

Contents

<i>Foreword</i>	v
<i>Preface</i>	vii
<i>Table of Cases</i>	xv
<i>Table of EC Legislation</i>	xli
<i>Table of National Legislation</i>	liv
<i>Table of Treaties and Conventions</i>	lix
<i>Table of Competition Decisions</i>	lxiv
1 INTRODUCTION	1
I. Trade	1
II. Parallel Trade	2
III. The European Community	3
A. Basic Terminology	4
B. The Common Market	6
<i>i. Free Movement of Goods</i>	6
<i>ii. Freedom to Provide Services</i>	8
<i>iii. Competition Law</i>	9
<i>iv. Taxation</i>	11
C. Enforcement	12
<i>i. European Commission</i>	12
<i>ii. National Competition Authorities</i>	14
<i>iii. National Courts</i>	15
<i>iv. European Court of Justice</i>	16
IV. Policy Arguments	17
A. Free Trade	17
B. Domestic Industry	18
C. Market Differences	20
D. Distribution	22
E. Risk of Piracy and Counterfeiting	22
F. Consumer Benefit	23
V. Structure of This Book	25
2 INTELLECTUAL PROPERTY RIGHTS	27
I. Scope of Intellectual Property Rights	27
A. Existence/Exercise Dichotomy	28
B. Industrial and Commercial Property	30
<i>i. Patents</i>	31
<i>ii. Copyright</i>	31

x Contents

iii. Design Rights	32
iv. Trade Marks	33
v. Designations and Indications of Origin	35
C. Unfair Competition and Passing Off	37
II. Community Exhaustion	40
A. Placed on the Market	44
i. Sale	45
ii. Licences	48
iii. Transportation	53
iv. Downloaded Products	54
B. By or with Consent	59
i. Scope of Consent	59
ii. Compulsory Marketing	61
iii. Marketing by Third Parties	61
iv. Burden of Proof	68
C. Contractual Restrictions	70
III. Advertising	71
IV. Repackaging	74
A. General Right to Prevent Repackaging	75
i. Articles 28 to 30	76
ii. Trade Mark Directive	78
iii. Changing Marks	83
iv. Removing Marks	84
v. Products other than Pharmaceuticals	85
B. Necessity of Repackaging	86
i. Necessity of Reboxing: Different Sizes	87
ii. Necessity of Reboxing: Consumer Resistance	89
iii. Necessity of Relabelling	93
iv. Necessity of Changing Trade Marks	94
v. Discussion	96
C. Original Condition of the Product	97
D. Presentation of Repackaging	100
E. Identification of Repackager	102
F. Identification of Additional Articles and their Source	103
G. Identification of Manufacturer	104
H. Identifying Marks	105
I. Notice	109
J. Samples	112
V. Other Grounds for Opposing Further Commercialisation	113
A. Change or Impairment	114
B. Differences between National Rights	115
C. Place of Manufacture of the Products	117
D. Differences between Domestic and Imported Products	118
E. Defective Products	119

F. Governmental Interference with Pricing.....	119
G. Ethical Obligation to Market.....	120
H. Damage to Prestige.....	121
I. Pharmaceutical Products	122
J. Transitional Provisions on Enlargement.....	123
VI. Rights Which are not Subject to Exhaustion	126
A. Communication and Performance Rights.....	127
B. Rental and Lending Rights	131
3 COMPETITION LAW	135
I. Article 81: Anti-Competitive Agreements	135
A. Article 81(1): Undertakings.....	139
<i>i. Corporate Groups</i>	140
<i>ii. Other Subsidiaries</i>	144
<i>iii. Agents</i>	145
<i>iv. Consumers</i>	148
B. Article 81(1): Agreement.....	149
<i>i. Vertical Agreements</i>	150
<i>ii. Unilateral Conduct</i>	164
<i>iii. Horizontal Agreements and Unilateral Conduct</i>	167
C. Article 81(1): Anti-competitive Object or Effect.....	170
<i>i. Export and Import Bans</i>	173
<i>ii. Exclusive Distribution Agreements</i>	176
<i>iii. Selective Distribution Agreements</i>	177
<i>iv. Delaying or Refusing Supplies</i>	178
<i>v. Higher Prices for Exported Goods</i>	179
<i>vi. Reduced Prices for Goods Facing Parallel Imports</i>	184
<i>vii. Restricting Guarantees and After-sales Service</i>	185
<i>viii. Packaging</i>	188
<i>ix. Intellectual Property and Unfair Competition</i>	189
<i>x. Safety Regulations</i>	196
<i>xi. Tracing Parallel Imports</i>	197
<i>xii. Agreements to Litigate</i>	201
<i>xiii. Third Party Services</i>	201
D. Article 81(1): Appreciable Effect	202
E. Article 81(3): Justifications	207
<i>i. Vertical Agreements</i>	208
a. Restrictions on sales by manufacturers or distributors	210
b. Restrictions on purchases by the distributor.....	215
c. Other restrictions on parallel trade.....	216
<i>ii. Vertical Agreements Regarding Motor Vehicles</i>	223
a. Restrictions on sales by manufacturers or distributors.....	225
b. Other restrictions on parallel trade.....	232

