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European Perspective on Licensing in a Network Environment

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EUROPEAN PERSPECTIVE ON LICENSING IN A NETWORK ENVIRONMENT

Hans Henrik Lidgard

After a century of industrial success for Swedish industry, the past decade has resulted in a sell-out of much of what was built up during prior years. The pharmaceutical companies Astra and Pharmacia have been transferred to the United Kingdom and New Jersey respectively. The car industry - sporty SAAB and reliable Volvo - has been passed on to Detroit whereas ASEA and Tetra Pak are now headquartered in Switzerland. The list could be made longer. Fortunately, Ericson is still flying the Swedish flag, even if the executive group is doing so from London.

Interestingly enough, these developments do not appear to have had much impact on the commercial environment in Sweden. Unemployment rates are decreasing, the stock market is booming, and 1999 was a good year for the overall Swedish economy in real terms. It is expected that this progress will be sustainable.

An important factor in this paradox appears to be the very rapid shift towards information technology that has taken place during the period the sell-outs occurred. Over the last decade we have seen a large number of innovative information technology companies develop and grow with unprecedented speed. Even if present stock values appear to be grossly exaggerated by traditional industry standards, there can be little doubt that a change has occurred that is here to stay. Sweden will have made the transition from the post-industrial era to an information society in a very short time-span, and the sell-out appears to have expedited this evolution.

With the new trend come new problems relating to the protection, dissemination and use of the new technology. The legal community is facing new terms and notions unknown to most of us just some ten years ago, such as

The question is whether the new technology requires new legal solutions or whether traditional legal standards remain applicable. In investigating the answer to this question, the focus will be on the European rather than Swedish solutions. Furthermore, what changes have the new development necessitated, and are there more to come?

Licensing in a network environment is a broad and undefined concept. I will address the situation in which the rights-holder grants rights to use his protected work for adaptation or inclusion in the licensee's product and subsequent marketing. This is the traditional aspect of licensing. In a network environment, the licensing concept is also used when the rights-holder transfers rights to the end user - whether that is in the form of a traditional program sale or it happens on line over the net. Such sales-license agreements are also part of the study.

In order to provide a European perspective on licensing in a network environment, I will deal with different forms of intellectual property protection. I will address current intellectual property rights and contract law in the context of technology transfer through licensing arrangements. I will focus on the limits set by competition law. A final reflection goes to on-line choice-of-law and forum stipulations in licensing agreements.

There are reasons that the civil law European approach is basically a statutory one. Case law is often less developed and essentially elaborates and illustrates the law rather than actually creating it. In a certain sense the approach is more reactive than the proactive common law approach. As can be expected, the U.S. discussion is therefore ahead of the European - even if much is happening at the Community level. Little does it matter. Any company interested in doing European business has to understand the present state of affairs.
I. PROTECTING NEW ADVANCES

The notion of licensing entails a rights-holder allowing a third party to lawfully operate under an immaterial property right. The American approach appears to be that the licensor undertakes not to sue the licensee for the infringement he otherwise commits. The European perspective is rather that the licensor under the law allows an independent party to operate the licensor’s rights. The end result is much the same, but it sometimes explains differences in agreement drafting techniques.

This, however, begs the question of what kind of right and what type of protection is available in Europe for information technology. The choice is between patent and copyright protection.

A. Patent Law Development

Presently, national European patent laws remain applicable and provide fundamental protection for inventors who are finding new solutions to identified problems. The European Patent Convention (EPC) has coordinated the handling of patent obligations as an optional alternative, but the end result is still a national patent. Efforts to create a unified European patent have remained unsuccessful. The EPC requires that an invention be susceptible of industrial application, be novel, and include an inventive step.

These traditional standards of protection apply to all inventions, but European patent law specifically excludes patent protection for software in the form of computer programs. Europe will not patent “schemes, rules and methods for performing mental acts, playing games or doing business and program for computers” if they are related to the activity “as such.”


