

The European IP Bulletin

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Hot Topics

1. COMPARISON: DIVISIONAL PATENTS IN EUROPE AND THE UNITED STATES

Patent applications may have offspring in the form of additional applications based on the main application, to cater for additional inventions that are disclosed in the main application. This stems from a basic requirement of 'unity of invention' that dictates that no more than one inventive concept may be covered by the claims of a single patent. Broadly speaking, the purposes of this rule are firstly practical in that only one invention can be protected per application fee, but secondly principled in that it creates certainty for the public. This second purpose arises as the public have a right to know the scope of protection of a patent. If a second invention could be found in the patent with the same priority date then there would be uncertainty as to which patents contained hidden or partially hidden inventions.

Typically, a division might occur after first examination where the Patent Office examiner identifies a second invention and requires the applicant to divide off this second invention. More controversially however, it is possible for the applicant himself to take the initiative and use the system for his own ends, one possible goal being an attempt to protect an improvement of the invention. These latter cases serve to contrast the practices allowed either side of the Atlantic.

In the US, a division called a 'continuation' is permitted. Under the European Patent Court, the system uses the term 'divisional application'. In both cases, the divided application is based on the same disclosure as the parent application. If a subsequent division is made then the first 'offspring' application then the initial application will be described as the 'grandparent' application and so on.

As well as sharing the disclosure of the parent application, the divisional application will make a claim to the priority date of the parent. This is obviously an advantage where technology the interval between filing of the parent and offspring might give rise to novelty/inventive step destroying publications.

In the US a number of conditions exist to support the claim to the same priority:

- The parent application must still be pending, however, the grandparent need not be pending;
- There must be at least one named inventor in common between the parent and offspring. Thus, an inventor can be common between the offspring and either parent or grandparent application so long as the grandparent is still pending. If the grandparent is no longer pending, then the common inventor must be in the parent application;
- The claims in the offspring must be fully supported by the disclosure in the parent application. Typically, the continuation is filed with the same disclosure as in the parent so in normal continuations this is not a problem.

Similar rules have been considered by the European Patent Office (EPO) in cases on divisional applications:

- Case J 7/04 confirmed that the last possible date on which a divisional may be filed is the day before the date of grant of the parent. Case T1158/01 confirmed, following clarification of the drafting of the European Patent Convention (EPC) and especially of the French text at the inter-governmental conference on the EPC in 2000, that multiple divisional applications are allowed by the EPC.

- Case J 2/01 (Legal Board of Appeal) confirmed that the identity of the divisional applicant(s) must be the same as the applicant or co-applicants named at the time on the application form from which the divisional is filed.

To this extent, the European approach is similar to the US, and in practice an identical disclosure is filed with the offspring and then reduced to support the carved out claims made in the offspring.

However, the US system of continuations permits a US applicant to make sure that the disclosure of an original patent application is always pending. Since an unlimited number of continuation applications may be filed (the only requirement being that at least one application in the chain of continuation applications is still pending) it is possible to keep a chain of patent applications alive for a long period of time.

This is useful when a technology field is crowded and there are several competitors, and when it is not certain exactly what the competitor will try to bring to market. Competitors will often attempt to design around patent claims. In this case, the initial claims of the original patent may not be effective in maintaining the monopoly power of the patentee. By filing additional continuation applications whenever an existing patent application is to issue as a patent or whenever the prosecution of an existing patent application is to be terminated, an applicant can make sure that a continuation patent application claiming priority from the original application is always pending. Then, if a competing product is ever produced, the claims of the pending continuation application can be amended, or another continuation application can be filed, so that the claims clearly cover the competing product, ensuring that the product will infringe the new claims.

This approach has been frowned upon in Europe and shows in some of the decisions mentioned above.

Indeed, the EPO now requires that the grandparent still be pending when a second divisional is filed if inventions from that grandparent are to be contained in the second divisional. In Case T720/02, the tribunal said: "To allow subject matter from a grandparent application (which was no longer pending) which was reproduced in the description of a parent divisional application but not encompassed by the invention actually divided out of the grandparent application to be further divided out of that parent application at a later date would be to allow applicants by the mere filing of recurrent cascading divisional applications to leave the public completely uncertain during most of the life of a patent as to how much of the subject matter of the original patent application might still be claimed".

