EC COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS: THE REGULATION OF INNOVATION. By Steven D. Anderman. Oxford, Clarendon Press, 1998. 320 pages.*

Reviewed by Ewell E. Murphy, Jr.**

The United States of America and the European Community[1] have dealt with competition law and intellectual property rights by methods that are historically contrasting and institutionally diverse.

The historical contrast is the sequence in which the two legal subjects became creatures of central legislation. The U.S. Constitution of 1787 granted the federal Congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,"[2] but left federal competition law to be asserted in a later century, and then not by Constitutional amendment but as implied in the power of Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[3] The E.C. Rome Treaty of 1957 created supra-national competition rules implementable by Community legislation,[4] but granted no central authority to create intellectual property rights, and mentioned "the protection of industrial and commercial property"[5] merely as

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1. In this review "European Community" and "E.C." refer to the treaty group of nations bound by the Treaty Establishing the European Economic Community (Rome Treaty), Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY], *available in* WL I.E.L. V-A-1-b, as amended by the Single European Act, Feb. 17 & 28, 1986, O.J. (L 169) 1 (1987), [1987] 2 C.M.L.R. 741 (1987), *reprinted in* 25 I.L.M. 503, and the Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C340) 1 [hereinafter Amsterdam Treaty], *reprinted in* 37 I.L.M. 56, and separately joined (as the European Union) by the Treaty Establishing the European Community (Maastricht Treaty), Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992), *reprinted in* 37 I.L.M. 56, as amended by the Amsterdam Treaty. The Amsterdam Treaty was recently ratified on May 1, 1999. *See France Ratifies EU Amsterdam Treaty Amid Criticism*, AGENCE FRANCE-PRESSE, Mar. 3, 1999, *available in* 1999 WL 2556911.
2. U.S. CONST. art. I, § 8, cl. 8.
3. *Id.* at cl. 3.
4. *See* EEC TREATY arts. 81–89 (as amended 1997).
5. *Id.* at art. 30 (as amended 1997).

a qualified exception to its prohibition of restrictions on imports and exports between Member States.[6]

That left each E.C. Member State with legislative power over its national intellectual property law, subject to the authority of the E.C. Council to direct "approximation of such laws, . . . as directly affect the establishment or functioning of the common market."[7] "Approximation" efforts did not achieve a functioning supra-national E.C. trademark until 1996,[8] and the creation of a supra-national E.C. patent still awaits ratification by all Member States of the Community Patent Convention of 1975.[9]

The institutional diversity between the U.S. and the E.C. is in their governmental structures. The U.S. Constitution followed Montesquieu's concept of a government of three separate branches: legislative, executive, and judicial. Of such branches, the Rome Treaty grants comparable judicial power to the European Court of Justice, but diffuses legislative and executive authority among the E.C.'s Commission, Parliament, and two Councils with complexities that baffle U.S. observers and would astonish Montesquieu. [10]

Because of the peculiarities of the Rome Treaty, the E.C. deals with the supra-national effect of Member States' intellectual property laws chiefly as a function of E.C. authority over supra-national E.C. competition law, and it does that dealing chiefly by competition regulations and rulings of the E.C. Commission, periodically adjusted to conform to decisions of the European Court of Justice. [11] Understanding E.C. competition law is consequently the best route to understanding E.C. intellectual property rights, and that is the path that Steven Anderman (Birkett Long Professor of Law at the University of Essex) follows in this useful book. With fifteen years experience as an Expert of the Economic and Social Committee of the European Union,[12] he writes as an insightful insider, not only explaining official

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6. *See id.* at arts. 28–30 (as amended 1997).

7. *Id.* at art. 94 (as amended 1997).

8. *See "Community" Trademark Takes Effect*, 8 EURECOM 2 (Jan. 1996). The system is based on Council Regulation No. 40/94 of 20 December 1993 on the Community Trademark, 1994 O.J. (L 11) 1.

9. *See* GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 423 (1993); *see also* RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 141 (3d ed. 1999).

10. *See* BERMANN ET AL., *supra* note 10, at 50–70.

11. *See* ANDERMAN, *supra* note 1, at 3, 8.

12. *See id.* at xi.

texts of the E.C. Commission but remembering the drafts from which they developed.

Professor Anderman identifies Rome Treaty Article 85[13] as the E.C.'s chief competition norm for intellectual property rights. [14] The E.C.'s principal regulations under Article 85 have been the Patent Licensing Regulation of 1984[15] and the Know-How Regulation of 1989,[16] each now incorporated into the Technology Transfer Regulation of 1996.[17] Following the pattern of its predecessors, the Technology Transfer Regulation (the full text of which is an appendix to this book) grants time-limited "block exemptions" for described types of licenses,[18] identifies green-light provisions "which are generally not restrictive of competition"[19] and red-light provisions that invalidate otherwise permitted licenses,[20] and establishes a procedure for voluntary disclosure that assures exemption if the Commission does not "oppose" within four months;[21] but the Regulation reserves the Commission's right to "withdraw the benefit of this Regulation" in particular cases that breach Rome Treaty competition rules.[22] Intellectual property rights are also considered in calculating the "dominant position" of "undertakings" for purposes of the anti-monopoly rules of Rome Treaty Article 86.[23]

This book is a down-to-earth practitioner's handbook, not an academic comparison of E.C. law with the law of other jurisdictions. In fact, the book's perspective is so inwardly European that it barely mentions intellectual property licensing that moves from, or into, the European Community as a whole. Professor Anderman does acknowledge, however, the influence of U.S. antitrust law on the formation of E.C.

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13. EEC TREATY art. 81 (as amended 1997).
14. *See* ANDERMAN, *supra* note 1, at 8–9.
15. *See* Commission Regulation 2349/84 of 23 July 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Patent Licensing Agreements, 1984 O.J. (L 219) 15.
16. *See* Commission Regulation 556/89 of 30 November 1988 on the Application of Article 85(3) of the Treaty to Certain Categories of Know-How Licensing Agreements, 1989 O.J. (L 61) 1.
17. *See* Commission Regulation 240/96 of 31 January 1996 on the Application of Article 85(3) of the Treaty to Certain Categories of Technology Transfer Agreements, 1996 O.J. (L 31) 2.
18. *See id.* at art. 1.
19. *Id.* at art. 2.
20. *See id.* at art. 3.
21. *See id.* at art. 4.
22. *Id.* at art. 7.
23. *See* EEC TREATY art. 82 (as amended 1997); ANDERMAN, *supra* note 1, at 147–50.

competition law,[24] and includes as an appendix the full text of the Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice on April 6, 1995. [25]

It is difficult to discern precisely how up-to-date this book is. The frontispiece dates Professor Anderman's copyright, oddly, as 1988, but shows first publication of the book in 1998. The book cites several cases as recent as 1997, but does not mention *Silhouette International v. Hartlauer*,[26] the innovative 1998 decision of the European Court of Justice that allowed the owner of a Member State trademark to prevent re-importation into the European Community of gray market goods manufactured in the Community.[27]

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24. *See* ANDERMAN, *supra* note 1, at 62 (quoting Hartmut Johannes, the administrator within Directorate General IV (the Competition Directorate)), as stating, "In the art of antitrust, the Americans are the teachers and the Europeans are the pupils.").

25. *See id.* at 276.

26. *See* Case C-355/96, Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft MbH, [1998] 2 C.M.L.R. 953 (1998).

27. *See id.*