3. The Commission is still actively proposing new solutions. The latest proposal is from January 19, 2000. Considering the success of the European Trademark system, chances for a development on the patent side has most likely increased substantially.

4. See EPC, supra note 2, at art. 52(2).

5. See EPC, supra note 2, at art. 52(3).
The language has been interpreted to exclude computer programs, in general, but to allow protection of certain specific features. After an initially restrictive approach, European authorities, in line with U.S. practices, appear to be taking a gradually more amenable approach to the patenting of information technology. The (EPO) Guidelines emphasize that a computer related invention must contain technical know-how to be patentable. Lists of instructions (computer programs) are excluded unless they have a technical process or technical effects. The technical content is, however, a concept leaving room for discretion and allowing a certain freedom: opening the door for logic algorithms and programming language, which are excluded from copyright protection. The case law of the EPO, however, eludes full conformity with the guidelines but rather rests on a number of conflicting theories. Europe is still in search of a reasonable approach to dealing with the patenting of information technology. It has been suggested either that the exemption for computer programs should be interpreted in a narrow way and European standards focus only on traditional patent concepts, or that the


9. The major problem appears to be to find a balance between the need to protect truly creative inventions on the one hand and avoiding unwarranted obstacles to further development on the other. See Josefson, P., Patent Protection of Computer Programmes - the Scope of Patent Claims (in Swedish), Nordiskt Immateriellt Rättskydd (NIR) 58-64 (1998).

10. See generally Newman, J., The Patentability of Computer-Related Inventions in Europe, 19(12), E.I.P.R. 1997, 701, 701-08. Newman concludes "[t]he better approach, it is suggested, would simply be to interpret Article 52 in accordance with the principle that exceptions to patentability are to be construed narrowly.... Sufficient protection against unmeritorious patents can be secured in the computer industry through reliance on the novelty and (especially) the inventive step requirements. Indeed, none of the unpatentable computer-related "inventions" mentioned in this article would have passed the inventive step criterion in any case. This very fact illustrates that the current complex approach of safeguarding, through Article 52(2), against unmeritorious patents in the field of computer-related inventions is unnecessary and wasteful." Id. at 708.
exclusionary provisions in Article 52(2)c EPC should be deleted. 11

B. Copyright

Apart from this level of patent protection, computer programs are protected by copyright legislation. The good news for the rights-holder is the exorbitantly long protection granted for intellectual property without any formal registration requirement. Copyright protection prevents outright copying. Authors have a right to authorize or prohibit any communication to the public of their works by wire or wireless form. Likewise, rules regarding exhaustion of copyright have been harmonised on the European level. 12 The bad news is that the idea behind the program is not protected as such. It is therefore perfectly possible for others to independently create similar types of programs.

At present, the transfer of rights to a computer program, whether sold at retail or through Internet mass transactions, ordinarily entails a license under copyright and/or complementary know-how. The future may bring more patent protection, but there is still some way to go.

II. SHRINK-WRAP SALES LICENSES IN A RETAIL ENVIRONMENT

In commercializing information technology, it has become the industry standard to do so in the form of licensing arrangements. The idea was originally a way to induce customers to buy hardware. Today it appears that the rights-holder, through the licensing technique, is seeking to control the further handling of his product.

The question is whether current practices involving software can properly be termed licensing in every situation.

When a right-holder has produced a product and passes it on to the end-customer in a physical form, such as a computer game, he is first and foremost selling a product. The buyer should be free to use the product and have the right to sell it to third parties. Patent or copyright protection excludes the right to interfere with the product and may not be copied other than for protective reasons. The seller’s terms and conditions often regulate the sale of a computer program. Ordinarily, they take the form of licensing provisions that the buyer has to accept before opening the sealed package. The shrink-wrap clause may indicate:

By opening this sealed disk package, you are agreeing to be bound by the terms of this agreement. If you do not agree to the terms of this agreement, return this product to the place of purchase promptly for a full refund.

In certain circumstances the specific conditions are visible from the outside of the package, and in other situations they may become apparent only after opening or even at a later stage when loaded into the computer.

