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Antitrust and International Technology Licensing: A Primer

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ANTITRUST AND INTERNATIONAL TECHNOLOGY LICENSING: A PRIMER

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> The foreign element in foreign commerce antitrust compounds the uncertainty inherent in all antitrust doctrine, for judicial discretion in statutory interpretation is matched by judicial discretion in the determination of personal and legislative jurisdiction. Even if there were more precedents available, their predictive value would be limited. Not only are business fact situations very largely unique, but there is room for judges to continue to mold the law in the light of jurisdictional reason no less than under the Sherman Act's own rule of reason.[1]

In the twenty years since this statement was written, all of antitrust law, not just foreign commerce antitrust, has moved toward a rule of reason analysis. The Supreme Court, for example, first handed down *White Motor*,[2] replaced it with *Schwinn*,[3] and then bounced back with *Continental T.V., Inc. v. GTE Sylvania Inc.*[4] The helpful, or at any rate predictable, presumptions of *Philadelphia National Bank*[5] have given way to the uncertain world of *Marine Bancorporation*[6] and *General Dynamics*,[7] with their emphasis on ad hoc determinations and economic proof. In sum, many of the presumptions and rules that formerly separated safe channels from un-

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1. K. Brewster, Antitrust and American Business Abroad 53 (1958).
2. White Motor Co. v. United States, 372 U.S. 253 (1963).
3. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).
4. 433 U.S. 36 (1977).
5. United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
6. United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).
7. United States v. General Dynamics Corp., 415 U.S. 486 (1974).

safe shoals are disappearing, and in their place only one navigational aid remains for antitrust counselors: the ever-flexible rule of reason.

This trend toward wide-open rule of reason evaluation is a mixed blessing. Ideally, business arrangements should stand or fall on their merits rather than on mechanical rules established in other cases. But evaluating every business transaction on a rule of reason basis can be prohibitively time-consuming, considering the large number of transactions that occur every day. When the only guideline available is that "reasonable restrictions are legal, unreasonable restrictions are not," business may forego legitimate transactions and the Government may decline to investigate unreasonably restrictive arrangements simply because neither is willing to invest the time and money or to accept the risk involved in a rule of reason analysis. Moreover, a rule of reason analysis requires not only a familiarity with the existing market structure, but also an ability to spot trends and predict the likely future effects of a contemplated transaction upon the market. Such an extensive evaluation is often not cost-justified where the transaction is relatively small or just one of many.

In terms of the rule of reason test, international technology transfer is at a double disadvantage. International licensing arrangements are often complex, making market predictions difficult, yet may not be major transactions for the parties involved. Accordingly, application of the rule of reason in this area is a burdensome requirement for transactions that often do not merit large expenditures of legal time and fees. To compound the problem, little judicial precedent exists in the international technology licensing area, so that even conclusions of counsel based on a careful and lengthy rule of reason analysis are not certain to withstand antitrust attack.

The thesis of this Article is that experience, logic, and cost considerations justify replacing the rule of reason with rules of presumptive legality and presumptive illegality in many categories of international licensing restrictions.[8] As discussed below, *experience* with domestic antitrust law has established rules of per se illegal conduct in technology licensing.[9] To the extent that these rules deal with economic realities resulting from a particular restriction imposed in a given market of a given size and structure, the only question is whether the addition of a foreign firm justifies following different rules. A rule of presumptive illegality starts with the premise that transactions that are per se illegal domestically should also be illegal when

8. Baker, *Vertical Restraints in Times of Change: From* White *to* Schwinn *to Where?*, 44 ANTITRUST L.J. 537 (1975).

9. *See* notes 34-35 *infra* and accompanying text; Remarks of Bruce B. Wilson, then Special Ass't to the Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Fourth New England Antitrust Conference, *Patent and Know-how License Agreements: Field of Use, Territorial, Price and Quantity Restrictions* (Nov. 6, 1970) (copy on file at the offices of the *Cornell International Law Journal*).

a foreign participant is involved, unless the parties can demonstrate that the arrangement is a reasonable one.

Logic also supports the conclusion that if a restriction—for example, requiring a licensee to purchase nonpatented goods as a condition of licensing the patented technology—has been shown to be so anticompetitive as to be per se illegal when practiced in U.S. markets, it is not likely to have a significantly different impact on U.S. competition simply because one or more of the participants are foreign firms. The economic effects will be similar. Thus, legal standards should be similar, except where the international setting presents overriding considerations that save the restriction from illegality. A rule of presumptive illegality would allow the "international" factors to be taken into account by permitting the contracting parties to rebut the presumption of illegality with evidence of such counterbalancing justifications.