The contrasting nature between the US and European approaches is further demonstrated when considering a further US form of division called a 'continuation-in-part' ("CIP"). These allow for inclusion of the same disclosure that is found in a parent application plus some additional invention disclosure, for example to support an improvement. Multiple priority dates can arise where some of the claims of the CIP are supported by the parent application but other claims are supported by new matter introduced to the offspring application.

In contrast, under Art 76(1) of the EPC if the divisional includes added new matter then the divisional will be invalid. This cannot only invalidate the first divisional but subsequent divisional applications (Case T1158/01). Furthermore, claims in the offspring will be restricted by those inventions or group of inventions claimed in the parent. Further offspring will likewise be restricted. This leaves no room for claiming

improvements in divisional applications under the EPC (Case T720/02). This approach is supported by the requirement under the EPC that the identity of the divisional applicant(s) must be the same as the applicant or co-applicants named at the time on the application form from which the divisional is filed not just that there is one common inventor as in the US (Case J 2/01).

A few years ago, Edmund Kitch a US economist published a paper to justify the patent system, describing it a tool for 'prospecting' (or fishing!) just as prospectors in the old Wild West were given prospecting rights. US continuation applications do partly reflect this nature, allowing patentees to look again at the claims made and to extend the scope of their protection gradually at a later date. However, the EPO Boards of Appeal have made a clear policy statement in their decisions that the patent system in Europe must provide certainty for the public. This balances the right of third parties to design around the patent claims as originally filed and the right of patentees to obtain protection fairly based on the invention they have claimed at the original date of filing. The contrasting views from either side of the Atlantic on dividing out patent applications does give rise to important considerations when drafting patent applications, as well as for ongoing prosecution of current applications.

Copyright

2. COPYRIGHT ON PAPAL DOCUMENTS

Shortly after the election of Joseph Ratzinger to the Cathedral of St. Peter, the Vatican decided to embark upon a new initiative to ensure acknowledgement and enforcement of copyright on papal documents. In a decree of 31 May 2005, the Secretary of State declared that the Vatican publishing house, called *Libreria Editrice Vaticana* (LEV), was entrusted with the exercise and custody of all moral copyrights and exclusive rights arising from every deed and document through which the Pontiff exercises his own *magisterium*. Accordingly, LEV's director has the power to dispose of the rights and, if necessary, he can start legal action against infringers, according to international treaties and conventions to which the Vatican adheres. This applies to all works created by Joseph Ratzinger even before he became Pope Benedict XVI together with all works of his predecessors over the prior 50 years.

Enforcing copyright in papal documents is not as revolutionary as it might sound. In 1978, another decree asserted that the LEV had been acting as official publisher for the Holy See. From that date, the Vatican publishing house was also entrusted with the enforcement of copyright in the works of John Paul II both before and after he became Pope. In a straightforward and exhaustive statement, the decree explained that any utilisation of the Pope's works could only be done after obtaining explicit authorisation from the publisher.

Given Ratzinger's extremely wide literary production, both before and after his election as Pope, copyright over his works is a matter of primary importance. Authors and editors willing to publish a work containing some of the papal documents will have to address a request to LEV and possibly pay a fee or a royalty on the book's sales. In order to have a better understanding of the new enforcement measures adopted by LEV, a meeting between the publishing house representatives and Ratzinger's publishers was convened in December 2005. During this meeting, LEV provided guidelines on how papal documents were to be licensed.

Restrictions on the diffusion of papal documents were primarily established to provide order and avoid derogatory treatment. But the issues of freedom of speech

and right to information naturally arise, especially when the media requires information to be widely available. According to the Vatican, availability is a non-issue given that all documents by the Pope are published and systematically posted on the Vatican's official website.

The problem is probably an economic one. It has been reported that LEV requested the payment of a fee of £10,000 from a publisher for the use of short excerpts of two of Ratzinger's recent speeches. While this sum seems to be disproportionate, one should bear in mind that the book in which the excerpts were included had significant commercial success, a point reiterated in a recent press release issued by LEV. Indeed, a second edition of the book has recently been released at the approximate price of £6.70. Therefore, from a legal point of view, it is arguable that the copyright holder should not be required to give away his material for free when subsequent exploitation generates profit for the licensee. But it is also clear that, in some circumstances, the purposes of dissemination must be superior to all economic matters and such a question would become redundant.