From a contract law perspective much can be said about such stipulations. The U.S. perspective appears to start from a notion of freedom of contract, which would support fairly restrictive conditions: if the buyer is not satisfied he can return the product. Consideration of public policy notions, like protecting innovation, competition and freedom of speech in accordance with Constitutional requirements,

13. See Council Directive 91/250, supra note 8, at Art. 4. Article 4 stipulates that “[t]he first sale in the Community of a copy of a program by the right-holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.” Id.

14. The exclusivity for the rights-holder includes reproduction by any means or form, any right to alter the program and distribution rights – including rental rights – to the public. See Council Directive 91/250, supra note 8, at art. 4. Necessary adaptations for making the program operative in a new environment, back-up copies and to observe, study or test the program during normal work is specifically exempted under Article 5. See id. at art. 5. The same applies on conditions to decompilation according to Article 6. See id. at art. 6.
appear to have been injected into the debate. Presently, the focus of the United States is on the creation of specific provisions in the Uniform Commercial Code for computer information transactions.

To the extent contractual provisions are merely paraphrasing copyright legislation and the prohibition on copying, no real concern appears in Europe. Such a stipulation is not even legally required. Under civil law tradition, there is no notion of implied license unless expressly prohibited. The buyer is only allowed to copy for security reasons. To the extent contractual provisions add exonerating or aggravating stipulations, general rules on contract formation may well apply - especially rules of consumer protection. Contract stipulations surpassing acceptable limits by being either too burdensome or misleading for the average consumer are likely to be ignored by an ordinary court. Even if efforts are made to harmonize European contract law, such standards remain basically national. For example, the Swedish contract law provides fairly broad discretion for courts to modify unfair contract terms.


19. Swedish law on contract formation (Avtalslagen – SFS 1915:218) § 36 provides that courts may modify or disregard unfair contract terms. Swedish law on contractual terms in consumer relations (Konsumentköplag-SFS
In a commercial relationship between independent business entities, the outcome may differ as the parties are free to design whatever terms they see fit within a fairly wide margin. Even agreements such as these require a consensus between the parties, and hidden or concealed stipulations may well be disregarded. Assuming that the product is copyright protected, the buyer is strictly limited in his use of the product, and there should be no real need to contractually secure this fact. There is nothing wrong in informing the customer. Any add-on stipulations limiting liability or the equivalent should be presented in advance and should otherwise be confined to standard stipulations without burdensome or unexpected provisions.

III. CLICK-WRAP SALES LICENSES IN A NETWORK ENVIRONMENT

Will the situation be different if the transaction takes place in a network environment?

Randomly surfing through different Web-sites discloses a wide variety of techniques and terms for downloading programs and services. For example the U.S. distributor beyond.com™ presents its conditions of purchase under a small, hardly noticeable reference to “Terms of Use.” The ordinary consumer will have to be observant to see it. The link transfers the reader to a five-page document prohibiting reproduction, distribution, modification, retransmission or publication of protected material. In addition, beyond.com™ subjects the buyer to the special conditions in the end-user license provided by the publisher. The buyer cannot access the license at this stage of the procedure. The terms also contain substantial alternative disclaimers in characteristic capital letters intended to shield beyond.com™ from responsibility.

Considering that there are normally no formal requirements for agreements regarding the purchase of goods, a click-wrap agreement should be acceptable. The click-

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1990:932) provides mandatory provisions to protect consumers.
20. See Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd., 1996 F.S.R. 367, 367 (1996). In Beta Computers, the Scottish court held that a shrinkwrap clause was enforceable. The fact that the agreement is entered on the net should not give a different result as long as it can be proved.
wrap, however, is an adhesion contract. To the extent European contract law principles are to be applied, it appears likely that courts will follow the pattern already discussed for shrink-wrap licensing and disregard unfair and burdensome terms. European legislation on unfair competition or marketing practices prevents any unfair representation that could mislead the consumer. Such stipulations also remain likely to apply to network transactions.