The third factor supporting the adoption of a rule of presumptive illegality for international licensing restrictions is *cost*. A rule of reason analysis may or may not produce acceptable results in terms of accurate identification of anticompetitive restrictions;[10] it certainly will not do so if its use is so costly and time-consuming that both business and the Government avoid applying it. Rather than abandon any examination of the numerous international technology transfer restrictions imposed every day by U.S. and foreign firms, a simpler, less costly test should be developed: in this case, categories of presumptive illegality.

I

PRELIMINARY CONSIDERATIONS

A. Applicability of Other Laws

Before examining U.S. antitrust law, one caveat is in order. In every international technology transfer situation, several bodies of law may be applicable and must be considered. In recent years, a growing number of foreign countries have adopted laws and created regulatory agencies to control technology transfers and payments within their borders. Many U.S. antitrust lawyers are unfamiliar with these measures, which are often based on considerations of nationalism or revenue collection, rather than on antitrust principles. For example, the Andean Pact countries—Bolivia, Colombia, Ecuador, Peru, and Venezuela—as well as Brazil and Argentina, have made technology transfer payments an important part of their overall regulation of foreign capital. All technology transfer arrangements and pay-

10. *See* Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960).

ments in those countries must be registered and approved, and many ancillary restrictions common in the United States are prohibited.

Over and above the requirements imposed by foreign laws, U.S. tax laws, import-export controls, and financial regulations may also apply to international technology transfers. These topics are well beyond the scope of this Article, and it will henceforth be assumed that competent counsel has dealt with them.

B. THE BASIC SUBJECT MATTER

U.S. law protects ownership rights in four major categories of so-called intellectual property: copyrights, trademarks, patents, and know-how. The law of copyrights guards the uniqueness of a written or performed creative work. The law of trademarks protects the distinctive way a product or service is identified and distinguished through the use of a symbol or a mark. The law of patents safeguards inventions that meet sufficient statutory and constitutional standards of novelty, utility, and nonobviousness. Know-how, often referred to as trade secrets, protects technical knowledge, experience, and skills that are secret and valuable and that are most effectively transferred either by a writing or by observation of the actual performance of those possessing such knowledge, experience, and skills. Know-how may consist of clearly patentable, doubtfully patentable, or clearly nonpatentable subject matter.[11]

Although the statutory schemes for protecting copyrights, trademarks, patents, and know-how vary, the interests protected and the effects that licensing these properties have upon competition are sufficiently similar to justify subjecting them to a collective analysis. Thus, the following discussion will focus on technology and intellectual property in general, without attempting to distinguish among the various forms. There is one caveat, however, to treating the four types of technology as one: know-how as a rule is less protected from antitrust attack than the other forms. The U.S. Constitution authorizes the granting of exclusive rights in patents and copyrights,[12] and Congress has implemented the Constitution by defining statutory rights.[13] Know-how, however, lacks a statutory scheme similar to those that define the scope of the other technology rights. Trade secrets and know-how need not meet the novelty, utility, and nonobviousness requirements imposed on a patent, requirements which have the beneficial effect of preventing the creation of monopolies providing no social benefit. Also, the patent right extends only to what the inventor claims and is limited to seventeen years. Know-how licenses, in contrast, have no such statutory

11. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 482-92 (1974).
12. U.S. CONST. art. I, § 8, cl. 8.
13. *E.g.,* Act of July 19, 1952, ch. 950, § 1, 66 Stat. 804 (codified at 35 U.S.C. § 154 (1976)).

limitation. Accordingly, the Department of Justice has taken the position in its *Antitrust Guide for International Operations*[14] (the Guide) that restraints that are ancillary to trade secret and know-how licenses are subject to stricter scrutiny than patent licenses: "Because know-how licensing lacks the protections and legislative mandate of the patent system however, know-how licenses will in general be subject to antitrust standards which, if anything, are stricter than those applied to patent licenses."[15]

The practical problem created by the Department's strict position on know-how licensing is that in the international area, U.S. companies often use know-how licenses instead of patent licenses because foreign patent laws may offer less protection than these companies desire. Licensors may feel they have a better chance to protect their technology by keeping it secret, releasing it only to contractual partners. Furthermore, it is unclear whether and to what extent U.S. patent law applies abroad.[16]

