	<i>Public Law</i>
QB	Queen's Bench Division of the High Court
RBDI	<i>Revue belge de droit international</i>
RCADI	<i>Recueil des cours de l'académie de droit international</i>
RCDIP	<i>Revue critique de droit international privé</i>
RDE	<i>Rivista di Diritto Europeo</i>
RDH	<i>Revue des droits de l'homme</i>
RDP	<i>Revue du Droit Public</i>
Rec	<i>Recueil de la jurisprudence de la Cour de justice des Communautés européennes</i>
Rev de l'integ europ	<i>Revue de l'intégration européenne</i>
RGDIP	<i>Revue générale de droit international public</i>
RIDC	<i>Revue international de droit comparé</i>
RMC	<i>Revue du Marché Commun</i>
RPC	Reports of Patent Cases
RSC	Rules of the Supreme Court
RTDE	<i>Revue trimestrielle de droit européen</i>
RW	<i>Rechtskundig Weekblad</i>
s	section
SA	Société anonyme
SARL	Société à responsabilité limitée
SCt	Supreme Court
SEA	Single European Act
SEW	<i>Sociaal-economische Wetgeving</i>
SI	Statutory Instrument
Soc	Société

SpA	Società per Azioni
SPRL	Société de personnes à responsabilité limitée
Stb	<i>Statsblad</i>
St GB	Strafgeszbuch
St Tr	State Trials
Uni Chi L R	<i>University of Chicago Law Review</i>
UN	United Nations Organisation
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTS	United Nations Treaty Series
VC	Vice Chancellor
Ves	Vesey Junior
Ves Sen	Vesey Senior
VN	<i>Vereinte Nationen</i>
WEU	Western European Union
WHO	World Health Organisation
WLR	Weekly Law Reports
WuW	<i>Wirtschaft und Wettbewerb</i>
YBILC	<i>Year Book of the International Law Commission</i>
YECHR	<i>Yearbook of the European Convention on Human Rights</i>
YEL	<i>Yearbook of European Law</i>
ZaöRV	<i>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</i>

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Vorsprung durch Technik: The Commission's Policy on Know-How Agreements*

TIM FRAZER

Introduction

Of the recent legislative developments in EEC competition law, the publication of the block exemption for know-how agreements¹ provides clear insights into the policy of the Commission on the place of technology within competition policy, and the objectives of competition policy generally. The Regulation appears to signify a triumph of technology over the idea of an internal market,² defined in the Single European Act, as 'an area *without internal frontiers* in which the free movement of goods, services and capital is ensured in accordance with the provisions of this [EEC] Treaty'.³

The Commission justifies a block exemption for exclusive know-how licences on the basis that such licences 'encourage the transfer of technology and thus generally contribute to improving the production of goods and to promoting technical progress, by increasing the number of production facilities and the quality of goods produced in the common market and expanding the possibilities of further development of the licensed technology'.⁴ It is also claimed that consumers are allowed a fair share of the resulting benefit and that the restrictions permitted by the block exemption are not indispensable to improving the transfer of technology.

The long-standing policy of the European Court of Justice is that, by applying a rule of reason analysis, exclusive licence agreements may be regarded as not incompatible with Article 85(1) in certain circumstances.⁵ The Commission has extended the Community welcome to exclusive licences for know-how by block exempting those that do fall within Article 85(1). It is the theme of this paper that the terms of the block exemption are over-inclusive; the Commission has allowed its desire to

* © Tim Frazer, 1989, Professor of law at the University of Newcastle-upon-Tyne. The author is grateful to Dr Steve Anderman for his comments on this paper.

¹ Regulation 556/89, OJ 1989 L61/1, hereafter referred to as the 'Know-How Licence Regulation'.

² Anderman talks of 'a new technology exception to the scope of Article 85(1)'—S. D. Anderman, 'The Conflict Between Intellectual Property Rights and EEC Competition Policy', W. G. Hart Legal Workshop, Institute of Advanced Legal Studies, London, 1989.

³ Art 13, Single European Act, adding Art 8A to the EEC Treaty, emphasis added.

⁴ Know-How Licence Regulation, Preamble (7). In the Regulation the term 'licensed technology' includes initial and subsequent know-how communicated to the licensee and any patents included in the licence agreement: Art 1(7) 7.