It may also be added that certain other practices on the net appear questionable under European standards. "Linking" may reflect a sensitive issue and likewise the current practice of investigating consumer preferences by "cookies" could contravene ordinary standards of privacy.

IV. TECHNOLOGY TRANSFER LICENSING

The third situation addressed is the traditional production license. Again, the question appears to be whether special standards apply to information technology.

European statutory provisions that regulate pure licensing are rare. Contract law does not deal with licensing agreements as such. The parties in a commercial relation are free to regulate as they see fit. The exemptions are merely theoretical.

Intellectual Property Rights (IPR) legislation normally contains very few provisions that affect the drafting of a licensing agreement. Accordingly, a third party may ask for a compulsory license if the rights-holder unreasonably abstains from exploiting his right in the protected territory. There is, however, no requirement in modern civil law legislation that the product must be produced in the specific country. Generally, IPR legislation confines itself

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23. See generally Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1629, art. 4A.
to establishing that the rights-holder has an option to exploit the right himself or allow third parties to do so under license. The right to license does not include an automatic right to sublicense. Furthermore, the legislation often clarifies that the exclusive licensee has a right to act under property rights against third party infringers. The law leaves the designing of the specific relation to the parties. If the parties do not do their work properly, it is likely that accepted industry standards would apply when interpreting the agreement.

The structure of a licensing agreement depends on the specific circumstances and requirements of different industries. Accordingly, it is quite normal that licensing practices in the information industry have their own specific features. Standard agreements in this industry seem to emphasize questions regarding ownership of the program code and secrecy to prevent disclosure and unauthorised use. Field-of-use limitations are frequent and the agreements tend to carefully outline the terms under which the licensee is entitled to adapt and change the technology as well as who has ownership of any such improvements. All of these features are used in other types of licensing contracts. Thus, there does not appear to be anything so unique as to require legislative intervention.

V. COMPETITION LAW LIMITATIONS

Competition law establishes restrictions on what the parties must and must not do in a licensing arrangement. Today this system regulates and limits freedom of contract to a far greater extent than any traditional contract law provisions.

Gradually, the European rules have been harmonized at the supranational European Union level and among different member states. The force of the law is hardly different from the parallel U.S. antitrust provisions. The Commission secures implementation on the European level with an

efficient and experienced staff, and national authorities complement such implementation by applying either their national law or European Community competition policies directly. The trend is clearly one of decentralization of supervising powers to national authorities, with the Commission focusing on policymaking and handling serious infringements.20 In the past, Europeans have taken a more formal approach than their U.S. counterparts to vertical collaboration and collaboration in licensing arrangements. At least with respect to vertical agreements, this stricter approach has softened substantially through the introduction of the vertical block-exemption in late 1999.27

Article 81 EC (formerly Article 85) prohibits agreements (including licensing agreements in a network environment) that affect trade between member states and are detrimental to competition. Initially, the Commission took a permissive attitude to licensing practices but became more restrictive during the 1970s. Under the Commission standards, an exclusive licensing agreement restricts the freedom of the parties and excludes third parties from becoming licensees.28 Thereby the requirements of Article 81 are satisfied without any balancing test. If the parties wish to operate under such an agreement they have to notify the agreement and receive an individual exemption.29 With a more permissive attitude, as pronounced by the European Court of Justice (ECJ), exclusivity as such is not the problem. When the parties add other restrictive provisions, the limit

may well be exceeded.\textsuperscript{30}

The Commission has resolved these contradictions by issuing group exemptions for licensing agreements, which cover exclusive agreements in case they are regarded as prohibited under Article 81. Since 1996, two separate group exemptions covering patents\textsuperscript{31} and know-how\textsuperscript{32} have been amalgamated into a single group exemption for Technology Transfer agreements.\textsuperscript{33} This regulation covers patent and know-how licensing as well as ancillary provisions relating to trademarks.\textsuperscript{34} No group exemption exists for pure trademark or copyright licensing. Yet it appears that the standards set for technology transfer in general would normally also be applicable to such other forms of intellectual property licensing. The point, however, is that such agreements, if they contain anti-competitive elements, cannot rely on the block exemptions but must be brought to the attention of the authorities perhaps under a negative clearance notification.\textsuperscript{35}