C. Subject Matter Jurisdiction

A threshold issue in international technology licensing antitrust law is whether the requisite effect on U.S. commerce, either interstate or foreign, is present to support subject matter jurisdiction over an international transaction.[17] Generally, an activity that does not itself occur in U.S. interstate commerce is within the scope of the Sherman Act only if it substantially affects interstate commerce.[18] The same analysis applies to transactions not directly in U.S. foreign commerce, but that affect U.S. foreign commerce: the general requirement is that there be some substantial effect.[19]

Although language in a few cases indicates that a substantial effect on foreign commerce is not necessary to establish subject matter jurisdiction,[20] the Department of Justice in the Guide appears to have adopted the substantial effect test. The Department has stated that, as a matter of both law and policy, the Sherman Act applies only where foreign transactions have a substantial effect upon U.S. foreign commerce, either by adversely affecting import competition in U.S. markets or by restricting the export and foreign

14. Antitrust Division, U.S. Dep't of Justice, Antitrust Guide for International Operations (1977) [hereinafter cited as Antitrust Guide], *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 799, at E-1 (1977), *and* Trade Reg. Reports (CCH) No. 266, pt. II (1977).

15. *Id.* at 33-34 (Case F).

16. Deep South Packing Co. v. Laitram Corp., 406 U.S. 518, 523 (1971). *But see* Dunlop Co. v. Kelsey-Hayes Co., 484 F.2d 407 (6th Cir. 1973), *cert. denied,* 415 U.S. 917 (1974).

17. Sherman Act § 1, 15 U.S.C. § 1 (1976).

18. Burke v. Ford, 389 U.S. 320 (1967).

19. United States v. Watchmakers of Switz. Information Center, Inc., [1963] Trade Cas. ¶ 70,600 (S.D.N.Y. 1962), *order modified,* [1965] Trade Cas. ¶ 70,352 (S.D.N.Y. 1965).

20. United States v. Imperial Chem. Indus. Ltd., 100 F. Supp. 504, 592 (S.D.N.Y. 1951), *supplemental opinion,* 105 F. Supp. 215 (S.D.N.Y. 1952).

investment opportunities of U.S. citizens.[21]

II

ANALYSIS

A. STEP ONE

Under the principles set forth in the Guide, the sale, transfer, accumulation, or cross-licensing of technology is not necessarily, or even presumptively, violative of U.S. antitrust law. The ancillary restrictions included in a license package may, however, create problems. The first step required by the Guide in analyzing an international licensing arrangement is to determine whether the arrangement is in fact a cartel device for dividing up or controlling markets, or is simply a licensor's rational use of his technology. Among antitrust lawyers, this test is referred to as the *Timken* test. *Timken Roller Bearing Co. v. United States*,[22] the classic international joint venture and technology licensing case, involved trademark license agreements and accompanying ancillary restraints among three related companies: U.S. Timken, British Timken, and French Timken. British Timken's predecessor and U.S. Timken had made longstanding agreements providing for the territorial division of world markets. Subsequently, U.S. Timken purchased some of the stock of British Timken and ultimately held about thirty percent of British Timken's outstanding shares. U.S. Timken and a major shareholder of British Timken then organized a subsidiary, French Timken.

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21. ANTITRUST GUIDE, *supra* note 14, at 4-5. The recent Supreme Court decision in Pfizer, Inc. v. Government of India, 98 S. Ct. 584 (1978), has sparked further controversy in this area, since *Pfizer* could be read as indicating that the Supreme Court is willing to apply U.S. antitrust laws where the injury is solely to foreign consumers. Although the Court did not need to reach the issue, in dicta it noted:

> To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat [the purposes of the antitrust law]. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

Id. at 588. Subject matter jurisdiction aficionados are referred to an as yet unresolved debate for further discussion of this topic. *See* Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1, 9 (1974) ("[T]he Act is concerned with restraints of competition which occur in, or which substantially affect any of the commerce, interstate or foreign, which Congress regulates."); Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 34-38 (1974); Rahl, *A Rejoinder*, 8 CORNELL INT'L L.J. 42 (1974); Remarks of Douglas E. Rosenthal, then Ass't Chief, Foreign Commerce Section, Antitrust Div., U.S. Dep't of Justice, before the American Society of International Law, *Subject Matter Jurisdiction in United States Export Trade* 3 (Apr. 23, 1977) (copy on file at the offices of the *Cornell International Law Journal*), *partially reprinted in* 71 AM. SOC'Y INT'L L. PROC. 214 (1977) (I believe that . . . *as a matter of United States law*, restraints in United States export trade which *only* injure persons in foreign markets may not be made subject to the jurisdiction of United States courts.").

