THE ASCENDANCY OF EUROPEAN COMMUNITY LAW—THE IMPLICATIONS OF THE COURT OF JUSTICE DECISION IN MAGILL ON THE BALANCE BETWEEN NATIONAL AND EC INTELLECTUAL PROPERTY LAW

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I. INTRODUCTION

In its early stages, the case of RTE, ITP and BBC v. Magill Publications1 appeared to be a confrontation of David and Goliath proportions on the battlefield of the licensing of copyrighted television listings. However, the case has since come to represent a significant issue of European Community competition law, one that attempts to balance concern over industrial and commercial property rights defined under national law against the Community's interests in creating a system of undistorted competition.2 A variety of interested parties have followed the case as it has proceeded from one judicial level to the next. Scholars on the evolution of European Community law have watched to see how the courts would balance competition law with national laws on intellectual property rights.3 Practitioners in the field of intellectual property have watched to see how far the courts would go in forcing dominant owners of intellectual property rights to make their products available to emerging players.4 However, the result of the case may be so specific to its own facts and circumstances that, in the end, the case provides much more in the way of speculation than concrete guidance.

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1 Radio Telefis Eireann and Independent Television Publications Ltd. v. Commission (1 June 1994), Joined Cases C-241/91 P and C-242/91 P.


4 Id.
II. EUROPEAN COMMUNITY BACKGROUND

The European Community (EC) was established by the Treaty of Rome (EC Treaty) in 1957 in an effort by its individual member states to form a common market to promote the "harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." EC competition law is based on the premise that coordinated action in the international market could lead to a competitive advantage over individual action. In particular, the removal of trade barriers within the Community provides the advantages of greater efficiency through specialization based on comparative national advantage and increased competition. To maintain this free and open economic system, the EC Treaty establishes guidelines for fair competition and for the balancing of national and Community law on competition issues. In this manner, the Treaty seeks to establish a cooperative trading environment to concentrate the focus of member states on the development of Community rather than national markets.

The European Court of Justice (ECJ) has held that where national laws conflict with Community laws, Community laws take precedence. However, in some areas potential conflicts have not specifically been provided for in the EC Treaty. The Treaty does not provide for specific regulations on the law of intellectual property or for how this area might conflict with competition laws. Laws on issues such as copyright have been left to the government of each Member State to develop and enforce. Instead of developing intellectual property laws of its own, the EC has focused on how the interaction of the laws of Member States affects the competition principles enumerated in the EC Treaty. The difficulty lies

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7 Id. at 346.
9 Law, supra note 6, at 333.
10 Id. at 333.
11 Id. at 342.
in the inherently exclusive nature of the intellectual property right, which directly conflicts with the Community’s goal of eliminating restrictions on trade.

Article 222 of the EC Treaty states that the Treaty provisions “shall in no way prejudice the rules in Member States governing the system of property ownership.” Under this rationale, it seems that the holder of an intellectual property right would be in a position to frustrate the Community’s goals of preventing trade restrictions. The Advocate-General has interpreted this Article to mean that the existence of basic intellectual property rights cannot be challenged. The Court of Justice has dealt with this difficult matter in the past by distinguishing between the existence of an intellectual property right and the exercise of that right, finding that while the existence of the right may not be challenged, the exercise of that right may be restricted if it violates provisions of the EC Treaty. The Court has also applied a “subject matter” test, which provides that the protection of national intellectual property laws cannot extend beyond the bounds of the core subject matter, as distinguished from a fringe characteristic, of a given intellectual property right.

The courts of the Community indirectly control intellectual property rights such as copyright by ensuring that the exercise of these rights by their owner does not violate the restrictions set forth in Articles 36, 85 and 86. Article 36 provides that protective copyright laws will remain unaffected by

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12 EC Treaty, supra note 5, at art. 222.
14 Id. at 100 (citing Opinion of Advocate-General Roemer, Parke, Davis, 1968 E.C.R at 77, 7 C.M.L.R. at 48).
16 The specific subject matter of a right is determined by “an assessment of what is necessary to fulfill the essential function of the intellectual property right in question.” Gulmann Opinion, supra note 2 para. 85. As to copyrights, the ECJ has held that the exclusive rights of performance and reproduction as well as exclusive lending rights are among its core subject matter. Reindl, supra note 15, at 66-68 (citing Case 158/86, Warner Brothers v. Christiansen, 1988 E.C.R. 2605, 3 C.M.L.R. 684 (1990)); Myrick, supra note 13, at 103 (citing Case 15/74, Centrafarm v. Sterling Drug, 1974 E.C.R. at 1162, 2 C.M.L.R. at 503).
17 Law, supra note 6, at 333.
other provisions in the Treaty as long as they do not constitute "arbitrary discrimination or a disguised restriction on trade between Member States."\textsuperscript{18} Article 85 prohibits agreements which effectively restrict, distort or prevent competition among the Member States.\textsuperscript{19} Article 86 prohibits the abuse of a dominant position to the extent that it has the potential to affect trade within the Community.\textsuperscript{20}

III. FACTUAL BACKGROUND

The tension between national copyright law and the pro-competition policies of the European Community is exemplified by the 1986 case involving, on the one hand, Magill Publications, an Irish publishing company, and, on the other hand, the British Broadcasting Corporation (BBC), Independent Television Publications Ltd. (ITP) and Radio Telefis Eireann (RTE).\textsuperscript{21} The case involved a conflict over the publication of program listings protected by copyrights held by the broadcasters under the national copyright laws of the United Kingdom and the Republic of Ireland. RTE enjoys a statutory monopoly in Ireland for the provision of culturally-oriented television and radio service.\textsuperscript{22} The BBC and ITP share a duopoly within the United Kingdom for the provision of television services.\textsuperscript{23} Most of the homes in Ireland and approximately 30-40\% of the homes in Northern

\textsuperscript{18} EC TREATY, supra note 5, at art. 36.