⁵ See text at n 34 below.

ensure a speedy dissemination of technology among EEC firms to prevail over the 'first fundamental objective' of competition policy, which is to keep the common market open and unified.⁶

The Know-How Licence Regulation in outline

The scheme of the Regulation is broadly similar to that of the Patent Licence Regulation.⁷ The Know-How Licence Regulation applies to pure know-how agreements and to those mixed know-how and patent agreements which are not exempted by the Patent Licence Regulation.⁸ It also applies to agreements which contain ancillary restrictions relating to trade marks and other intellectual property rights.⁹ In common with the Patent Licence Regulation, the exemption applies not only to licences granted by the proprietor of the licensed technology, but also to: licences granted by authorized agents or licensees; assignments of technology where the assignor retains risks relating to the innovation (such as accepting royalty payments based on turnover, etc); and licences involving undertakings connected with the parties.¹⁰

The exemption from Article 85(1) applies to such agreements under which licensees are granted 'open' exclusivity.¹¹ Licensees may also agree not to exploit the licensed technology in the licensor's territories or in those of other licensees.¹² There are also provisions exempting restrictions of both active and passive sales in the territories of other licensees.¹³ Finally, exemption is granted to licensees' obligations to market the licensed product under the licensor's trademark,¹⁴ and to limit production to quantities required in the manufacture of the licensee's own products.¹⁵ With the exception of the obligation not to manufacture or use the licensed product or process in the territory of another licensee, the exemption will apply only if the licensee manufactures or proposes to manufacture the product itself or has it manufactured by a connected undertaking or a subcontractor.¹⁶

The application of the Know-How Regulation to the transfer of technology

The array of legislation on the transfer of technology under the EEC competition regime results in a need for firms to distinguish the following transactions in order to determine their exposure to Article 85:

⁶ EC Commission, *Ninth Report on Competition Policy*, 1980.

⁷ Regulation 2349/84, OJ 1984 L219/15.

⁸ For a discussion of the nature of 'mixed agreements', see p. 3, below.

⁹ Art 1(1).

¹⁰ Art 6.

¹¹ Art 1(1).

¹² Art 1(1) 3 and 4.

¹³ Art 1(1) 5 and 6.

¹⁴ Art 1(1) 7.

¹⁵ Art 1(1) 8. This provision does not appear in the Patent Licence Regulation.

¹⁶ Art 1(5).

- (i) a patent licence or related agreement covered by the Patent Licence Regulation;
- (ii) a mixed patent and know-how agreement covered by the Patent Licence Regulation;
- (iii) a pure know-how agreement covered by the Know-How Licence Regulation;
- (iv) a mixed know-how and patent agreement covered by the Know-How Licence Regulation;
- (v) an agreement involving the transfer of know-how covered by the Franchise Agreement Regulation;¹⁷
- (vi) an agreement involving the transfer of know-how covered by the Research and Development Agreement Regulation;¹⁸
- (vii) an agreement involving the transfer of know-how *not* covered by any of the block exemptions, such as know-how transfers to joint ventures, or patent pools.

In practice perhaps the greatest difficulty will be experienced in distinguishing the two types of mixed agreement described in (ii) and (iv), above. The importance of know-how to the successful transfer of patented and non-patented technology has been recognized for some time. Bertin and Wyatt's empirical study of multinational companies revealed that European multinationals rank know-how as the best method of protecting and securing a technological advantage over competitors. Know-how, ranked even higher than patent protection in this regard, has become of greater importance to European companies in the last ten years.¹⁹ The mixed agreement was found to be more common than the pure patent licence, with sixty per cent of patent licences granted by European multinational companies making provision for the supply of additional know-how to the licensee.²⁰ The importance of know-how was recognized by the European Parliament in its Resolution on the draft Know-How Licence Regulation, where it stated that 'know-how, because it allows possession of or immediate access to the most recent technology, has an economic value equal to, if not greater than, that of patents'.²¹ Similarly, the Economic and Social Committee, in its Opinion on the draft Regulation, stated that 'the acquisition of know-how from others is the most economical—and often the sole—way of keeping abreast of technical progress'.²²

The Patent Licence Regulation exempts mixed agreements but in order to qualify for block exemption under that Regulation, the mix of technology types must be weighted in favour of the patented technology. The licensed

¹⁷ Regulation 4087/88, OJ 1988 L359/46.

¹⁸ Regulation 418/85, OJ 1985 L53/5.

¹⁹ Bertin and Wyatt, *Multinationals and Industrial Property*, (Harvester-Wheatsheaf, 1988), 28.

²⁰ Worldwide this figure rises to 69.1% in the pharmaceutical sector and 74.1% in electronics. Bertin and Wyatt, *op cit*, 75.

²¹ European Parliament, *Resolution on the Draft Know-How Licence Regulation* [1988] 4 CMLR 653.

²² Economic and Social Committee, *Opinion on the Draft Know-How Licence Regulation* [1988] 4 CMLR 498.

patents must be both extant and 'necessary for achieving the objects of the licensed technology'.²³ Under the Know-How Licence Regulation the mix must be weighted in favour of the non-patented technology. The Regulation will apply where the licensed patents are not necessary to achieve a successful transfer of the technology. It will also apply where restrictions are imposed in relation to Member States where no patents exist, whether or not they are 'necessary' in the countries in which they do exist. The mutual exclusivity of the two Regulations²⁴ might appear to be a neat legislative device but it will often be difficult for firms to determine which Regulation properly applies to their transaction, since the question of the 'necessity' of the patents to a successful transfer of the technology is not likely in all cases to be a precise test. The calculation of the relative importance of patented and non-patented information will be especially difficult where there is to be a constant flow of know-how throughout the life of the agreement. One test of 'necessity' put forward by the Know-How Licence Regulation is the usefulness of the patents in providing effective protection against the exploitation of the technology by third parties;²⁵ in the absence of litigation, this will often be a matter of speculation.