22. 341 U.S. 593 (1951).

The three companies entered into trademark license agreements pursuant to which they allocated world markets among themselves.

In holding this arrangement illegal, the Supreme Court emphasized that it was condemning "the aggregation of trade restraints" pursuant to which the companies had allocated the world markets.[23] The Court found that the three companies entered into the agreements for the purpose of avoiding all competition among themselves and that the trademark licensing provisions were "subsidiary and secondary to the central purpose of allocating trade territories."[24]

The *Timken* test is of considerable importance. In fact, the Justice Department has emphasized this "aggregation of restraints" approach in two of its recent cases involving international technology licensing, *United States v. Addison-Wesley Publishing Co.*[25] and *United States v. Westinghouse Electric Corp.*[26] In *Addison-Wesley,* the Justice Department charged the defendants, twenty-one major American publishing houses and certain alleged co-conspirators, with an unlawful combination and conspiracy in restraint of foreign and interstate trade and commerce in the distribution and sale of books, in violation of section 1 of the Sherman Act. Named as co-conspirators were the Publishers Association, a British organization whose membership includes virtually all major United Kingdom publishing houses, and individual members of the Association.[27]

The competitive impact statement filed by the Department of Justice emphasized that its attack focused on an across-the-board pattern of licenses between U.S. and British publishers. All of the licenses in question contained clauses granting the British publishers exclusive rights of distribution in the "British traditional market" and granting U.S. publishers exclusive rights in other markets. The Government pointed out that the relief sought "in no way interfered with the legitimate exercise of specific copyright rights."[28]

The Department of Justice took the same approach in *United States v. Westinghouse Electric Corp.* There the Department emphasized that, although the alleged violation arose out of written technology interchange agreements between Westinghouse, Mitsubishi Electric Corporation, and Mitsubishi Heavy Industries, Ltd., these agreements were not the only issue in the case: "The combination and conspiracy cannot be understood, the government believes, solely by examination of these written contracts—for

23. *Id.* at 598.
24. *Id.*
25. [1976] 2 Trade Cas. ¶ 61,225 (S.D.N.Y. 1976) (consent judgment), *approving* 41 Fed. Reg. 32,615 (1976) (proposed consent judgment and competitive impact statement).
26. No. C-70-852-SAW (N.D. Cal., filed Apr. 22, 1970).
27. Because of personal jurisdiction problems, the Government did not name the Publishers Association and its members as defendants.
28. 41 Fed. Reg. at 32,618.

what the defendants in fact did is at least as important as what they said in writing."[29] The complaint alleged that the parties, in addition to their written agreements, maintained an ongoing course of dealing whereby neither Westinghouse nor Mitsubishi would make bids or sales in the other's territory. The Justice Department charged that the effect and purpose of the technology agreements between the parties was to prevent sales by each party in the other's market area.

B. STEP TWO

The second step of the analysis under the Guide is to apply the three-pronged ancillary restraints test. The Guide states that terms of a licensing agreement that restrict some amount of competition are permissible, as long as the restrictions are clearly ancillary to some legitimate purpose, are appropriately limited in scope, and do not significantly harm the interests of the public. In other words, the Justice Department in antitrust cases very often focuses on the totality of the circumstances surrounding a transaction or the particular wording of some clause of a license. For example, the Department may not challenge an otherwise forbidden restriction limiting competition if it occurs in a single patent license and is shown to be reasonably necessary to further the main purpose of a legitimate technology transfer agreement. In contrast, a broad pattern of restrictions covering a wide variety of different products, patents, or licensees may be quite objectionable, because the overall effect of the restrictions is to create a broad territorial allocation between or among the parties. The rule of reason determines the legality of such international licensing restrictions on the basis of several key inquiries, such as:

(1) Is the restriction related to and designed to effectuate the main and legitimate purpose of the license?

(2) Is the scope and duration of the restriction substantially greater than necessary to achieve that purpose?