\textsuperscript{19} EC TREATY, supra note 5, at art. 85(1). "The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . ." Id.

\textsuperscript{20} Id. at art. 86. "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States." Id. A dominant position can be defined as a "position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers." Gulmann Opinion, supra note 2 para. 177.


\textsuperscript{23} Id. at 294.
Ireland receive the six television channels provided by these three broadcasters. Some additional channels are available through satellite transmissions. At the time of the case, there was no comprehensive TV guide available in either the U.K. or in the Republic of Ireland because of similar licensing policies by the three broadcasters restricting the dissemination of program listings. At the time, each of the broadcasters produced its own weekly guide containing its program listings as well as program descriptions, all of which the broadcasters asserted was protected as copyrighted material under the U.K. Copyright Act of 1956 or the Irish Copyright Act of 1963. The broadcasters provided weekly schedules to newspapers free of charge under a license which provided that the listings could only be published 1-2 days in advance of their broadcast and subject to certain qualitative restrictions to ensure the moral rights of the listing’s content.

Magill TV Guide Ltd. was established in Ireland with the express purpose of publishing a comprehensive TV guide containing the information under the disputed copyright protection. In May 1986, Magill published complete listings for channels that could be received in Ireland using listings identical to those distributed by the broadcasters except for commentary related to Magill’s own publication. All three broadcasters demanded Magill at that time to discontinue its publication of the listings in violation of the licensing agreement, stating that the listings were protected under authors’ rights. When Magill resumed publication of the comprehensive weekly, the broadcasters sought an injunction in the Irish courts to prevent Magill from continuing to publish, claiming that as literary works and

24 Id. at 294.
25 Id. at 294.
26 Id. at 294. The BBC’s listings are published in Radio Times, ITP publishes the listings for both ITV and Channel 4 in the TV Times and RTE publishes its radio and TV listings in the RTE Guide. Id. at 295.
27 Id. at 295. ‘Moral rights’ is a European concept allowing authors to prevent any alterations of their work that might damage their reputation. Junda Woo, European Court is Advised to Overturn Antitrust Ruling, WALL ST. J., June 9, 1994, at B9.
28 Perkins, supra note 22, at 295.
30 EU: Court of Justice - Advocate General Invites Court to Annul Judgment of TV Programme Publication Ruling, AGENCE EUROPE, June 3, 1994, available in WESTLAW, INT-NEWS-C.
compilations, the schedules were entitled to national copyright protection. Magill opposed the broadcasters' copyright claim and counterclaimed that the broadcasters violated Articles 85 and 86 of the EC Treaty by refusing to allow it to publish the listings on fair and reasonable terms.

IV. LEGAL BACKGROUND

A. Irish High Court

The Irish High Court found that the listings at issue constituted original literary work as defined by the Irish Copyright Act of 1963. Such work is not confined to literary art but encompasses any printed or written composition, including tables and compilations. Only the expression in writing need be original, not necessarily the ideas expressed. The Court held that as long as the compilation involved the author's skill, labor and time, the author was entitled to the protection of the copyright.

As to Magill's Article 85 complaint, the Court found that Article 85 would apply only where the broadcasters had engaged in a concerted practice which had the potential to affect Member State trade and had the objective or effect of preventing, distorting or restricting competition within the common market. To establish the existence of a concerted practice, Magill would have to prove some coordination between the undertakings of the broadcasters which, though falling short of an agreement, "knowingly substitutes practical cooperation for the risks of competition."

31 Perkins, supra note 22, at 295. Copyrights in compilations involving no original or artistic creativity are only recognized under the national copyright laws of the United Kingdom, Ireland, Denmark and the Netherlands. Id. at 296.

32 Irish High Court, (1990) ILRM at 534.

33 Id. at 534.

34 Id.

35 Id.

36 Id. at 534-35.

37 See generally, EC Treaty, supra note 19, at art. 85.

38 Irish High Court (1990) ILRM at 535.

39 Id.
Member States. As to the Article 86 claim, the Court found that the broadcasters' refusal to allow Magill to publish program information beyond that provided in the conditioned license was merely an exercise of the commercial advantage granted to them by their Irish copyright. On April 4, 1986, in contemplation of its publication of a comprehensive TV Guide and prior to the injunction complaint in the Irish court system, Magill had lodged a complaint against the three broadcasters with the European Commission alleging an abuse of dominant position under Article 86 for the refusal to grant Magill a license to publish the listings. Consequently, the Irish High Court limited its consideration to finding facts relevant to the Article 86 claim regarding the potential existence and abuse of a dominant position by the broadcasters. The Court withheld determination on these claims because of the pendency of the broadcasters' appeal from the Commission decision.

B. European Commission

In its consideration of the Magill case, the European Commission defined the relevant product market as advance weekly listings and comprehensive weekly TV guides for both radio and television and the relevant market as both Northern Ireland and the Republic of Ireland. In its examination of the Article 86 claim of abuse of dominant position, the Commission characterized a dominant position as one which stifles competition and cultivates economic dependence in downstream users of a product. The

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40 Id. The Member States alleged to have been affected were Ireland and the United Kingdom because of the publication's potential sales in Northern Ireland.

41 See generally, EC TREATY, supra note 20, at art. 86.

42 Irish High Court (1990) ILRM at 535.

43 Perkins, supra note 22, at 295. Magill's complaint was lodged under European Council Regulation No. 17 which implements Articles 85 & 86 of the EEC Treaty. Id. at 295.

