## Contents

Pr	eface		xi
Ta	ble of Ca	ses	xiv
Ta	ble of Leg	gislation	xxiv
		PART I	
		INTRODUCTION	
1	Conor	al Introduction	3
7	1.1		0
		Intellectual Property Rights	3
	1.2		
		the Policy Context	8
2	The Re	elationship between Intellectual Property Rights and	
		etition Law under the Treaty	8
	_	Introduction	8
	2.2	Grant and 'Existence'	11
	2.3	Permitted and Prohibited Exercise of Intellectual	
		Property Rights	12
	w.	2.3.1 Normal Exercise	12
		2.3.2 A Functional Test for Permitted	10
	2.4	Exercise? The Objectives of the Dules on Commetition in	13
	2.4	The Objectives of the Rules on Competition in the Treaty	16
	2 5	Effective Competition	16
		The Goal of Fair Competition	19
		The Goal of Integration	21
		Negative or Positive Integration	23
	ARTI	PART II CLE 85 AND INTELLECTUAL PROPERTY LICENSING	
		CLE OS AND INTELLECTOAL TROTEINT LICENSTING	
3	Introd	uction: Intellectual Property Right Licensing	
		ompetition Policy Generally	27
4	The St	ructure of Article 85 and Licensing Agreements	34
E.	4.1	Introduction	34
	4.2	The Requirements of the Exemption Process	37

	4.3	The Clearance of Licensing Agreements under		
		Article 85	5(1)	40
		4.3.1	Agreements between independent	
			undertakings	40
		4.3.2	Effect upon Interstate Trade	43
		4.3.3	Agreements of Minor Importance:	
			De Minimis and Article 85(1)	45
		4.3.4	The Object of Effect or Preventing, Restricting	
			or Distorting Competition	48
5	The D	ovalonmai	nt of the Concept of Restriction of	
9			Intellectual Property Right Licensing	52
	5.1		e of the Patent Doctrine and Restriction on	02
	0.1	1		52
	5.2	Competi-		02
	3.2		mission's Change to <i>per se</i> Prohibitions in	55
			Agreements The Canadia Decision	55 55
			The Grundig Decision	
	ГО		The Commission's Change of Policy	57
	5.3		rt's Application of the Appreciability Test to	
			al Property Rights	63
			Exclusive Territoriality	63
		5.3.2	The Scope of the Exception for Open	<b>(</b>
	F- 4		Exclusive Licences	65
	5.4		Technology/Market Opening Test	66
	5.5		itorial Restraints and Restrictions on	
		Competi	tion	73
6	The D	evelopmei	nt of the Commission's Block Exemption	
	Policy	for Techn	ology Licensing Agreements	76
	6.1	The Pater	nt Licensing Block Exemption (2349/84)	76
	6.2	The Know	w-how Block Exemption Regulation	
		(556/89)		78
	6.3	The Tech	nology Transfer Block Exemption	
		Regulation	on (240/96)	81
7	The D	and ation	of Townitorial Doctrointain Intalloctual	
1		•	of Territorial Restraints in Intellectual	00
	_		icensing Agreements under Article 85	90
	1.1		rt's Approach	-
		7.1.1	Non-Restrictive Exclusive Licences	91
			Exemptible Exclusive Territoriality	95
			ation of Territorial Protections	95
	1.3	L losed L	icences and Intellectual Property Rights	97

