member States. The pattern of horizontal and vertical information-sharing, which is designed to minimise the risk that public authorities will ignore the impact of market integration, is readily comparable to that established by Directive 83/189, although the concern of Decision 3052/95 is with more detailed instances of impediments to trade than the regulatory measures which are the focus of the regime under Directive 83/189.

No "stand-still" is imposed on notifying member States and, in the light of the reasoning in *CIA* discussed in Section C.3 above, it is therefore unlikely that a failure to notify in breach of the Decision would deprive national measures of enforceability at national level.

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III. INTELLECTUAL PROPERTY

A. *Introduction*

The period since the last note on this subject has been eventful.[1] There have been some important legislative measures, and a good deal of significant case law. However, contradictory messages are being conveyed. The volume of legislation marks the Community's recognition of the economic value of intellectual property rights in international trade. Its broad aim is, as always, to achieve a level playing-field for competition, and to integrate the market by removing restrictions on the free movement of goods. Yet the unwavering adherence to the principle of free movement is being challenged in several areas, precisely because of its effect on competition, notably in the pharmaceuticals market.

B. *Patents and Know-How*

In an important case, *Merck* v. *Primecrown*,[2] the European Court of Justice was invited by its Advocate General to overturn one of its own decisions, but declined to do so. Differences between member States' rules on the patenting of pharmaceuticals provide tempting opportunities for parallel importers. In the earlier case of *Merck* v. *Stephar*[3] the UK patentees had argued that they should be allowed to prevent imports of their own product from member States where they could not obtain patent protection. The Court disagreed, holding that once a product had been placed on the market in one member State with the consent of the patent holder, any rights affecting the product in any other member State must be treated as exhausted. The issue remained extremely controversial within the pharmaceuticals industry, which regarded this limitation on the exercise of patent rights as draconian, particularly given the disparities between national markets. In a further patent infringement case involving Merck, a reference from the English High Court allowed the European Court to review its stance. One of the questions referred offered an opportunity to soften the exhaustion principle where the patentee was obliged for legal or ethical reasons to sell its product in a State where

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1. (1995) 44 I.C.L.Q. 712 (Part 3—July).
2. Case C-267–268/95 *Merck & Co. Inc.* v. *Primecrown Limited* [1997] 1 C.M.L.R. 83.
3. Case 187/80 (1981) E.C.R. 2063.

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patent protection was not available.[4] The Court maintained its strict line, and refused to be influenced by what it regarded as transitional problems. The rule in *Merck* v. *Stephar* remains: only the absence of consent to marketing will allow a patent holder to resist the free movement of a patented product. Where the patentee is legally bound to market his products in a member State, he cannot be deemed to have given his consent to the marketing of those products. But it is for the patentee to prove a "genuine, existing obligation", and the Court was dismissive of the attempt to show such obligations in the present case.

The new block exemption regulation on technology transfer came into force in April 1996.[5] It provides an integrated regime for the licensing of technology by replacing the (expired) patent licensing and know-how licensing block exemption regulations. Previous draft versions of the regulation had sought to restrict the benefit of the exemption to licensees with less than 40 per cent market share. This much disliked market-share ceiling has now gone, although the Commission will pay particular attention to agreements where the threshold is exceeded.[6] The regulation is now generally regarded as sufficiently sensitive to the needs of the market for technology licensing.

C. Trade Marks

In another series of cases of great interest to the pharmaceutical industry, the European Court considered how far it was legitimate to use trade mark rights to resist the repackaging of branded drugs by parallel importers seeking to exploit price differentials within the common market.[7] The new decisions clarify the detailed law in this area, specifying closely what the parallel importer may and may not do in repackaging a trade-marked product.[8] The Court confirmed that the approach to repackaging was not affected by the recent Trade Marks Directive:[9]

4. The ECJ has accepted that a patent holder does not "consent" to the activities of a compulsory licensee: Case 19/84 *Pharmon* v. *Hoechst AG* [1985] E.C.R. 2281. It is arguable that there may be a legal obligation either under national law or under Community law (Arts.85 and 86 EC) to maintain supplies to a particular market. It was also argued in the present case that there was an ethical obligation to continue to supply a product which had been released in a member State and was being prescribed by doctors there.

5. Reg.240/96 (1996) O.J. L31/2.

6. After a general economic assessment of the licensing relationship, the Commission may withdraw the benefit of the block exemption where the agreement has effects incompatible with Art.85(3) EC.