The difficulty which may thus be experienced in calculating the relative importance of licensed know-how and patents will render the selection of the correct Regulation complex and uncertain. Although this will create problems for firms, it might also be used to their advantage. In transactions where uncertainty exists, it will be open to firms, through careful drafting, to choose the regime under which their technology package is to be regulated. Such freedom of choice will be advantageous where the parties wish to exploit the differences between the Commission's present policy with respect to know-how and its policy towards patent licences. The Commission has stated that some such differences have been dictated by the fact that know-how is not a protected property right, and therefore has no finite legal existence.²⁶ It was for this reason that the Commission drafted the Regulation in terms more favourable to the licensor than those of the Patent Licence Regulation.²⁷ However, as Venit points out, the implications of the absence of legal protection are ambiguous, supporting arguments both for and against a generous regime for know-how licensing.²⁸ Further, the

²³ The Patent Licence Regulation, Preamble (9).

²⁴ Know-How Licence Regulation, Art 1(7) 6.

²⁵ Preamble (2).

²⁶ See the statement of Commissioner Sutherland during the European Parliament debates on the Franchise and Know-How Licence Regulations, [1989] 4 CMLR 6.

²⁷ The Economic and Social Committee criticized the Commission for adhering too closely to the Patent Licence Regulation, having regard to the differences between patents and know-how: The Economic and Social Committee, *op cit*, n 22.

²⁸ Venit, 'Know-How Licensing Under EEC Law: Where We Have Been, Where We Are, and Where We May Be Headed', 32 *Antitrust Bulletin* 189 (1987). In addition, there are arguments to support the idea that property *does* exist in know-how: see Libling, 'Property in Intangibles', (1978) 94 *LQR* 103, at 115 *et seq*; Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell, 1981) 289; Phillips, *Introduction to Intellectual Property Law* (Butterworths, 1986) 209.

availability of actions for breach of confidence in respect of the abuse of know-how will reduce the apparent divide between know-how and patents.²⁹

The Know-How Licence Regulation allows for a wider variety of licences to be bundled together than is permitted under the Patent Licence Regulation.³⁰ Licences of software or intellectual property (other than patents) may be included, and restrictions may be attached to such licences so long as they do not differ from those attaching to the know-how component. It is necessary to show only that these additional rights 'are of assistance in achieving the object of the licensed technology',³¹ rather than *necessary* to achieving that end. This is a very modest requirement; as a result, licensors will be able to enjoy the benefit of automatic exemption for restrictions attaching to more extensive packages of technology rights than has been possible hitherto.

The Know-How Licence Regulation and the rule of reason

In keeping with the Commission's policy in the Patent Licence Regulation,³² its attitude to the application of Article 85 to territorial exclusivity in know-how licences still gives only scant regard to the policy of the European Court of Justice in the *Maize Seeds* case.³³ The preamble to the Know-How Licence Regulation confirms that, under the rule of reason analysis required by *Maize Seeds*, 'open' exclusive licences will not always be incompatible with Article 85(1).³⁴ The Commission does not define the distinction between those licences which are outside the prohibition as a result of *Maize Seeds*, and those which are block exempted. The opacity of the Regulation in this respect, and the potential penalties for getting the distinction wrong, will have the effect of inducing firms to comply with the Regulation rather than relying on *Maize Seeds*. This tendency is given greater impetus by the statement in the preamble to the Regulation that if firms require longer periods of territorial protection than are granted in the Regulation 'in particular to protect expensive and risky investment . . .' then exemption can only be granted by individual decision under Article 85(3). Surely *Maize Seeds* requires the rule of reason analysis to be applied to Article 85(1) precisely in such situations of expensive and risky investment, rather than have recourse to Article 85(3).

²⁹ See The Law Commission, *Breach of Confidence*, Cmnd 8388 (1981), and Black, *Intellectual Property in Industry* (Butterworths, 1989) 50 *et seq.*

³⁰ The draft Regulation did not, however, extend to sub-licences, assignments where the assignor retains a degree of risk, and group agreements. The omission of such transactions was surprising since the draft Know-How Regulation was based on the Patent Licence Regulation, which does extend to such transactions. Art 6 of the Know-How Licence Regulation now covers this omission.

³¹ Know-How Licence Regulation, Art 5(1) 4.

³² See Whish, *Competition Law* (Butterworth, 1985) 363.

³³ *Nungesser v Commission (Maize Seeds)* [1983] 1 CMLR 278.

³⁴ Preamble (6).