From the legal point of view there is nothing strange or scandalous in the decree by the Vatican as it does not conflict with common copyright practice. Nevertheless, from the point of view of dissemination a problem could arise in respect of the ability of the LEV to deal promptly and efficiently with the worldwide demand for the Pope's works. In view of the social function of the Church, Vatican authorities should monitor how papal works are handled and be ready to act when economic interest goes against the pastoral mission of the church to disseminate "the good news".

3. NOVA PRODUCTIONS V MAZOOMA GAMES: COPYRIGHT INFRINGEMENT OF VIDEO GAMES

On 20 January 2006, the High Court of Justice gave its ruling in the matter of Nova Productions Limited v Mazooma Games Limited [2006] EWHC 24 (Ch).

The Claimant, Nova Productions, is a company that designs, manufactures and sells arcade video games. Among these games is one called "Pocket Money", which has proven to be very popular and a huge commercial success to the Claimant.

After several dealings with the Claimant regarding the commercialisation of "Pocket Money", the Defendants designed and commercialised similar video games.

The key issues in this case were whether these similar video games were created by copying "Pocket Money" and, if so, whether this copying involved the reproduction of a substantial part of any work in which the Claimant owned copyright.

In order to address these issues, the court had previously identified the particular copyright works upon which Nova relied. Nova claimed to be the owner of artistic works, literary works, dramatic work and film copyright. However, the court only recognised the existence of the artistic and literary works, finding that, in accordance with *Norowzian v. Arks (No. 1)* [1998] FSR 394, film copyright can only be infringed by photographic copying from the film, and therefore "Pocket Money" could not be a dramatic work for the following reasons:

- it was not intended to be or was capable of being performed before an audience;
- the features described as features of a dramatic work cannot be described as so, taking into account that they are not capable of performance;
- the notes that were claimed to record the dramatic work were accepted as a literary work, so they cannot be, simultaneously, a dramatic work; and
- the claimant did not explain how the dramatic work upon which it relied was recorded in the object code of the video game.

After comparing the similarities and differences between the video games' features, the court considered that the similarities mainly consisted of the ideas and principles at a high level of abstraction, which are not protected by copyright.

By reviewing in detail each class of copyright work related to these video games, and by analysing whether a substantial part of a video game has been reproduced, the High Court has provided an important contribution to the interpretation of copyrighted works and the limits of their protection. In particular, in relation to computer programmes, this case emphasises the difference between, on the one hand, ideas and principles, and, on the other hand, expressions of these ideas and principles. According to the High Court rule, due to the fact that an idea or principle is not expressed in the program code or program architecture, and are only reflected in its outputs, it does not form a substantial part of the computer program itself and cannot be protected by copyright.

4. THE PERFORMANCE (MORAL RIGHTS, ETC) REGULATIONS 2006

The Performance (Moral Rights, etc.) Regulations 2006 came into force on 1 February 2006 to implement the UK government's community obligation under EU law, pursuant to ratification of the World Intellectual Property Organization's Phonograms and Performances Treaty 1996 (WPPT). Article 5 of this treaty gives performers, independent of economic rights, rights to claim identity with their performance and rights to object to any distortion, mutilation, or other modification of their performance that would be prejudicial to their reputation. Previously, there were no specific provisions for performers' moral rights under English law.

The Regulations provide for two rights for performers: (1) the right to be identified as the performer in a performance (the paternity right); and (2) the right to object to modifications made to performances that are prejudicial to the performer's reputation (the integrity right). These rights are closely based on the existing moral rights legislation for authors and directors set out in the Copyright, Designs and Patents Act 1988.

Performers will be entitled to protection for any live performance given to the public, a performance that is broadcast live or a performance of which a sound recording is made and subsequently communicated or issued to the public. The person who organises or promotes the performance is responsible for identifying the performers. In the case of a group, then identification of the group as a whole will suffice. Other exceptions include: no obligation to identify a performer where it would not be reasonably practicable to do so, nor where performances are given for the purposes of reporting current events or advertising any goods or services. There are exceptions from the right to be identified for acts relating to news

reporting, incidental inclusion, things done for the purposes of examination, parliamentary and judicial proceedings and Royal Commissions and statutory inquiries.