Based on existing group exemptions and Community practices, it appears reasonable to characterize the present situation as follows. If the license agreement is a pure sales license and does not entail any conversion of the product, the rules of the vertical block-exemption should apply. There is no collaboration between parties at the same distribution stage. Vertical agreements are not likely to affect the competitive climate if the product involved has not achieved a market share exceeding thirty percent


\textsuperscript{34} See Technology Transfer Regulation, supra note 33, at art. 1.

of the relevant market. In Article 2(3), the Commission adds,

The exemption provided for in paragraph 1 shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers. The exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object or effect as vertical restraints, which are not exempted under this Regulation.36

The provision that the license terms relating to intellectual property “do not constitute the primary object” of the agreement could be interpreted to exclude certain elements, such as copyright protected material. That, however, does not appear to be a reasonable conclusion. The product sold is a physical product rather than the protected program. The transaction can be compared with the sale of a book or a gramophone record, which also contains protected material.

Agreements that contain black-listed clauses are excluded from the agreement. Accordingly, the agreement must not contain binding minimum resale price maintenance provisions (RPM) or territorial restrictions that prevent the free flow of products between Member States.37 Generally, the new attitude is welcomed and allows companies to create the type of collaboration their businesses require without being hindered by the straitjacket effect of the old interventionistic approach.

In a pure licensing situation, where the rights-holder licenses his rights to a third party producer, who will either undertake the production and subsequent marketing of the product or who will integrate the technology into his own product, the approach is different. Such collabora-

37. See Vertical Regulation, supra note 27, at art. 4 (a)-(e); see also Exhibit 1.
tion is horizontal in character and viewed with more suspi­
cion. On the other hand, the Commission is also anxious

to emphasize that technology transfer agreements promote
industrial efficiency and that it generally favours such
collaboration. The Technology Transfer regulation ex-
empt exclusive agreements for the life of the patent, or
ten years, if the agreement covers know-how. There is no
formal position on copyright licensing.

In a very detailed list, the regulation clarifies which
stipulations do not cause competition concerns. The inten-
tion of this “white list” is to give positive indications to
industry, but the criticism is that such lists have a strait-

jacket effect. More important is the “black list”, which
excludes application of the exemption in cases of RPM
(whether minimum or maximum pricing), non-compete
obligations, territorial limitations, customer limitations,
quantitative limitations and assignment of or automatic
inclusion of improvements. 39

These standards apply to patent and/or know-how agree-
ments. For the rest, the field is more open. If an agree-
ment contains certain provisions that are neither white-listed
or black-listed but could be regarded as restrictive of
competition, Article 4 of the regulation opens an abbreviat-
ed procedure, the “opposition procedure”. 40 The condition
stipulates that the Commission be notified of the agreement
and not oppose it within four months from notification.
The procedure is particularly required where the licensee is
required to accept quality specifications or further licenses,
or to procure goods or services that are not necessary for
a technically satisfactory exploitation of the license. The
same applies to non-contest provisions of the secrecy or
substantiality of the licensed know-how, or if the licensee
is prevented from challenging the validity of the licensed
patents. The Commission has in addition reserved itself the
right to revoke the benefit of the block-exemption in cases
where the collaboration has adverse effects. 41