7. Joined Cases C-427, 429 and 436/93, *Bristol-Myers Squibb & Others* v. *Paranova A/S*; Joined Cases C-71, 72 and 73/94, *Eurim-Pharm Arzneimittel GmbH* v. *Biersdorf AG & Others*; Case C-232/94, *MPA Pharma GmbH* v. *Rhône-Poulenc Pharma GmbH* [1977] F.S.R. 102.

8. Existing case law formed the starting point. The four conditions from Case 102/77, *Hoffmann-La Roche* v. *Centrafarm* [1978] E.C.R. 1139, were explicitly reiterated and approved. The trade mark owner cannot resist repackaging if his marketing system contributes to the artificial partitioning of markets, if repackaging does not affect the original condition of the product, if he receives prior notice (and a specimen on demand), and the identity of the repackager is printed on the product.

9. Council Directive 89/104/EEC (1989) O.J. L40/1.

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the old Article 36 case law retains its relevance. As in *Merck* v. *Primecrown*, the Court refused to engage with the wider issue of lack of uniformity in the market for pharmaceuticals, regarding this as a matter for market forces and (where necessary) the Community authorities.

As mentioned in a previous note, the Trade Marks Directive was implemented in the United Kingdom by the Trade Marks Act 1994. Early cases on its interpretation are beginning to appear.[10] In addition, it is at last possible to apply to the Office for the Harmonisation of the Internal Market (Trade Marks and Designs) in Alicante for a Community Trade Mark having effect throughout the whole market. It began to receive applications from April 1996, with a view to processing them from the autumn of 1996. Early signs are encouraging, as applications have far exceeded targets.

D. Copyright and Related Rights

This area has been the subject of considerable change as a result of a number of harmonisation measures. The Term Directive has now been fully implemented in the United Kingdom, after considerable delay, as have the Rental, and Satellite and Cable Directives.[11] The basic term of copyright for literary and artistic works has been raised from the Berne Convention minimum requirement of the author's life plus 50 years to the author's life plus 70 years. Any work protected in at least one member State on 1 July 1995 falls under the ambit of the Term Directive. In the face of irreconcilable differences between the approaches of member States, the Directive left various important questions open (such as who would receive the benefit of these extended rights). This generates an extremely complicated array of revived and extended rights, and fearsomely complex transitional provisions.[12] The lack of clarity is likely to prevail for a considerable time, for arguably slender gains.

There are other notable changes, although there is space to mention only a few. Film copyright has been strengthened. The principal director of a film is now one of the relevant parties for the purpose of calculating duration of copyright in a film, and, for the future, is also designated a co-author together with the producer.[13] Rental rights used to be treated as an aspect of issuing copies to the public, but now either renting or lending a work to the public is a restricted act in its own right.[14] Rights of performers are also significantly enhanced. A proposed directive on

10. Notably *Wagamama* v. *City Centre Restaurants plc and Another* [1995] F.S.R. 713; *British Sugar plc* v. *James Robertson & Sons Ltd* [1996] R.P.C. 281; *Barclays Bank* v. *RBS Advanta* [1996] R.P.C. 307; *BASF plc and Another* [1996] E.T.M.R. 51.

11. Directive 93/98 on Term of Protection of Copyright (1993) O.J. L248/15. Directive 92/100 on Rental Rights, Lending Rights etc. (1992) O.J. L346/61. Directive 93/83 on Copyright and Neighbouring Rights relating to Satellite Broadcasting and Cable Retransmission. Implemented in the UK by Duration of Copyright and Rights in Performances Regulations (S.I. 1995/3297) and the Copyright and Related Rights Regulations (S.I. 1996/2967).

12. For which see Part III of Regulations mentioned in the preceding note. The UK has been much more specific on these matters than most member States.

13. Copyright, Designs and Patents Act 1988, s.9(2)(ab).

14. The CDPA 1988 defines infringement by reference to a list of "acts restricted by copyright": s.16(1). The previous total of five restricted acts has thus been increased to six as a result of the Rental Directive.

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artists' resale rights is causing storms of protest in the art markets of Amsterdam and London.[15] The proposal is to give artists or their heirs, as part of their copyright, a right to receive a percentage of the price paid for their work when this is resold by public auction or through an agent. Eleven member States already have such a right, although there are differences between them.[16] The proposal covers works in the "graphic and plastic arts"[17] and would apply only to twentieth-century works. The first transfer by the artist, and sales between private individuals, would be excluded. Rates would be progressive.[18]

E. Other Legislation

A directive on the legal protection of databases was adopted in March 1996.[19] Member States must introduce, by 1 January 1998, a new *sui generis* right to enable the maker of a database to prevent unauthorised extraction or re-use of the whole or a substantial part of the contents of the database. The right subsists for 15 years, and is renewed at each substantial change to the database.[20] The directive also harmonises copyright protection for the structure of databases at the normal period (life plus 70 years).