Similarly the right to object to modifications does not apply in relation to any performance given for the purposes of reporting current events and is not infringed by modifications made to a performance which are consistent with normal editorial or production practice, nor by anything done for the purpose of avoiding the commission of an offence, complying with a duty imposed by enactment (such as the Acts licensing and monitoring broadcasters), or, in the case of the British Broadcasting Corporation, avoiding the inclusion of anything which offends against good taste. In the latter cases, there may have to be a disclaimer that the modifications were made without the performer's consent.

Moral rights in performance last for as long as the property rights in performance (50 years from the end of the year in which the performance occurred). The rights cannot be transferred, except upon the death of the performer when they may be transferred by will. A performer, or their agent, may consent to any act that would otherwise infringe their rights, and it is also possible for a performer to waive their moral rights.

Patents

5. THE EPO CLARIFIES THE CONCEPT OF DIAGNOSTIC METHODS

On 29 December 2003, the President of the European Patent Office (EPO) made use of his power under Article 112(1)(b) EPC and referred a question to the Enlarged Board of Appeal. The referral was mainly based on the conflicting interpretation contained in decisions T 385/86 and T 964/99 of the term "diagnostic methods practiced on the human or animal bodies" within the meaning of Article 52(4) EPC.

The question referred concerned the following points of law:

1. Are diagnostic methods practised on the human or animal body excluded under Article 52(4) of the European Patent Convention (EPC) only those methods containing all the steps needed to carry out a medical diagnosis (namely, the collection of data, the comparison of the said data with standard values, the discovery and attribution of a significant deviation) ? ; or
2. Does the exclusion also preclude those methods containing one step or more that can be used for diagnostic purposes?

Further, the President asked whether a claimed method is a diagnostic method if it contains at least one essential procedural step and requires the presence of a physician; or it does not require the presence of a physician but the latter bears the responsibility for the method; or all procedural steps can be carried out by non-technical staff. Additionally, he questioned whether the presence of the physician is necessary; what are the procedural steps he/she has to undertake; and how to construe the phrase "practised on the human and animal body".

The Enlarged Board of Appeal said that, according to the well established jurisprudence of the EPO, a diagnostic method practised on the human or animal body for making a diagnosis for curative purposes has to include the four steps and therefore a narrow interpretation has to be given to Article 52(4) EPC and to the cases of exclusion from patentability since the very wording of the provision which

indicates the narrow construction is appropriate. In fact, a member of the Enlarged Board of Appeal held that steps are required to bring a diagnostic method within the meaning of Article 52(4) due to the inescapable multi-step nature of such method.

Furthermore, the Board regarded the qualification of a method as having diagnostic character does not necessarily depend on who is involved because it is unequivocal that the exclusion relates to the method and not to the person carrying out the method.

Finally, the Board found that the criterion “practised on the human or animal body” is to be considered only in relation to the method steps of technical nature and not to the diagnosis *stricto sensu*, i.e. the deductive decision phase which cannot be practised on the human or animal body. As far as the other technical steps are concerned, the Board stated that the performance of all method steps of technical nature should imply an interaction with the human or animal body.

In summary, the Enlarged Board of Appeal, on 16 December 2005, answered the referred point of law by delivering its opinion stating that the subject matter of a claim relating to diagnostic methods practised on the human or animal body falls under the prohibition of Article 52(4) EPC when the claims include features relating to all the above mentioned procedural steps necessary to make a diagnosis. Thus, whether or not a method is a diagnostic method does not depend on a medical or veterinary practitioner being present or bearing the responsibility. Essentially, all the procedural steps of technical nature that are involved in making the diagnosis for curative purposes must satisfy the criterion “practised on the human or animal body”, and this criterion is met when their performance implies some type of interaction with the human or animal body.

6. TAMGLASS V LUOYANG NORTH GLASS

Tamglass v Luoyang North Glass & Anr [2006] EWHC 65 Ch was a patent action in which the claimants alleged infringement of a European Patent (UK) relating to a glass bending and tempering process. The claimants argued that the first defendant company Luoyang North Glass (LNG) was the manufacturer, importer and seller of the infringing machine to the second defendant company “Novaglaze”, and Novaglaze had been guilty of keeping and using the machine. LNG counterclaimed for revocation of the patent on the grounds of novelty and obviousness, while Novaglaze expressed its intention to abide by the court’s decision in respect of infringement and validity, but sought an opportunity to be heard on remedies.