44 Irish High Court, (1990) ILRM at 547-48.

45 Id.

46 Commission Decision 89/205 EC of 21 December 1988, relating to a proceeding under Article 86 of the EEC Treaty, 1989 O.J. (L78) at 48 [hereinafter Commission Decision]. It has been asserted that by so defining the relevant product market, the Commission is focusing first on the abuse and then tailoring the market to reflect the policy considerations thereby implicated. Reindl, supra note 15, at 62 n.11.

Commission found that the broadcasters held a legal monopoly by virtue of their copyright for the listings, as well as a factual monopoly by virtue of the fact that, as producers of the raw materials essential to the production of any weekly guide (namely the listings themselves), they controlled the market for those listings.\footnote{Id. at 48-49.} On the basis of the legal and factual monopolies and the creation of economic dependence on the broadcasters by publishers like Magill, the Commission found that the broadcasters held a dominant position in the market for advance weekly listings.\footnote{Id. at 49.}

In deciding whether or not the broadcasters' exercise of their copyright licenses constituted an abuse of their dominant position, the Commission considered the potential demand for a comprehensive TV guide within the relevant market.\footnote{Id. at 49.} The Commission determined that the potential demand was substantial based on the sales of Magill's previously offered comprehensive weekly TV publication and the popularity of such publications in other Member States.\footnote{Id. at 49.} In response to the broadcasters' argument that control over their listings was necessary to preserve comprehensive and high quality treatment of all of its offerings, the Commission found that less restrictive quality control methods were available, noting that the broadcasters did not demand such high standards from the already authorized daily publication of their listings.\footnote{Id. at 49-50.} On this basis, the Commission found that the licensing restrictions were designed more for the protection of the broadcasters' position in the market for weekly guides than for quality control.\footnote{Id. at 50.} As such, they constituted a restriction to the prejudice of consumers by preventing a new product with substantial potential demand from entering the market.\footnote{Id. at 50.}

The Commission considered the subject matter of the copyright held by the broadcasters to be limited to advance weekly listings.\footnote{Id. at 50.} The Commission determined that the market for weekly TV guides was a derivative market and that in retaining dominance within that market, the broadcasters

\footnote{Id. at 48-49.}
\footnote{Id. at 49.}
\footnote{Id. at 49.}
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\footnote{Id. at 49-50.}
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\footnote{Id. at 50.}
\footnote{Id. at 50. Article 86(b) provides that, "limiting production, markets or technical development to the prejudice of consumers" constitutes an abuse of a dominant position. EC Treaty, supra note 5, at art. 86(b).}

\footnote{Commission Decision, 1989 O.J. (L78) at 48.}
were using their copyrights to obtain benefits beyond the specific subject matter of their intellectual property right.56

In order to constitute a violation of Article 86, the abuse must affect trade between Member States.57 The Commission found that because the weekly TV guide would be offered for sale in both Northern Ireland and the Republic of Ireland, trade between Member States would be detrimentally affected.58 Having found all of the required elements for abuse of a dominant position, the Commission held that the broadcasters' licensing restrictions were an infringement of Article 86.59

The Commission has the power to stop an infringement of Article 86 when it determines that one exists.60 As a result of the decision, the broadcasters were required to provide their individual advance weekly program listings to each other and any third parties requesting them on a non-discriminatory basis, and to permit reproduction of these listings.61 The Commission recognized that royalties and any licenses the broadcasters felt necessary to exact in order to maintain high quality and comprehensive program coverage would be reasonable.62 The broadcasters appealed the decision of the Commission under Article 173 and were granted an interim suspension of the mandated licensing by the acting President of the Court of Justice.63

56 Id. at 50.
57 EC TREATY, supra note 5, at art. 86.
58 Commission Decision, 1989 O.J. (L78) at 50.
59 Id. at 51.
60 Council Regulation No. 17 implementing Articles 85 and 86, art. 3, 1959-1962 O.J. SPEC. ED. 87. "Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by design require the undertakings or associations of undertakings concerned to bring such infringement to an end."
61 Commission Decision, 1989 O.J. (L78) at 50.
62 Id. at 50-51.
C. The Court of First Instance

All cases related to competition are heard first in the Court of First Instance (CFI), whose decisions are then appealable in the ECJ. The case was heard by the Court of First Instance (CFI) in July 1991 with Magill intervening in favor of the Commission decision. The broadcasters asserted that the relevant market was not the weekly listings but instead was the general market for information on television programs, and that because a large proportion of viewers got their information from sources other than the broadcasters' own publications, such as the 1-2 day listings, their position in the market was not dominant. The CFI rejected this view, stating that the daily listings could not be substituted for the comprehensive weekly guide, and agreed with the Commission that the relevant market should be that of weekly program listings and weekly television publications. The CFI held that the broadcasters were dominant in both of those markets, since they monopolized the information itself and therefore any potential competitors were economically dependent on the broadcasters for the supply of the listings information.

The CFI acknowledged that under the Court of Justice ruling in Keurkoop v. Nancy Kean Gifts, when the Community has not standardized or harmonized national rules, the procedures and conditions under which copyrights are protected are governed by national rules. However, the CFI stressed the need to maintain a balance between national copyright rules granting the right to control creative property and Community rules designed to maintain freedom of competition between the Member States.