Draft legislation on the protection of designs is proceeding slowly. A new Community registered design right would offer up to 25 years' protection. There is huge controversy as to the appropriate protection for motor vehicle spare parts. The Commission's original proposals were heavily revised after intervention by the European Parliament. The new proposals offer a very limited design right in these cases, combined with a compulsory licensing system for visible spare parts (in return for equitable remuneration, schematically defined). Vigorous opposition by car manufacturers was predictable (and continues).

Although the draft Biotechnology Directive appeared to have suffered a terminal blow in March 1995,[21] when the European Parliament used its veto against it, a proposal for a new draft has emerged.[22] The aim is to harmonise the individual member States' laws on the granting of biotechnological patents in Europe. The difficulty has been (as ever) to provide legislation strengthening the competitive position of the European biotechnology industry, whilst maintaining an ethical approach. Particularly controversial issues include the patentability of body parts, germ line gene therapy and genetically engineered animals.[23] A wide range of

15. (1996) O.J. C178/16. This is heavily criticised in Judge Jacob's Stephen Stewart Lecture (1996, not yet published).

16. The Netherlands, Austria, Ireland and the UK do not recognise such a right.

17. This expression is intended to cover pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics and photographic work.

18. The proposed rates are: 0% on the first 1,000 ECUs; 4% of the price between 1,000 and 50,000 ECUs; 3% between 50,000 and 250,000 ECUs; and 2% on any excess.

19. (1995) O.J. C288/14.

20. Potentially indefinite protection is therefore available for dynamic databases (such as telephone lists, share prices etc.), as for the new editions of a book.

21. (1995) O.J. C68/26.

22. (1996) O.J. C296/3.

23. The previous draft provided that the human body *as such* or parts of the human body *as such* should not be patentable. The new version provides that "the human body and its elements *in their natural state* shall not be considered patentable inventions." For further discussion see Jones [1996] E.I.P.R. 363.

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interested parties pull in different directions. Although the compromise is arguably an improvement, concerns remain.

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IV. TRANSPORT

IN the past 18 months developments which have been most relevant to the transport industry as a whole involve the control of State aids and external relations. In addition, at the end of 1995, the Commission published a Green Paper entitled "Fair and Efficient Pricing in Transport",[1] the aim of which was to initiate a debate on how best to allocate the true costs of transport among those who generate them, in the fairest manner. The argument of the paper is that each form of transport should bear the external costs for which it is responsible. This position has been hotly disputed.

A. Control of State Aids

The Commission has had several opportunities to test its State aid guidelines[2] in respect of a number of State aid packages to airlines. The guidelines state that direct operating aid is *prima facie* prohibited. As an exemption, aid can be authorised only when it is part of a comprehensive and self-contained restructuring programme, and does not imply future direct aid. Furthermore, if an airline has already received a State aid then any additional aid will be allowed only under exceptional circumstances, and subject to conditions. Despite these reservations, the Commission did authorise State aid to Iberia (at the beginning of 1996), to Air France (in the middle of 1996) and to Alitalia (at the end of 1996).

In the case of the maritime sector, the delay in the ratification of the 1994 OECD Agreement,[3] which phases out subsidies to shipyards, has led to an extension (to the end of 1997) of the seventh Council directive[4] on aid to shipbuilding. The Commission has adopted revised guidelines for State aids in this sector. They replace those drawn up in 1989 and also deal with compensation for public service obligations.[5]

Earlier provisions have was been amended to extend the temporary system of granting aid to combined transport (rail, road and inland waterways) to the end of 1997.[6] In July 1996 the Commission proposed a Council regulation concerning the

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1. COM(95)691 final.
2. (1994) O.J. C350/5.
3. Agreement signed between the European Community, Norway, United States of America, Japan and South Korea aimed at controlling and eventually phasing out subsidies. This agreement has been incorporated into Community law by Council Reg.3094/95 (1995) O.J. L332/1.
4. Council Directive 90/684 (1990) O.J. L380/27.
5. Guidelines for the Examination of State Aids to Community Shipping Companies defining the conditions under which aid to shipping may be considered compatible with the common market, IP/97/385 of 6 May 1997.
6. Reg.1107/70 (1970) O.J. L130/1, extended by Reg.543/97 (1997) O.J. L84/6.

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