38. See Technology Transfer Regulation, supra note 33, preamble at 8.
39. See Technology Transfer Regulation, supra note 33, at art. 3 (1)-(7);
see also Exhibit 2.
40. See Technology Transfer Regulation, supra note 33, at art. 4.
41. See Technology Transfer Regulation, supra note 33, at art. 7.
Article 82 EC (formerly Article 86) covers abuse of a dominant position. According to consistent case law of the European Court of Justice (ECJ), the property right in itself does not confer dominance.\(^42\) The right-holder is often in a situation of "de facto dominance," and then the rules apply. The reasoning is confusing and somewhat fictitious due to the fact that European Union (EU) law does not affect the existence of the property right but does affect its exploitation. Case law establishes that in such a situation the doctrine of "essential facility" applies. This may well obligate dominant companies to license intellectual property rights even if that would not otherwise be in the interest of the company.\(^43\) The latest "victim" of this reasoning is Microsoft, which has been trying to keep Canadian products out of the French market. The Court of First Instance has referred the matter back to the Commission to consider if Microsoft is abusing its dominant position.\(^44\) On this point, IPR legislation, containing certain possibilities for compulsory licensing, and competition law converge.

VI. APPLICABLE LAW AND FORUM STIPULATIONS

The question is whether a U.S. company can avoid what it regards as troublesome European provisions by making any contract subject to U.S. law and, to further isolate European standards, subject to arbitration — perhaps under the AAA rules.

The normal answer is that in most instances the European courts will respect any reasonable choice-of-law made by the parties. A few caveats may be necessary. First, European courts are not likely to accept that choice-of-law stipulations can replace mandatory statutory provisions.\(^45\)

\(^45\) See Directive 97/7, 1997 O.J. (L 144) 19. The Directive on the Protection of Consumers in respect of Distance Contracts provides in Article 12(2) that "Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the
In a consumer contract the foreign licensor must expect that ordinary protective rules will, for example, apply with respect to the right of the consumer to change his mind within a stipulated time frame. Nor is it likely that clever choice-of-law provisions can limit decompilation and fair use.

Lacking an express agreement on choice-of-law, the parties are likely to end up in a difficult situation with no precise solution. In the European Contracts Convention signed in Rome in 1980, no specific provision exists with respect to licensing. Article 4 of the Convention stipulates that the law of the country with which licensing is most closely connected shall govern the contract. The presumption is that the law of the country where the party who is to effect performance which is characteristic of the contract has his habitual residence shall decide.

The question remains as to how this statement should be interpreted in licensing situations. Is the characteristic performance the country where the licensee is entitled to exercise the right or is it connected to the licensor and the fact that he is abstaining from taking action? The question especially begs an answer in the situation where the license covers many countries and connecting factors are vague.

It could be argued that the performance for which the payment is due is determinative. The delivery of goods (the right to make use of an item of property, the provisions of a service, etcetera), usually constitutes the center of gravity in determining choice-of-law. On the other hand there is support for the opposite view: that the licensee's principle place of business should be the determinative factor when dealing with rights to use and exploit the license. The situation remains a "rhubarb," as Fritz

choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States." The same stipulation appears in Article 6 of Directive 93/13/EEC on Unfair Terms. See Council Directive 93/13, supra note 17. See also Steckler, supra note 18, at 252 (making further references to German legislation).

48. Such an interpretation appears consistent with the 1978 Convention of
Juenger aptly puts it with respect to U.S. practices. In the end it appears that European conflict rules fail to provide a precise answer to what constitutes "characteristic performance" in licensing situations. It remains unclear, therefore, which law has the closer connection. Judges will have a balancing discretion. There is certainly no fixed determinative factor such as where the agreement was entered into. The characteristic purpose of the contract is to allow an activity in a specified territory in the interest of both parties. That appears to be a more refined analysis than focusing on payments and allowing the licensor a privileged position.

Uncertainties underscore the need to introduce clear and specific provisions in any commercial agreement. Likewise, parties may normally provide forum stipulations, including reference to arbitration. The wisdom of using arbitration over ordinary court procedures is the subject of constant debate. In making such references, however, it is important to understand the latest European developments. A serious regression has suddenly injected uncertainty into dispute resolution practices and the finality of the arbitration award.