Article 36 of the EC Treaty provides a conditional exception for intellectual property from the Community's stringent rules relating to the free movement of goods. The CFI interpreted this exception "in the light of

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65 Court of First Instance, 1991 E.C.R. II-575, para. 12.
66 Id. para. 15, 16.
67 Id. para. 47.
68 Id. para. 49.
70 Court of First Instance, 1991 E.C.R. II-575, para. 51.
71 Id. para. 52.
the Community’s objectives and activities as defined by Articles 2 and 3 of the EEC Treaty” to allow intellectual property rights to be protected from Community restrictions only insofar as they are “inherent in the protection of the actual substance of the intellectual property right.” As stated earlier, the ECJ has narrowly defined the subject matter of an intellectual property right as consisting of a “core bundle” of rights distinguishable from any peripheral rights which might constitute merely a fringe of that right in a derivative market. Restrictions on an intellectual property right may therefore be enforced under Article 36 if the court finds that the holder of that right has gone beyond the limited subject matter and has exercised peripheral rights in a restrictive or arbitrarily discriminatory manner. In this way, the Court may concede a certain level of protection for property rights granted by national governments while narrowly interpreting those rights to prevent broad restriction on Community competition.

The CFI found that the broadcasters had attempted to exercise their copyrights, not merely to protect the legitimate core functions of the rights—those of protecting the moral right of the product and ensuring reward for creative effort—but to “pursue an aim manifestly contrary to the aims of Article 36.” In such a case, where the fundamental principles of freedom

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72 Court of First Instance, 1991 E.C.R. II-575, paras. 53, 54. Article 2 provides for the “harmonious development of economic activities.” EC TREATY, supra note 5, at art. 2. Article 3(f) includes as a Community purpose the “institution of a system ensuring that competition in the common market is not distorted.” Id. at art. 3(f).

73 Myrick, supra note 13, at 103.


75 Court of First Instance, 1991 E.C.R. II-575, para. 56. The CFI cites the prior ECJ cases of Volvo AB v. Erik Veng (UK) Ltd. Case 235/87, 1988 E.C.R. 6211, 4 C.M.L.R. 122 (1989) and Consorzio Italiano della Componentistica di Ricambio per Auto vei coli v. Regie Nationale des Usines Renault Case 53/87, 1988 E.C.R. 6039, 4 C.M.L.R. 265 (1990) (upholding refusal of car manufacturers to grant licenses to third parties to manufacture and market spare parts as an exercise of the core subject matter of their intellectual property right). The ECJ indicated in those cases that the exercise of an intellectual property right outside of the proper subject matter of that right may be prohibited if it involves the abuse of a dominant position in violation of Article 86. The ECJ cited examples of what it would have considered to be violations of Article 86. Among those cited were arbitrary refusal to supply independent repairers with spare parts and a decision by the manufacturer to cease production of spare parts when many cars requiring those parts were still in use. The CFI likened the broadcasters’ refusal to grant third parties the right to publish its program listings with the arbitrary refusal of a manufacturer to supply spare parts to an independent repairer. Additionally, the CFI likened the broadcasters’ failure to consider the needs of the consumer
of competition and free movement of goods were at stake, the CFI found that Community law would prevail over national law in a manner inimical to those principles.\footnote{Id. para. 56.}

In the Magill case, the CFI found that by withholding the right to publish the weekly listings, the broadcasters were preventing a new product, a comprehensive weekly TV guide, for which there was potential consumer demand, from entering the market.\footnote{Id. para. 58.} The CFI affirmed that the true motivation for this restriction was not the protection of the broadcasters' legitimate copyright concerns in the integrity of the program listings, but rather the procurement of a monopoly in the derivative market of weekly TV listings for its own product.\footnote{Id.}

The CFI further determined that, in ordering the broadcasters to supply third parties with weekly listings, the Commission did not exceed the limits of its power as granted by Article 3(1) of Regulation 17.\footnote{Id. para. 71; see generally supra note 60.} The CFI referred to ECJ case law interpreting the Commission's power to end an infringement to imply a "right to order such undertakings to take or refrain from taking certain action" to bring about the end of the infringement.\footnote{Court of First Instance, 1991 E.C.R. II-575, para. 70 (citing Joined Cases 6 & 773, Commercial Solvents v. EC Commission, 6 March 1974).}

In their appeal to the CFI, the broadcasters asserted that, even if under Article 3 of Regulation 17 the Commission was authorized to impose compulsory licensing, they were prohibited from doing so under the provisions of the Berne Convention for the Protection of Literary and Artistic Works.\footnote{Id. para. 73.} The broadcasters asserted that since all of the Member States of the Community are parties to the Convention, it must be considered to be a part of Community Law under Article 234 of the EC Treaty.\footnote{Id. para. 73.} Article 9(1) of the Convention was said to confer the exclusive right of reproducing a

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\footnotesize{in having access to a comprehensive weekly television guide to the halt in production of spare parts for an automobile when there was still consumer demand for the parts. Based on these comparisons, the CFI concluded that the broadcasters' actions were not related to the core subject matter of their copyrights. Id. para. 57.}
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protected work on the author, while Article 9(2) was asserted to allow only national governments to compel licensing as long as it did not unreasonably prejudice the author and was not in conflict with the ordinary exploitation of the work.\textsuperscript{83} The Commission asserted in its answer that the Berne Convention did not apply because the Community itself was not a member and that the ECJ had held that the EC Treaty took precedence over any agreements concluded between Member States before the Treaty was established.\textsuperscript{84}

The CFI agreed with the Commission that the Berne Convention did not apply to modify their right to compel licensing in this case. The CFI held that Article 234 had consistently been interpreted as affecting only pre-Treaty obligations between a Member State and a non-Member State and that therefore, the Article could not be used in the relations between Member States to justify inter-Community trade restrictions.\textsuperscript{85} Additionally, the Court established that Article 9(2) was never ratified by Ireland and was ratified by the United Kingdom only after accession.\textsuperscript{86} The Court concluded that in the case of a post-accession ratification, a Member State may not avoid the rules of the Treaty by concluding a convention or agreement.\textsuperscript{87} The CFI therefore upheld the decision of the Commission and its proposed remedy and dismissed the appeal of the broadcasters.\textsuperscript{88}