Before examining the legal issues involved, the Court had to wade through complicated procedural issues due to certain particularities of the case. Firstly, LNG was representing itself through its employee, Mr. Wang, who had little understanding of the English procedure, rather than through English solicitors and counsel. Secondly, the expert evidence submitted on behalf of LNG was not made in accordance with the *Ikarian Reefer* requirements. The expert, Mr. Gao, was a shareholder in the company. The court gave due regard to these circumstances in evaluating the expert evidence and the allegations advanced by the defendant. The court rejected the anticipation and obviousness attacks against the patent because the defendant had failed to prove them.

On the issue of infringement, LNG denied that they had made an offer to sell the machine or that they had any knowledge that the machines would infringe. They stated that the fax from their agent was merely a list of machines with their

identification number and a description in general terms, and that such a fax could not amount to a formal contractual offer. However, the court relied on the judgment of Justice Jacob in the case of *Gerber Garment Technology Inc v Lectra Systems Ltd* [1995] RPC 383. In that case Jacob J had held that an advertisement or negotiations demonstrating a willingness on the part of the person to supply an infringing machine is an “offer to dispose” within S 60 of the Patent Act, 1977. Therefore, Justice Mann similarly concluded that the fax from the LNG’s agent could amount to an “offer” for the purposes of S 60 of the Patent Act, 1977, even though it is not a formal offer.

On the second requirement, as to whether or not LNG knew that the use of the machine without the consent of patentee would infringe, the court held that such knowledge could be imputed to LNG through inference. LNG’s position in the glass market, its patent portfolio and the evidence that they had participated in the trade fairs where the claimants were present were held as important factors for making such an inference against LNG. Hence, the Court found the defendants guilty of infringing the patent.

Trade Marks

7. DEUTSCHE SISI-WERKE V OHIM

On 12 January 2006, the ECJ gave its judgement in *Deutsche SiSi-Werke v OHIM*, C-173/04 P.

The case at issue refers to an appeal by the German company Deutsche SiSi-Werke to a decision by the the Court of First Instance (CFI) of January 2004 which upheld two decisions of the Office for Harmonisation of the Internal Market (OHIM) rejecting claims to register product shape marks due to lack of distinctiveness.

In 1997, the company had sought the registration of a three-dimensional dimensional pouch as a form of fruit drinks packaging at OHIM but the claim was rejected because OHIM took the view that the product shape lacked distinctive character and hence registration would give the applicant a monopoly on that form of packaging. Under Article 7(1)(b) of Council Regulation EC No 40/94 on the Community Trade Mark, signs which are devoid of any distinctive character are unregistrable.

The ECJ rejected the appeal, deciding that the CFI had “not erred in law” in assessing the distinctiveness of the three-dimensional shapes’.

In it’s judgement, the ECJ said that according to established case law, only marks which depart significantly from the norm or customs of the sector and thereby fulfil their essential function of indicating origin are not devoid of any distinctive character.

The ECJ ruled that the CFI had correctly found the claimed shape was not distinctive because this form of packaging for liquids was already in general use in the EU. The shape was not unusual enough for the average consumer to distinguish it as an indication of the specific commercial origin of products in this category.

According to the ECJ, the CFI had based its conclusion on proper criterion as the decision was not based on the possibility that the drinks sector may commonly use such pouches in the future, but on the finding that they are

already commonly used.

The ECJ defended the CFI's finding that competitors in the fruit drinks market could use stand-up pouches in the future as a point made for the sake of completeness. The ECJ concluded by asserting that the CFI did not in any way base its findings on the interest of possible competitors, but limited itself to determining whether those trade marks enable the average consumer of fruit drinks and fruit juices to distinguish, without any possibility of confusion, the goods of the appellant from those of a different commercial origin.

8. EMANUEL V CONTINENTAL SHELF: NAME OF FASHION DESIGNER AS A TRADE MARK

On 19 January 2006, the Advocate General (AG), Ruiz-Jarabo Colomer, handed down his opinion in *Elizabeth Florence Emanuel v Continental Shelf 128 Ltd*, C-259/04.

