Editorial Article

Magill: Consumer Interests Prevail

Tom Skinner

BARRISTER*

It had been hoped that the European Court of Justice (ECJ) in its judgment[1] in the *Magill* appeals would take the opportunity, if not to determine conclusively the relationship between Article 86 and copyright, at least to clarify some of the confusion in the field, particularly as to the question of abuse.

The Existence of Abuse

The issue of the existence of abuse was dealt with in ten short paras without referring once to the principles of specific subject-matter or essential function. Instead reference was made to the category of "author's rights"[2] which were acknowledged to be "exclusive"[3]. Included in this category was the exclusive right of reproduction. The ECJ cited[4] with approval the dictum, which was common ground throughout between the parties, that a refusal to grant a licence cannot in itself constitute abuse of a dominant position.[5] The ECJ then cited[6] the further dictum in the *Volvo* case that the exercise of an exclusive right by the proprietor may, in exceptional circumstances, involve abusive conduct.[7]

The ECJ decided in this case that the conduct objected to was the appellants' reliance on copyright conferred by national legislation so as to prevent Magill – or any other undertaking having the same intention – from publishing on a weekly basis information (channel, day, time, and title) together with commentaries and pictures obtained independently of the appellants.[8]

The ECJ went on to highlight, one assumes with approval, three sets of circumstances which the Court of First Instance (CFI) had identified, and which led to the conclusion that the appellants' conduct was abusive. It logically follows, since there is nothing in the conduct found objectionable in para 51 to distinguish this case from any other refusal by a copyright proprietor to license other undertakings to use its copyright material, that these three sets of circumstances must be the 'exceptional circumstances' which rendered abusive these particular copyright proprietors' conduct.

'Exceptional Circumstances'

The three sets of circumstances were:

1. there was a "specific, constant and regular potential demand on the part of consumers"[9] for a "weekly television guide containing comprehensive listings for the week ahead" for which other published sources of television listings were "only to a limited extent substitutable"[10]. This may be summarised by saying that Magill's was a new product;
2. There was no justification for the refusal to license, either by reference to the appellants' activities in television broadcasting, or in publishing;[11]
3. The appellants' conduct "reserved to themselves the secondary market of weekly television guides by excluding all competition on that market".[12]

These three sets of circumstances were summarised, at para 54 as:

> "The appellants' refusal to provide the basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer, and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second para of Article 86 of the EC Treaty."

Failure to Justify

Of the three sets of circumstances, the second need detain us least. The prior failure of the appellants to justify their conduct cannot be considered an exceptional circumstance indicative of abuse. The lack of justification only falls to be considered once the conduct in question has been found to be an abuse of a dominant position contrary to Article 86.

Reserving the Secondary Market

Of greater significance is the characterisation of a copyright proprietor's reservation of the secondary market as an exceptional circumstance indicative of abuse. The ECJ clearly based this on the CFI's comparison of the appellants' behaviour with that of the first example of potentially abusive conduct in the *Volvo* case, as where a car manufacturer arbitrarily refuses to supply spare parts, produced in the course of his main activity of car making, to an independent

**The Chambers of Alan Tyrrell QC, Francis Taylor Building, London*

[1]Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Limited (ITP) v Commission* Judgment of 6 April 1995, not yet reported.
[2]Para 49.
[3]Para 50.
[4]Para 49.
[5]Case 238/87, *Volvo v Veng* [1988] ECR 6211, paras 7 and 8.
[6]Para 50.
[7]Para 9.
[8]Para 51.
[9]As the CFI had found: Case T-69/89 *RTE v Commission* [1991] ECR II-485, para 62; Case 76/89 *ITP v Commission* [1991] ECR II-575, para 48.
[10]See para 52.
[11]Para 55.
[12]Para 56.