\textbf{D. Advocate General}

RTE and ITP appealed the decision of the Court of First Instance to the

\textsuperscript{83} \textit{Court of First Instance}, 1991 E.C.R. II-575, para. 73.
\textsuperscript{84} \textit{Id.} para. 74.
\textsuperscript{85} \textit{Id.} para. 75.
\textsuperscript{86} \textit{Id.} para. 76.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} \textit{Id.} para. 77. Leon Brittan, competition Commissioner for the EC, said in a written statement following the \textit{Magill} decision in the CFI, "There can no longer be any doubt that the creation of a single market in which competition is undistorted cannot be held up by abuse of dominant positions built on national rules.\ldots\ Companies cannot unreasonably sit on their intellectual property in order to stifle enterprise and prevent the emergence of new forms of competition." \textit{EC Competition Law Held Supreme Over Member State Copyright Law}, 1992 - The External Impact of European Unification, July 26, 1991, at Vol. 3, No. 9 available in LEXIS, Intlaw Library, Irecas File.
Court of Justice. The ECJ is assisted by Advocates-General who provide the Court with independent and impartial recommendations on cases pending before the Court of Justice. The recommendations of the Advocate-General are advisory and as such are not legally binding but often have a significant impact on the Court. The case was presented to Danish Advocate General Claus Gulmann for his review and recommendation prior to its hearing before the Court of Justice. The broadcasters presented several arguments for overturning the CFI's decision, most significantly that the CFI had misinterpreted the concept of abuse of a dominant position under Article 86 of the EC Treaty. The Advocate General agreed with the broadcasters on that argument and recommended that the Court of Justice set aside the prior ruling by the CFI.

According to the Advocate General's opinion, the CFI erroneously concluded that the actions of the broadcasters in restricting the licensing of their program listings was an abuse of a dominant position under Article 86. Gulmann stated that the anti-competitive nature of the exercise of the copyright does not automatically qualify it as an abuse. The exclusive right to reproduce protected works, including the right to refuse to license, is considered to be an integral part of the subject matter of a copyright. The key question Gulmann considered is whether there may be special circumstances under which actions within the subject matter of a copyright


90 EC TREATY, supra note 5, at art. 166.
91 Myrick, supra note 13, at 90.
92 BNA Report, supra note 21, at 1.
93 Gulmann Opinion, supra note 2 para. 18.
94 BNA Report, supra note 21, at 1; The Advocate-General recommended that the broadcasters' costs in the CFI and the Court of Justice be borne by the Commission and the costs related to intervention be borne by Magill. EU: Copyright Can Protect TV Listings, Says Top Court Official, EUROPEAN COMMISSION PRESS RELEASES, June 1, 1994, available in WESTLAW, Int-News-C Database.
95 BNA Report, supra note 21, at 2.
96 Id. at 2.
97 Gulmann Opinion, supra note 2, paras. 34, 38.
might be considered an abuse.\footnote{Id. para. 40.} He states that it "is only where an exercise [of a given intellectual property right] is not necessary in order to fulfill the essential function that the interest of free movement of goods or the interest of free competition must prevail over the interest of the owner of the right to engage in that exercise."\footnote{Id. para. 80.} Gulmann did not find sufficient evidence of special circumstances beyond the essential function of the intellectual property right which would merit labelling the broadcasters’ refusal to license an abuse under Article 86.

Gulmann did not consider the broadcasters’ prevention of the emergence of a new product on the market for which there was potential demand to be a special circumstance. Gulmann asserted that the objective of a copyright is to allow the copyright holder in a dominant position to restrict existing or emerging enterprises from competing with his product.\footnote{Id. para. 67.} He argued that abuse exists when a copyright holder attempts to prevent a non-competing product, which had the potential to meet a need not being provided by the copyright holder, from entering the market.\footnote{Id. para. 96.} The Advocate General suggested that even in cases where a competing product might be superior to the one offered by the copyright holder, consumer interests should not be the basis of interference in the privileges surrounding the subject matter of the copyright.\footnote{Id. para. 97.}

Gulmann likewise asserted that the exploitation of a copyright on a derivative market can be regarded as necessary to fulfill the essential copyright function of obtaining reward for creative effort.\footnote{Id. para. 112.} Therefore, the broadcasters’ control of the derivative market of weekly television listings is not a special circumstance outside of the subject matter of the copyright.

The Advocate General stated that because he saw no special circumstances warranting consideration as an abuse of a dominant position under Article 86, the consideration of whether the broadcasters were justified in refusing to license was not relevant.\footnote{Id. para. 129.} However, Gulmann stated that should the ECJ find such an abuse to exist under Article 86, he agreed with the CFI that the refusal to license was not justified by the broadcasters’ claim of needing
to ensure comprehensive, high-quality coverage.\textsuperscript{105}

In considering the effect of the Berne Convention on the Commission's decision, the Advocate General suggested that the Convention, since it was not in conflict with the EC Treaty, need not be excluded from consideration but instead could be used to interpret the meaning of Article 86 and Article 3 of Regulation 17.\textsuperscript{106} Gulmann took into consideration the broad international support given to the Convention based on unanimous Member State accession to the Convention and a 1992 European Council resolution under which the Member States would endeavor to introduce national legislation in compliance with the provisions of the Convention.\textsuperscript{107}

Viewing Article 86 and Article 3 in light of the Berne Convention, Gulmann concludes that even when the listings are given the minimum protection provided by the Convention, Article 9(2) cannot be interpreted as an exclusive state provision restricting the Commission from imposing compulsory licenses.\textsuperscript{108}