The English court, hearing the appeal by Emanuel of the Trade Mark Registry's Hearing Officer's decision to reject her application to revoke the trade mark bearing her name, had referred several questions to the European Court of Justice regarding the goodwill in a mark when it has been assigned.

Emanuel is the designer who designed the wedding dress for Princess Diana's wedding. The trade mark bearing her name signifies prestige. When the trade mark was registered in 1997, it consisted of the words ELIZABETH EMANUEL with a heraldic device. However, when the trade mark was assigned to another party, that party changed the graphic arrangement, removed the heraldic device and registered the sign. According to Article 17 of Regulation No.40/94 and TRIPS Article 21, nothing prevents the transfer of trade mark rights and indeed, they are often transferred in commercial transactions.

The primary purpose of trade marks is to allow the final user to identify the origin of the products or services, so as to distinguish them from those originated from elsewhere. The issue in this case was whether the change in ownership of a trade mark comprising the name of its owner was deceptive in any circumstances.

The AG held that:

- All consumers know that a fashion designer is entitled to transfer his or her business at any time and there is no need to grant extra protection;
- A name that has been transferred with the goodwill is not liable to deceive the public within the meaning of Article 3(1)(g) of Directive 89/104 even if it may give the mistaken impression; and
- The customer's conflicting perception that the person is involved in the production process derives from the replacement of one trade mark owner by another does not deserve to be classified as deceit.

Therefore, the AG concluded:

- There is no deception of the public under Article 3(1)(g) of Directive 89/104 if the name is assigned with the goodwill; and

- The mere use of the mark does not deceive the public under Article 12(2)(b).

This case demonstrates that trade marks are special forms of property and are essential to commercial trade, and the transfer of a trade mark to another party may raise doubts as to whether the trade mark can be revoked. However, this case also shows that the Directive does not seek to annul trade marks when goods do not satisfy the expectations of the customer, because a particular person has ceased to be involved in their creation or manufacture. Further, the sign must, in any reasonably imaginable case, confuse the average customers in respect of the qualities and information in order to constitute deceit.

Thus, the AG followed ECJ precedent and gave a strict interpretation of revocation, requiring that the actual existence, or a sufficiently serious risk, of deception of the consumers. Goodwill is the essence of a legitimate transfer and lack of goodwill may give rise to revocation.

Media

9. GEORGE GALLOWAY MP V THE TELEGRAPH GROUP

On 25 January 2006, the Court of Appeal delivered its judgment in *George Galloway MP v The Telegraph Group* [2006] EWCA Civ 17. In this appeal the newspaper group did not succeed in its bid to overturn a 2004 first instance ruling concerning the defamation by the Daily Telegraph of politician George Galloway.

Galloway had brought an action against the Telegraph Group Ltd for damages for libel on the ground that articles in the Daily Telegraph newspaper's editions of 22 and 23 April 2003 were defamatory. The author of the relevant articles, reporter David Blair, claimed that, according to Iraqi intelligence documents, Galloway had been in the pay of Saddam Hussein, secretly receiving sums of the order of £375,000 a year, that he had used the Mariam Appeal as a front for personal financial advantage and that he had diverted monies from the oil-for-food programme, in effect depriving the Iraqi people, whose interests he had alleged to represent, of food and medicines. It also suggested that what he had done was tantamount to treason.

The Telegraph Group Ltd argued that publication of the articles was justified on the basis that the public had a right to know the contents of the documents irrespective of whether or not they were defamatory of Galloway or whether their factual content was true. Nevertheless, the Court awarded Galloway £150,000 in damages.

The Telegraph Group Ltd appealed the ruling of the court of first instance on the following grounds:

- Even if the articles were defamatory, the Telegraph Group maintained that the Daily Telegraph's coverage of the story amounted to *reportage* (essentially neutral reporting of attributed allegations, rather than their adoption by a newspaper) and, as such, the Group was protected by qualified privilege - the so-called "Reynolds" privilege (named after the 1999 case of *Reynolds v Times Newspapers Ltd* [2001] 2AC 127). This can provide a defence for publishers against defamation claims where it can be shown that publication of a story is in the public interest and that it has been reported in a responsible way;
- The claims made in the relevant published articles amounted to fair comment; and

- The £150,000 damages awarded were excessive.