xii Contents

c. Specifications	233
d. Price convergence.....	236
iii. <i>Horizontal Agreements</i>	238
iv. <i>Technology Transfer Agreements</i>	239
II. Article 82: Abuse Of A Dominant Position	243
A. Dominance.....	243
B. Refusals to Supply	245
i. <i>General Case Law</i>	245
ii. <i>Cases Involving Parallel Trade</i>	254
C. Restrictions on Resale	262
D. Misuse of Regulatory Controls	263
E. Excessive or Discriminatory Pricing.....	265
III. Restrictions On Services.....	267
A. Collecting Societies.....	267
B. Individual Undertakings	271
4 REGULATION.....	275
I. Quotas and Import Licences	276
A. General Prohibition	276
B. Trade Deflection	276
II. Taxation	278
A. Excise Duty	279
B. Value Added Tax (VAT).....	280
C. Travellers	281
i. <i>General Principles</i>	281
ii. <i>Limitations</i>	283
a. Frontier zone travel.....	284
b. Transportation by individuals	284
c. Personal use.....	286
iii. <i>Mineral Oils</i>	289
iv. <i>Tobacco Products</i>	290
D. Parcels	290
i. <i>Non-commercial Consignments</i>	291
ii. <i>Commercial Consignments</i>	292
E. Motor Vehicles	293
i. <i>VAT on New Means of Transport</i>	293
ii. <i>Car Registration Tax</i>	293
III. Pharmaceuticals.....	294
A. Regulatory Structure	296
B. Parallel Imports of Nationally Authorised Products	296
i. <i>Simplified Authorisation</i>	296
ii. <i>Withdrawal of Authorisation</i>	303
iii. <i>Other Restrictions</i>	305
C. Parallel Imports of Community Authorised Products	307

i. Notification	307
ii. Single Product Name and Branding	309
D. Price Controls	313
E. Funding and Reimbursement	316
IV. Pesticides	318
V. Motor Vehicles	321
VI. Labelling	324
VII. Unfair Competition And Consumer Protection	327
5 INTERNATIONAL ASPECTS.....	331
I. Intellectual Property Rights	331
A. International Exhaustion under the EC Treaty	331
B. International Exhaustion under Community Legislation	334
i. Initial Legislation.....	334
a. Patents.....	334
b. Trade marks (part I).....	335
c. Semiconductor products.....	337
d. Trade marks (part II)	338
e. Computer programs.....	338
f. Plant variety rights	340
g. Rights related to copyright	340
h. Database rights	341
ii. Interpretation of the Legislation.....	341
a. Commission.....	341
b. National courts.....	342
c. <i>Silhouette</i>	342
d. <i>Sebago</i>	344
e. <i>Davidoff</i>	345
iii. Legislative Reconsideration.....	347
a. Trade marks (part III)	347
b. Design rights.....	354
c. Copyright	355
C. Studies on International Exhaustion	361
i. UK Monopolies and Mergers Commission	361
ii. Swedish Competition Authority	362
iii. Danish Inter-Ministerial Working Group	363
iv. NERA	363
v. UK Select Committee on Trade and Industry.....	364
vi. Irish Competition Authority	366
vii. The Economist Intelligence Unit	366
viii. OECD	367
D. Border Controls	368
E. Internal Enforcement	372
F. Impact on the Internal Market	375
G. International Exhaustion in the United Kingdom	378

xiv Contents

<i>i. Patents</i>	378
<i>ii. Copyright</i>	385
<i>iii. Design Rights</i>	392
<i>iv. Trade Marks</i>	393
a. The old law	393
b. Trade Marks Act 1994	396
<i>v. Passing Off</i>	400
II. Competition Law	403
A. Article 81	403
B. Article 82	411
III. Regulation	412
A. Quotas and Import Licences	413
B. Taxation	413
<i>i. Customs Duties</i>	413
<i>ii. Retaliatory Import Duties</i>	414
<i>iii. Excise Duty and Value Added Tax</i>	414
<i>iv. Travellers</i>	414
<i>v. Parcels</i>	416
a. Non-commercial consignments	416
b. Commercial consignments	416
C. Marketing Authorisations	418
D. Diversion of Pharmaceutical Products	420
<i>i. Tiered Price Medicines</i>	420
<i>ii. Compulsory Licences</i>	421
IV. International Treaties	422
A. Agreement on the European Economic Area	422
<i>i. Free Movement of Goods</i>	423
<i>ii. Intellectual Property</i>	424
<i>iii. Competition</i>	427
<i>iv. Regulation</i>	428
B. Bilateral Free Trade Agreements	428
C. World Trade Organization	431
<i>i. Free Movement of Goods</i>	432
<i>ii. Intellectual Property</i>	432
<i>iii. Regulation</i>	436
D. Intellectual Property Treaties	436
<i>i. International Convention for the Protection of New</i> <i>Varieties of Plants</i>	436
<i>ii. WIPO Copyright Treaty</i>	437
<i>Bibliography</i>	439
<i>Index</i>	449