Gulmann cautioned that the imposition of compulsory licensing might reduce the value of a copyright to the mere collection of economic dividends.\textsuperscript{109} On this basis, he suggested that in order for the refusal to grant a license to third parties to be considered outside of the core subject matter of the copyright, especially substantial and weighty grounds within competition law must be established.\textsuperscript{110}

\subsection*{E. European Court of Justice}

The recommendation of the Advocate General, which seemed to establish national copyright as a defense against EC competition law in all but

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\item \textsuperscript{105} Id. para. 133.
\item \textsuperscript{106} Id. para. 153.
\item \textsuperscript{107} Id. para. 156. The Advocate General also cited Joined Cases 55 and 57/80, Musik-Vertrieb Membran GmbH v. GEMA, 1981 ECR 147, which relied on the Convention, and to the fact that the ECJ has previously held that Treaty rules could be interpreted in light of other widely adopted conventions such as the European Human Rights Convention. Id. para. 154 n.81.
\item \textsuperscript{108} Id. paras. 161, 166. Article 9(2) states that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Id. para. 162.
\item \textsuperscript{109} Gulmann Opinion, supra note 2, para. 87.
\item \textsuperscript{110} Id.
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\end{footnotesize}
extreme cases of abuse, then passed to the Court of Justice for a final judgment.\textsuperscript{111} As stated previously, the Advocate General’s opinion was merely advisory and the Court had the option of either accepting or rejecting Gulmann’s recommendations.\textsuperscript{112} In April, 1995, the Court of Justice declined to accept Gulmann’s reasoning and ruled in favor of the Court of First Instance’s confirmation of the Commission’s opinion.

The Court first addressed the issue of whether the broadcasters were in a dominant position. The Court affirmed the CFI’s rationale that the broadcasters, in having a de facto monopoly over the information used to compile the listings, could effectively prevent competition in the market for weekly television guides and were therefore in a dominant position.\textsuperscript{113}

In establishing the broadcasters’ abuse of that position, the Court reiterated some of the fundamental principles enumerated by both the lower courts and the Advocate General. The Court admitted that in the absence of Community harmonization or standardization of laws, protection of an intellectual property right is a matter for national laws.\textsuperscript{114} Additionally, the Court reaffirmed that the exclusive right of reproduction is part of the author’s rights and therefore the refusal to grant a license, even for a dominant undertaking, will not in itself constitute an abuse of a dominant position.\textsuperscript{115} However, the Court cited to the same precedent to show that under exceptional circumstances, a particular exercise within the subject matter of an intellectual property right may be considered abusive conduct.\textsuperscript{116}

The Court found three grounds for finding the broadcasters’ conduct in refusing to license the listings to be abusive. First, the Court agreed with the CFI that there was no substitute for the comprehensive weekly TV guide proposed by Magill.\textsuperscript{117} Therefore, the Court found that the broadcasters’ actions in refusing to license prevented the emergence of a new product which was not being offered by the broadcasters and for which there existed

\textsuperscript{111} Michael Foley, Republic of Ireland: TV Firms Can Prevent Listings Publication, European Court Told, IRISH TIMES, June 2, 1994, at 2, available in LEXIS, Europe Library, Txtwe File.
\textsuperscript{112} See supra note 91.
\textsuperscript{114} Id. para. 49.
\textsuperscript{115} Id. para. 49.
\textsuperscript{116} Id. para. 50.
\textsuperscript{117} Id. para. 52.
potential consumer demand.\textsuperscript{118}

Second, the Court agreed with the reasoning of the CFI and the qualified reasoning of the Advocate General and found no justification for the broadcasters refusal to license on the basis of quality control arguments.\textsuperscript{119} Third, the Court upheld the CFI's determination that the broadcasters reserved to themselves the derivative market of weekly television magazines by denying access to information essential to the production of such publications.\textsuperscript{120} The Court agreed with both the CFI and the Advocate General in finding that the actions of the broadcasters satisfied the Article 86 requirement of having an effect on trade between Member States.\textsuperscript{121} The Court cited to prior cases establishing that a substantial effect on trade is not necessary if it can be established that the conduct complained of is capable of having such an effect.\textsuperscript{122}

Without discussion of the Advocate General's analysis of the use of the Berne Convention in interpreting the Treaty, the ECJ rejected the broadcasters' appeal that imposition of compulsory licenses was incompatible with Convention provisions recognized in Community Law.\textsuperscript{123} The ECJ cited to settled case law establishing that the provisions of pre-accession agreements cannot be relied on in intra-Community relations where the rights of countries outside the Community are not involved.\textsuperscript{124}

The Court upheld both the CFI and the Advocate General in affirming that the Commission properly met the requirements of Article 190 in providing adequate reasoning for its judgment.\textsuperscript{125} The Court cited the CFI's findings that the Commission had clearly stated that the broadcasters went beyond the actual substance of their copyrights and committed an abuse under Article 86 and that the Commission's statement of reasons was sufficient to provide the main criteria on which the findings were based and would allow the Court to carry out a review of the decision.\textsuperscript{126}

\textsuperscript{118} Id. para. 54.
\textsuperscript{119} Id. para. 55.
\textsuperscript{120} Id. para. 56.
\textsuperscript{121} Id. para. 71.
\textsuperscript{122} Id. para. 69.
\textsuperscript{123} Id. para. 86.
\textsuperscript{124} Id. para. 84 (citing Case 286/86 Ministere Public v. Deserbais, 1988 E.C.R. 4907, para. 18).
\textsuperscript{125} Id. para. 95.
\textsuperscript{126} Id. para. 100.
V. ANALYSIS

Since the case began, RTE, BBC and ITP have all established the practice of granting licenses for the publication of comprehensive TV listings, and all three broadcasters' guides have become comprehensive weekly guides. Nonetheless, the controversy remains significant for its implications for the development of intellectual property rights within the EC and the uncertainty of the future relationship between national and EC competition law.