Under the 1999 Eco-Swiss judgement, the ECJ gave European competition law a fundamental position in the legal hierarchy of laws that has almost a constitutional ring to it. If arbitrators have not correctly considered competition law in dealing with a case, whether at the request of a party or ex officio, the judgement is flawed and subject to appeal in the ordinary courts. To disregard competition law is comparable to failing to address public policy. Considering the balancing approach required in complex licensing agreements, the reference of a dispute to an arbitration panel may result in continuous appeals and prove more problematic than either party had reason to believe when making the choice.


49. See Case C-126/97, Eco Swiss China Ltd. v. Benetton Int'l NV, June 1, 1999, 39 I.L.M. 103.
VII. CONCLUSION

I have scrutinized different types of legislation affecting both the traditional licensing agreement, where rights are granted to a licensee for subsequent adaptation, and sales and licensing arrangements with customers for the use of intellectual property, better characterized as sales arrangements.

At present there is a constant flow of regulations coming out of the European Union affecting information technology. Some may be premature and will not survive long-term with constant technological advances. When focusing on current trends in the protection of information technology and licensing in a network environment, however, it appears that legislative tools are in place, even if modern application may be required in certain instances. The main prediction is that patenting will be more common in the future.

The parties generally have wide discretion to design their agreements to fit specific purposes. As long as agreements with consumers remain within the standards of protective consumer legislation, they should be of limited concern. Informing the consumer of restrictions on copying computer programs falls within permissible limits - the question rather is whether it is required. Burdensome contractual stipulations in consumer relations may easily be set aside.

The main caveat, as so often the case, is the requirements of the competition law. With the modern approach taken by the Commission, these should not be an insurmountable problem as long as pricing and market sharing provisions are avoided.

From a practical perspective, I have also cautioned against the latest development on arbitration - even if I doubt that this is the final word.

Vertical Regulation

Article 4 – the black list

The exemption provided for in Article 2 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the restriction of the buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier’s imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) the restriction of the territory into which, or of the customers to whom, the buyer may sell the contract goods or services, except:
   — the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
   — the restriction of sales to end users by a buyer operating at the wholesale level of trade,
   — the restriction of sales to unauthorised distributors by the members of a selective distribution system, and
   — the restriction of the buyer’s ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;

(c) the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
(d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;

(e) the restriction agreed between a supplier of components and a buyer who incorporates those components, which limits the supplier to selling the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.
Exhibit 2

Technology Transfer Regulation

Article 3 – the black-list

Article 1 and Article 2(2) shall not apply where:

(1) one party is restricted in the determination of prices, components of prices or discounts for the licensed products;

(2) one party is restricted from competing within the common market with the other party, with undertakings connected with the other party or with other undertakings in respect of research and development, production, use or distribution of competing products without prejudice to the provisions of Article 2(1)(17) and (18);

(3) one or both of the parties are required without any objectively justified reason:
   a. to refuse to meet orders from users or resellers in their respective territories who would market products in other territories within the common market;
   b. to make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining outside, or from putting on the market in the licensed territory products which have been lawfully put on the market within the common market by the licensor or with his consent; or do so as a result of a concerted practice between them;

(4) the parties were already competing manufacturers before the grant of the licence and one of them is restricted, within the same technical field of use or within the same product market, as to the customers he may serve, in particular by being prohibited from supplying certain classes of user, employing certain forms of distribution or, with the aim of sharing customers, using certain types of
packaging for the products, save as provided in Article 1(1)(7) and Article 2(1)(13);

(5) the quantity of the licensed products one party may manufacture or sell or the number of operations exploiting the licensed technology he may carry out are subject to limitations, save as provided in Article (1)(8) and Article 2(1)(13);

(6) the licensee is obliged to assign in whole or in part to the licensor rights to improvements to or new applications of the licensed technology;

(7) the licensor is required, albeit in separate agreements or through automatic prolongation of the initial duration of the agreement by the inclusion of any new improvements, for a period exceeding that referred to in Article 1(2) and (3) not to license other undertakings to exploit the licensed technology in the licensed territory, or a party is required for a period exceeding that referred to in Article 1(2) and (3) or Article 1(4) not to exploit the licensed technology in the territory of the other party or of other licensees.