(3) Is the arrangement otherwise reasonable? And how substantial are the arrangement's adverse effects on the competitive interests that the U.S. antitrust laws seek to protect?[30]

At the present time, the Department of Justice applies the "reverse engineering" test in evaluating the reasonableness of the time period of know-how licenses. The reverse engineering period is defined as the time reasonably necessary for independent development of the licensed technology. The theory behind this standard is that during the period of time required

29. Letter from Thomas E. Kauper, then Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, to the Hon. Stanley A. Weigel (Government's Pretrial Brief) (June 13, 1973) (copy on file at the offices of the *Cornell International Law Journal*).

30. *See* ANTITRUST GUIDE, *supra* note 14, at 3-4.

for someone else to develop the technology or its equivalent, the licensor would not have faced competition anyway. Accordingly, any restriction imposed during that period of time would not reduce competition. A restriction extending beyond that period, however, might inhibit competition. In adopting the reverse engineering standard, the Department has rejected a frequently advanced argument that know-how licenses are reasonable for the life of the trade secret—regardless of the length of that period—and that such licenses are only unreasonable once the secret is lost.[31]

A word of caution is necessary at this point. Many years ago, antitrust law in the technology licensing area came under the influence of the so-called inherency doctrine, espoused by the Supreme Court in 1938 in *General Talking Pictures Corp. v. Western Electric Co.*[32] The inherency doctrine rests upon two assumptions: (a) one who owns technology has the inherent right to exclude all others from the use of his property; and therefore (b) an owner also has the right to relax the total exclusion and license a partial exclusion. By way of illustration, in the *General Talking Pictures* case, General Electric, Western Electric, and RCA had pooled certain patents relating to amplifiers. The pooling companies granted licenses to others that were expressly limited to the sale of the patented amplifiers for private uses, effectively reserving to pool members the right to use the patents for commercial purposes. The Supreme Court held that the field of use restrictive licenses were per se legal. The case has come to stand for the proposition that an owner of technology may grant licenses to manufacture, use, or sell his technology upon any conditions not inconsistent with the scope of his monopoly.[33]

The inherency test led to an easy rule of thumb for lawyers concerned with potential antitrust problems in drafting patent and know-how license agreements: if a restriction could be placed on a licensee in the form of narrowly defining the scope of the licensor's grant, such as a grant to use the license for production of only one type of product, the limitation would be a per se legal limitation on what was being granted. But if the restriction were instead written as an explicit contractual limitation, it would be

31. The Justice Department's three-pronged test is derived from the ancillary restraints doctrine, which, at least since the reign of Queen Anne, has been used to uphold restrictive conditions imposed upon the sale or exchange of property. *See* Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711); Addyston Pipe & Steel Co. v. United States, 85 F. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). The *Addyston Pipe* ancillary restraint theory is that a seller of property should be able to restrain the buyer from doing the seller an injury that, but for the sale, the buyer could not have inflicted. Restraining the use of the property so as to prevent that injury was not reducing competition, but rather securing the seller against increased competition of his own doing.

32. 304 U.S. 175, *aff'd on rehearing,* 305 U.S. 124 (1938).

33. *Id.* at 181.

viewed as a separate ancillary restraint and would be subjected to rule of reason scrutiny under the antitrust laws.

In this era of the rule of reason and factual economic analysis, one should not place too much weight upon the mechanistic inherency doctrine of *General Talking Pictures*. Indeed, since 1938 numerous embellishments and judicial interpretations have weakened the original doctrine. In 1970 an official of the Antitrust Division summarized these developments in what has become known as the "nine no-no's" speech,[34] concluding that there are nine types of restrictive technology licensing clauses that constitute per se violations of the antitrust laws.[35] Because of some overlap among the "nine no-no's," they can be condensed into five categories:

(1) tying arrangements that require a licensee to purchase nonpatented products from the licensor;

(2) horizontal control among patent licensees so that, for example, one licensee has veto power over other licensees;

(3) resale price maintenance whereby a licensor requires a licensee to adhere to a specified price in reselling licensed products;

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34. Remarks of Wilson, *supra* note 9; *see* Remarks of Bruce B. Wilson, then Deputy Ass't Attorney General, Antitrust Div., U.S. Dep't of Justice, before the Annual Joint Meeting of the Michigan State Bar Antitrust Law Section and the Patent Trademark and Copyright Law Section (Sept. 21, 1972), *partially reprinted in* [1977] 5 TRADE REG. REP. (CCH) ¶ 50,146.