The position forwarded by the Advocate General was supported by the character and purpose of an intellectual property right. The essence of an intellectual property right is the sole and exclusive right to control a particular product. The promise of the financial and creative satisfaction that comes from the dominant position accompanying such a right encourages research and development, creativity and innovation. The ECJ appeared to find that the copyright holder's right to use its product to generate exclusive financial rewards is satisfied by the reasonable return from a compulsory license. However, a creator faced with the likelihood of compulsory product licensing is potentially less likely to apply the time and effort needed for real ingenuity. In such a situation, the very essence of the intellectual property right has been appropriated.

In the Magill case, it could be said that the Court prohibited the broadcasters from doing exactly what their copyright under national law gave them the right to do: exclude third parties from using the copyrighted material in their own products. Arguably, the market for program guides was not a derivative market at all. The nature of a copyright provides that the same right that protected the listings also protects the listing in any form of reproduction. The ECJ artificially distinguished between the core subject matter of an intellectual property right and the ability to exercise that

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127 Foley, supra note 111, at 2; Gulmann Opinion, supra note 2, para. 10. The UK Broadcasting Act of 1990 required broadcasters to license their copyrighted program schedules to other publishers. Rice, supra note 89, at 14. The Irish Legislation has not been amended. Gulmann Opinion, supra note 2 para. 10.

128 Reindl, supra note 15, at 73.

129 Myrick, supra note 13, at 116.


131 Myrick, supra note 13, at 109.

132 Reindl, supra note 15, at 77.
right in derivative markets. By restricting the ability of the broadcasters to refuse to license to the detriment of any product that could be considered downstream and dependent on the copyrighted material, the Court’s judgment restricted the broadcasters from withholding their licenses from a producer intending to use that material to create a product which, while slightly different than the subject matter of the copyright, is in fact in direct competition with the holder of the copyright. Based on the Court’s findings, it is difficult to see when the broadcasters could have restricted the use of their copyrighted listings, since anyone seeking a license would have needed to use the listings in some “downstream” venture. If the broadcasters had the power to exclude no one, then their copyright would be meaningless and their incentive to supply the product would be diminished by the potential decline in revenue. As the Advocate General suggested, the Court might logically have required the broadcasters to license a non-competing product which was dependent on the broadcasters’ information, since that situation would not deprive the broadcasters of the benefits of their creativity.

As has been suggested by many legal scholars as well as the Advocate General, the decision of the ECJ is not readily reconcilable with European case law indicating that the exercise of a copyright is not in itself an abuse of a dominant position. The distinction between the Magill case and cases such as Volvo and Renault seems strained to fit a particular policy argument. No clear argument can conclusively distinguish Magill from cases where the mere exercise of an intellectual property right was held not to be an abuse. The CFI’s argument that the broadcasters’ refusal to supply Magill with the listings was similar to a manufacturer’s refusal to supply an independent dealer with spare parts is distinguishable because the broadcasters were not extending themselves into a derivative market where their product did not enjoy the protected status of the intellectual property

133 Corbet, supra note 8, at 354.
134 Myrick, supra note 13, at 116.
135 Id. at 117.
136 Id.; BNA Report, supra note 21.
138 See supra note 75.
139 Reindl, supra note 15, at 72.
The analogy to the refusal to supply parts for which a significant demand exists is distinguishable by the assertion that the broadcasters fully intended to supply the consumer demand for the information and were merely excluding a potential competitor from doing the same. Since the essence of the copyright is the right to exclude others from reproducing protected work, it is difficult to see how the refusal to allow even downstream producers to reproduce such work can constitute an abuse. The CFI seemed more concerned with the interest of the consumer in having access to information than the interest of the copyright holder in the protection of its property interest. As stated by the Advocate General, the interests of the consumer should not be used to justify an intrusion on the substance of a copyright.

The CFI's decision further appears to have used Article 86 to override national copyright laws in an area which was reserved to national legislation by Article 222 of the EC Treaty. In other words, even though the case law of the ECJ in competition cases established a "core bundle" of rights by which, based on the provisions of the EC Treaty itself, national laws had the power to protect in the absence of Community laws or harmonization, the CFI seemed to use Article 86 to establish a discretionary power to define what that "core bundle" of rights is and by doing so, circumvent the protection of Article 222.

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140 Id. at 74-5.
141 Id. at 75.
142 Smulders, supra note 74, at 41.
143 Corbet, supra note 8, at 354.
144 Gulmann Opinion, supra note 2, para. 97.
145 Perkins, supra note 22, at 298; Article 222 states that the, "Treaty shall in no way prejudice the rules in Member States governing the system of property ownership." EC TREATY, supra note 5, at art. 222.
146 Myrick, supra note 13, at 115. It is thought by some that the appropriation of the intellectual property right might violate the European Convention on Human Rights' general principle of respect for property. Nicholas Green, Intellectual Property and the Abuse of Dominant Position Under European Union Law: Existence, Exercise and the Evaporation of Rights, 20 BROOK. J. INT'L L. 141, 152 (1993). Article one of the first protocol to the Convention indicates that property rights may only be restricted by a state where necessary for the promotion of the general interest. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262. Though the Community itself is not a party to the Convention, it has pledged to respect the fundamental rights guaranteed in the Convention through a provision in the Treaty on European Union. Maastricht Treaty, supra note 64, art. F. See also Case 44/79, Hauer v. Land Rheinland-
Despite the ECJ's ruling that the Commission satisfied the provisions of Article 190 by sufficiently stating the basis of its decision, the ECJ failed to reference any rights held by the broadcasters in relation to its listings whose legitimate exercise would be beyond the reach of Community law restrictions and would not be considered an abuse. Nor did it provide any guidelines for exactly what exercise of a nationally protected intellectual property right would be considered to be an abuse by the EC courts and what exercise would be permissible. The use of discretion by the ECJ in determining exactly what constitutes the specific subject matter of an intellectual property right leaves the exercise of these rights lacking in guidance and stability and leaves the owners of these rights fearful of compulsory licensing at any time the Commission deems an exercise to be in conflict with EC competition policies.