Editorial Article

repairer carrying on his business on the derivative market of automobile maintenance and repair. Of course, that situation is readily distinguishable from the present. As ITP in particular argued and as Advocate General Gulmann saw[13], Magill was not comparable to an independent repairer in the derivative market of spare parts, since bare supply of ITP's product[14] on the secondary market of weekly television guides would not have enabled Magill to produce its product on that market. Magill further needed a licence to incorporate ITV's programme listings into its own product which would then compete with ITP's product.

The significance of the example goes further however. It is submitted, as ITP did, that examples of refusal to supply products to undertakings competing on secondary/derivative markets can have no application in relation to copyright cases if any substance is to be given to the principle of the exclusive rights of reproduction and of refusal to licence. The pro-competitive effect of copyright depends upon the copyright proprietor being able to obtain sufficient reward for his productive efforts by exploiting his copyright material. That reward is commonly obtained by means of the reproduction, or commercialisation of the copyright material via a secondary product on the secondary market. This paradigm is part of the specific subject-matter of copyright. It applies generally in copyright cases. Its existence in this case, it is submitted, cannot realistically be characterised as an exceptional circumstance connoting abuse.

New Product

In describing Magill's product, let us call it the intended product, as a new product which rendered an exceptional circumstance the appellants' refusal to license Magill, the ECJ applied the interchangeability test.[15] It found that the 24- or 48-hour television listings in newspapers, and weekly highlight sections in magazines, "were only to a limited extent substitutable for advance information to viewers on all the week's programmes."[16] This was because only comprehensive weekly television guides would enable users to co-ordinate in advance their weekly viewing with their other leisure activities.

Crucially of course, the ECJ ignored the appellants' own weekly magazines, which provided viewers with advance weekly information, and thus would clearly be more than merely to a limited extent substitutable for Magill's product.[17] In economic terms the Magill guide would have to compete with the other three products on the market for weekly television guides. Advocate General Gulmann thought that there could be no new product where the intended product competes with the proprietor's own product made from his copyright material since the intended product would "basically meet the same consumer needs as may be met by buying the individual proprietors' products".[18] Television users would be as able to balance their weekly viewing commitments with their other leisure activities by using the appellants' products as by using the Magill guide.

The key to the definition of "new product" cannot therefore be found simply by application of the interchangeability test. Rather it must lie in the perceived consumer need or interest which is satisfied or facilitated by the intended product.

Consumer Interests and Consumer Prejudice

It is possible to identify two, previously unsatisfied, consumer interests which the ECJ identified as being satisfied by the Magill guide, and therefore enabling the Magill guide to be classed as a new product. The corollary was that because the appellants' refusal to license resulted in these interests going unsatisfied that refusal was conduct "to the prejudice of consumers" contrary to Article 86 (b).

The first such interest arises from the ECJ's description of Magill's product as the appellants' weekly information "together with commentaries and pictures obtained independently of the appellants."[19] It is at least arguable that this rider means that there would be no new product, and no exceptional circumstance, where the intended product simply reproduced the copyright material. In other words that a new product must be more than the sum of its previously copyright parts. The intended product must add value in the sense of incorporating independently obtained components. Let us call this the 'added value interest'.

The second consumer interest arises from the fact that consumers desirous of comprehensive advance weekly television listings would, thanks to the Magill guide, be able to buy one product not three.[20] Let us call this the 'single purchase interest.'

The question is why the intended satisfaction of these interests was an exceptional circumstance sufficient to warrant compulsory licensing of copyright material. This is not the first case in which the ECJ has considered the effect on consumers of exercise of the rights of copyright proprietors' to refuse to license their protected material. The CFI thought the

[13]Opinion, para 109.
[14]*TV Times* magazine.
[15]Case 6/72 *Continental Can* [1973] ECR 215. For the purposees of defining the relevant product market regard shall be had to the "characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable."
[16]Paras 52.
[17]Although there is, however, an implicit acceptance of interchangeability between the Magill product on the one hand, and the appellants' products collectively on the other, in paras 53.
[18]Opinion of Advocate General Gulmann delivered on 1 June 1994, paras 97 and 98.
[19]Para 51, and see also para 47.
[20]Para 53.