35. The nine categories are:

(1) Requiring a licensee to purchase separate products as a condition of obtaining the license. International Salt Co. v. United States, 332 U.S. 392 (1947).

(2) The related practice of mandatory package licensing. American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959).

(3) Reciprocal cross-licenses used to form the basis of a cartel. United States v. General Elec. Co., 82 F. Supp. 753 (D.N.J. 1949); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945).

(4) Restraints on where, how, or to whom a patented product is disposed of in the United States after the licensor has once sold the product to an independent purchaser. United States v. Glaxo Group Ltd., 302 F. Supp. 1 (D.D.C. 1969).

(5) An agreement that the licensor will not grant further licenses to any third parties without the licensee's consent. United States v. Krasnov, 143 F. Supp. 184 (E.D. Pa. 1956), *aff'd per curiam*, 355 U.S. 5 (1957).

(6) Requiring a licensee to adhere to any specified or minimum price with respect to the licensee's sale of the licensed product. *See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

(7) Requiring the licensee to pay royalties in an amount not reasonably related to the licensee's sales products covered by the license rights. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969).

(8) Extending the license or collecting royalties on it beyond its term of years. Brulotte v. Thys Co., 379 U.S. 29, 32 (1964).

(9) Requiring a licensee to agree in advance to grant back to the licensor title to or an exclusive license on any new patents or trade secrets the licensee may obtain or develop related to the licensed technology rights. United States v. Associated Patents, Inc., 134 F. Supp. 74 (E.D. Mich. 1955), *aff'd per curiam sub nom.* Mac Inv. Co. v. United States, 350 U.S. 960 (1956).

(4) extending the scope of the monopoly by, for example, requiring a licensee to pay royalties on an expired patent; and

(5) exclusive grantbacks whereby a licensor requires an exclusive grantback of improvement patents from its licensee.[36]

The interesting question is whether these five categories should be per se illegal not only for domestic technology licensing but also for international licensing arrangements. In the Guide, the Department appears to reject application of a per se rule to international transactions except for those involving traditional horizontal restraints:

> The rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not normally found in the domestic market. . . . We emphasize, however, that the normal per se rules will be applied fully to basic horizontal restraints designed to affect U.S. market prices or conditions or to divide the U.S. market from other markets.[37]

Legitimate know-how licensing arrangements—those that are not subterfuges to cover cartel schemes—thus appear to fall within the category to which the Government would apply its three-pronged rule of reason test.[38] A rule of presumptive illegality, however, is more appropriate for these arrangements. Accordingly, the "nine no-no's" of domestic technology licensing may perhaps be summarized as "five presumptive no-no's" in the international sphere. In light of the Justice Department's treatment of these restrictions as per se illegal in the domestic context, it is probably safe to say that the Department will at least view them with suspicion, with the result that the restrictions may well be de facto presumptively illegal regardless of the label or category theoretically assigned to them.

CONCLUSION

The field of international technology licensing antitrust law remains wide open for the development of legal doctrine. The field has for too long been characterized by uncertainty, which may well cause businesses either to forego advantageous licensing arrangements rather than risk exposure to antitrust liability or to proceed under the rationale that, even if their actions are illegal, they may not be prosecuted. The first alternative is a wasteful

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36. *See* ANTITRUST GUIDE, *supra* note 14, at 42. Concerning this fifth category, the Department acknowledges that the Supreme Court has held that exclusive grantbacks of improvements made by licensees are not per se illegal. Transparent-Wrap Mach. Corp. v. Stokes & Smith Co., 329 U.S. 637 (1947). However, the Department is of the opinion that *Transparent-Wrap* has been substantially undercut by the later decision in Brulotte v. Thys Co., 379 U.S. 29 (1964), and takes the position that exclusive grantbacks should be per se illegal.

37. ANTITRUST GUIDE, *supra* note 14, at 2-3.

38. *See, e.g., id.* at 28-39 (Cases E, F, G). *But see id.* at 42-45 (Case I).

and unnecessary restriction upon our economy; the second fosters an attitude destructive of law enforcement. The presumptive legality/presumptive illegality categories suggested in this Article are designed to remove some of the uncertainty and unnecessary expense involved in complying with the antitrust laws pertaining to international technology licensing.