This uncertainty has spilled over into other areas of intellectual property law and has sparked concern over the possible extension of the decision to other areas where intellectual property rights are used to prevent the emergence of competing products. Many copyright holders fear that the EC competition laws will be used to force them to license billions of dollars worth of technology or proprietary information in critically competitive areas such as software and telecommunications. The Court's emphasis on the dependence of the downstream market concerns the producers of strictly utilitarian and functional products, such as computer programs, who almost inevitably create such a dependence. A lobbying group including General Electric, IBM and Digital Equipment intervened in the appeal to the ECJ to try to ensure that the mere exercise of an intellectual property right would not constitute an abuse of a dominant position and provoke compulsory licensing.

Pfalz, 1979 E.C.R. 3727.

147 Myrick, supra note 13, at 114.


149 Rice, supra note 89, at 14.


151 Mack, supra note 148.

152 Smulders, supra note 74, at 42-43.

153 Mack, supra note 148. The general counsel for GE's patent licensing division felt that the CFI's decision was an "ominous precedent" indicating the potential for expanding compulsory licensing to include the patenting of technical equipment such as radar devices
The recommendation of the Advocate General would have established the need for substantial abusive interference with competition by the holder of a national copyright to justify subordinating that right to EC competition rules.154 His opinion would have placed tight restrictions on the issuance of compulsory licenses as a threat to the fundamental nature of intellectual property rights.155

Support for the ECJ’s opinion naturally comes from the organs of the EC itself, which viewed the decision of the CFI as a vehicle for eliminating the distortions in competition created by national intellectual property laws.156 The goal of the Commission was to undermine anti-competitive practices by a uniform practice of forcing those copyright holders in a dominant market position to license their products.157 The advancement of a stable single market would be impeded by the preeminence of differing national intellectual property laws with the potential to allow trade barriers and pockets of anti-competitive behavior.158 The decision could have a marked impact in forcing monopolists to provide access to intellectual property vital for new entrants in a given market.159

Article 86 strives to eliminate abuse which would limit “production, markets or technical development to the prejudice of consumers.”160 The compulsory licensing of certain technological patents would facilitate the advancement of Community-wide development in the high-tech industry. Since the CFI acknowledged that royalties and qualitative restrictions would be proper in the copyright scenario, the holders of the copyright would see a certain, if limited, amount of financial gain while the Community would benefit from the dissemination of the product information.161

The decision also potentially opens the door to greater and fairer access to the dissemination of information on the information superhighway, much

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154 BNA Report, supra note 21.
155 Id.
157 BNA Report, supra note 21.
158 Corbet, supra note 8, at 363.
160 EC TREATY, supra note 5, art. 86(b).
161 Law, supra note 6, at 355.
to the benefit of consumers. The fear was that if the broadcasters’ protectionist argument was upheld, software producers in a position to control access to information networks could assert the same argument. The ECJ’s ruling might be used to prevent dominant creators of computer systems from limiting, through their control over operating system interfaces, the creation of compatible application programs or peripheral equipment.

VI. CONCLUSION

The scope of the *Magill* decision might inevitably be limited due to the particular information involved. The case concerned factual listings information considered to have little artistic or creative merit, and the statutory monopolies granted to the broadcasters perhaps heightened their responsibility to the viewing public. Additionally, the case implicates the Community’s commitment to “television sans frontières” under Article 59 of the EC Treaty. Nevertheless, intellectual property owners will not rest easy until more mainstream actions are brought before the Court and its position on compulsory licensing can be more conclusively determined.

The *Magill* decision was very significantly dependent on the specific facts of that case. The decision of the Court fails to establish a bright line rule for determination of what kind of exceptional circumstances would allow EC competition rules to supersede intellectual property rights. If the EC wants to establish a stable and comprehensive Community wide competition policy regarding intellectual property rights, case law under the ECJ would seem to indicate that an official harmonization policy would be appropriate to conclusively override the supremacy of national laws in this


164 *European Court Says Competition Trumps Copyright*, supra note 3.

165 Vinje, *supra* note 150, at 325.

166 Myrick, *supra* note 13, at 120.

167 This translates to “television without frontiers.”

168 *Court of First Instance*, 1991 E.C.R. II-575, para. 27.

169 *European Court Says Competition Trumps Copyright*, supra note 3.

170 *Id.*
area. Until then, the only guidance as to the meaning of "special circumstances" and the abuse of a dominant position for intellectual property owners may come from the CFI's warning that "[w]here it is apparent that a rightholder is exercising its rights in such ways or circumstances as in fact to pursue an aim manifestly contrary to Article 86, the right-holder must anticipate that its actions may be challenged on EC competition grounds before National or European Courts and/or the Commission."

See supra note 69 and 114. A proposal for a harmonization directive for copyright protection was established on March 23, 1992 and was amended on January 7, 1993. Rules on moral rights were removed from the proposal and would remain under the regulation of the member states. Corbet, supra note 8, at 363. Another example of harmonization initiatives in the area is the draft regulation on block exemptions of patent licensing which aims to combine existing block exemptions for agreements on know-how and patents and to harmonize and simplify the rules governing these areas. Patent Licensing Block Exemption Regulations Extended Again, EUROPEAN REPORT, Sept. 10, 1995, available in LEXIS, Intlaw Library, ECNews File.