			Contents	vii
8	The Re	gulation o	f Non-Territorial Restraints in	
		ng Agreer		100
		Introduct		100
			g the Integrity of the Innovation: the	
			sable Provisions in Licensing Agreements	102
			Introduction	102
			The Low Risk Indispensable Restraints	103
			Quality Controls and Licensing	106
	8.3		ts of Indispensability	107
			Tie-ins and Quality Specifications	107
			Improvements and Grant Backs	109
	8.4		Jse Provisions	118
			lation of Royalties	120
		0	Duration	120
		8.5.2	The Base for Calculating Royalties	122
	8.6		enge Clauses	123
	8.7		Territoriality, Minimum Quantities, and	
			petition clauses	125
			Minimum Royalties and Minimum	
			Quantities	125
		8.7.2	Non-Competition Clauses	127
0	C 1			120
9	Conclu		- Library Cari Jaliana	130
			ntitrust Guidelines	136
	9.2		ance of the US Guidelines for EC	120
		Competit	ion Law	139
			PART III	
	ART	CLE 86 A	AND INTELLECTUAL PROPERTY RIGHTS	
10	T 1 1			1/17
10	Introdu	iction		147
11	The Re	levant Ma	rket and Intellectual Property Rights	151
	11.1	The Relev	ant Product Market	151
		11.1.1	Defining the Relevant Product	153
		11.1.2	Narrow Product Markets and Commission	
			Practice	157
		11.1.3	Dependence, 'Essential Facility', and Market	
			Definition	160
	11.2	The Relev	ant Geographic Market	165
12	The Co	ncept of E	Dominance and Intellectual Property	
	Rights	_		168
	0	Introduct	ion	168
	12.2	Dominan	ce and Intellectual Property Rights	169

),

.

	12.3	Dominan to Entry	ce, Intellectual Property Rights, and Barriers	172
12	ThaCa		huce and Intellectual Droporty Rights	180
13		AL.	Abuse and Intellectual Property Rights nsion of the Concept of Abuse under Article 86	100
	. 10.1	_	loitive to Anticompetitive Conduct	181
		1	Weakening Levels of Competition in	
		10.1.1	Markets	182
		13.1.2	Methods of Normal Competition	184
	13.2		nded Concept of Abuse and Restrictions on	
	D	_	al Property Rights	187
			Structural Abuse and Intellectual Property	
			Rights in the Primary Market	188
		13.2.2	Specific Abuses, Second Markets and	
			Intellectual Property Rights	190
		13.2.3	The Concept of Related Markets under	
			Article 86	191
14	Rofusa	le to Sunn	ly and Intellectual Property Rights	195
17			to Supply: the Court and Commission	195
			usal to Supply to Refusal to License: the	
	17.2		sion Decisions	199
-			New Entrants and Commission Decisions	201
			The Commission's 'Essential Facility'	
			Doctrine	202
	14.3	Magill		204
		0	Magill and the Commission	204
			The Judgment of the Court of First Instance	
			in Magill	206
		14.3.3	The Advocate General's Opinion in Magill	207
			The Judgment of the Court of Justice	
			in Magill	208
		14.3.5	Some Implications of Magill	211
	14.4	The Pricin	ng of Compulsory Licensing	214
15	Tie-ins	and Intel	lectual Property Rights	221
16	Excessi	ve Pricing	and Intellectual Property Rights	224
		Introduct		224
			6(A) generally	225
			(A) and Intellectual Property Rights	228
			rkets, Intellectual Property Rights, and	
		Unfair Tr	1 2	231

		Contents	ix		
17		Discriminatory Pricing and Intellectual Property Rights			
		The Concept of Equivalent Transactions  Discriminatory Discounts and Rebates in a Single	232		
		Market	233		
		17.2.1 Non-Equivalent Transactions: Different Quantities	234		
		17.2.2 The Effects of the Discriminatory Practice	235		
	17.3	Separate Markets and Price Discrimination	235		
		17.3.1 Intellectual Property Rights and Separate			
		Markets	236		
	17.4	Geographic Price Discrimination	239		
		Article 86(C) as a Regulatory Framework for an			
		Essential Facility	242		
18	18 Predatory Pricing				
19	19 Conclusions				
	19.1	The Exceptional Circumstances Test and Normal			
		Exploitation	246		
	19.2	The Effect of the Competition Rules upon Incentives	247		
	19.3	Appropriation of Value and Market Power	248		
	19.4	Balancing Access to Markets and Exclusivity	250		
		APPENDICES			
Ar	nendix	I—Excerpts from the Treaty establishing the			
	European Community				
Ar	Appendix II—Commission Regulation (EC) No. 240/96				
1	1	III—Antitrust Guidelines for the Licensing of	258		
Intellectual Property (USA)			276		
Bibliography			305		
Inc	lex		311		