Editorial Article

appellants' conduct to "present a certain similarity"[21] to the third example of potentially abusive conduct given in the *Volvo* judgment, as where a car manufacturer decides no longer to produce spare parts for certain models even where there was still a market demand for such products. The manufacturer being the owner of the design right who both refuses to supply the spare parts or products made from the design **and** refuses to license the design to third parties to do so may mean that consumers are prejudiced to the extent that they are obliged to buy a completely new car.[22] The combined decision of the manufacturer in this case may have the effect of depriving the consumer of an essential facility for the use and enjoyment of his car. It is submitted that the prejudicial effect to the consumer in such a case is of a completely different degree to that endured by the consumer in this case. The consumer is not here deprived of the ability to watch television, nor even of the perceived need to be able to plan his leisure activities a week in advance, because ITP and RTE each consistently provided consumers with their individual products which enabled consumers, were they so minded, to balance their weekly television viewing with their other leisure activities. Further, it is submitted that the unavailability of some independently obtained commentary or pictures is in no sense analogous to the consumer deprived of an essential facility for the use or enjoyment of some product.

It is clear that if the concept of "consumer prejudice"[23] is to play any future role as an exceptional circumstance rendering otherwise legitimate conduct abusive, then a clearly defined test of 'essential consumer facility', enabling the corresponding determination of the requisite degree of consumer prejudice to warrant compulsory licensing on the basis of Article 86 would need to be developed.[24] This is important not only for consumers but for the proprietors of copyright. The hurdle has, it is submitted, been set too low by the ECJ, equating the failure to provide what are little more than consumer conveniences with consumer prejudice under Article 86 (b), thereby justifying compulsory licensing. Significantly, Advocate General Gulmann thought that compulsory licensing to satisfy consumer interests should be dealt with by national legislation, and if not by the Community legislature.[25]

Copyright Proprietor Satisfying the Consumer Interest

One final question left unanswered by the ECJ's decision is whether the previously unsatisfied consumer interest met by the intended product can be legitimately satisfied by the copyright holder himself. It will be recalled that the ECJ emphasised that the appellants did not themselves offer the facility of the new product.[26] It is submitted that it is strongly arguable that had the appellants themselves offered the comprehensive product, say by licensing each other or a new joint venture between them which marketed the new product, then there would have been no limitation of markets to the prejudice of consumers within the meaning of Article 86 (b) since the potential consumer demand for the new product would be satisfied and the new product would have been allowed to appear on the market.[27] In its Decision[28], at point 27 the Commission took the view that had the appellants' licensed each other exclusively then this would have been indicative of a discriminatory licensing policy contrary to Article 86. ITP and RTE not having appealed the point, the Advocate General did not feel constrained to decide the point either way.

Conclusion

The judgment on the issue of abuse shows every sign of being the product of a divided Chamber and it is perhaps, unwise to extrapolate statements of principle. However, unwisely, the concept of consumer prejudice has been set at a notably low threshold. A proper legislative balancing of the conflicting interests involved is required. In the meantime copyright proprietors may be able to protect themselves by maximising the exploitation of their copyright material where it can be further compiled or assembled into a more consumer-friendly form. Further it is arguable that new undertakings intending to enter the secondary market must go further than simply compiling copyright material and must provide some additional facility to consumers. Litigation will inevitably arise in establishing the limits of these rules.

[21] *ITP* Judgment, para 59; *RTE* Judgment, para 74.
[22] Opinion, para 101.
[23] Article 86 (b).
[24] For the essential facility doctrine in US antitrust law see Subiotto, "The Right to Deal with Whom one Pleases under EEC Competition Law", [1992] 6 ECLR 234, at page 242 ff.
[25] Opinion, footnote 61. See also para 16.
[26] Para 54.
[27] See Opinion, footnote 59.
[28] Commission Decision 89/205/EEC relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851 – *Magill TV Guide/ITP, BBC and RTE*) OJ 1989 L78/43.