Depending on the circumstances, certain matters must be taken into account in determining whether Reynolds privilege is available as a defence to defamation. These matters include factors such as: the seriousness of the allegation; the nature of the information and the extent to which the subject matter is a matter of public concern; the source of the information; the steps taken to verify the information; the status of the information; whether comment was sought from the plaintiff; whether the article contained the gist of the Plaintiff's side of the story; the tone of the article; and the circumstances of the publication, including timing. In the Reynolds case, it was emphasised that the courts should above all have particular regard to the freedom of expression and should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion.

In this case, the Court of Appeal also considered a number of decisions of the European Court of Human Rights which examined the balance to be struck between Article 10 of the European Convention on Human Rights (which relates to the right to freedom of expression) and Article 8 (which relates to the right to respect for private and family life). The Court of Appeal found the principles of the relevant Strasbourg jurisprudence of limited assistance in this case as the facts of the Strasbourg cases varied considerably. These cases were, however, of assistance in so far as they identify the correct approach and correct principles to apply (which have most recently been summarised in the case of *Cumpana and Mazare v Romania* (2005) 41 EHRR 200). They are essentially the same principles identified by the House of Lords in Reynolds, subject to the issue of whether it is fatal to a defence of Reynolds privilege for a defendant to have adopted the statement of others as true. On the basis that this is not fatal the question in each case is how to balance the freedom of speech contained in Article 10 with the reputation of an individual contained in Article 8. The national court essentially decides where this balance is to be struck and in this case the Court of Appeal did not disagree with the balance struck by the court of first instance.

The Court of Appeal dismissed the argument that the defence of qualified privilege should be available to the Daily Telegraph. The articles were not reporting the contents of the Baghdad documents in a fair or neutral manner, in particular, the documents did not allege that Galloway took money for himself, whereas the articles unequivocally made that allegation. Based on this premise, the Court held that the newspaper had both embraced and embellished the allegations.

The Court also dismissed the Daily Telegraph's defence of fair or honest comment after concluding that the various statements in the articles and headlines complained of by Galloway were either allegations of fact or, in so far as they were comment, they were based on unproven facts and conduct. Thus, in the absence of either a defence of justification or privilege, the newspaper could not rely on a defence of fair or honest comment.

As to the issue of whether the judge had erred in principle in awarding damages of £150,000 to Galloway, the Court of Appeal held that it would not interfere with

the amount awarded due to the seriousness of the allegations and the fact that the award of damages was based on libel that had been found proved.

Therefore, the Court of Appeal dismissed both the appeal on liability and the appeal on damages. This case was decided on its own facts relating to the overall impression given by the Telegraph articles. However, it gives guidance on the factors which will be taken into account when considering when a defence of Reynolds privilege will be available, as outlined above.

10. HRH THE PRINCE OF WALES V ASSOCIATED NEWSPAPERS

The High Court in London has granted a temporary order restraining the publication or disclosure of Prince Charles' private journals pending judgment on the summary judgment application or further order. Copies of the journals, which contained the Prince's views on the 1997 handover of Hong Kong to the Chinese, had come into possession of the Mail on Sunday.

Prince Charles regularly writes journals of his official visits detailing his personal impressions and private views of his overseas tours. He circulates copies of the journals to members of his family, close friends and advisors. This particular journal was circulated to 13 recipients together with a letter from the Prince of Wales or his personal assistant or secretary in an envelope marked "Private and Confidential". The Prince of Wales claims that these journals were confidential and protected by copyright which he owns. He claims that these journals were wrongly copied by a person who worked for his household and the copies were removed from his private office and given to the Mail on Sunday through an intermediary.

The paper published extracts of these journals and threatened to continue doing so. The Prince of Wales has applied for summary judgment, which the Defendant has resisted denying the breach of confidentiality and arguing that it is in the interest of the public to know the views of the heir to the throne. The Prince of Wales has a history of causing controversy by voluntarily disclosing to the public his opinions on a range of topics and private lobbying of democratically elected persons on topics of political importance. It is also alleged that he circulated his journals so widely as to destroy any confidence which might have resided in them.

Mr Justice Kitchin said that at this stage of the proceedings, the Prince of Wales had shown an arguable case that the information contained in the journals is confidential and entitled to protection. He said that simple assertions of confidentiality should not prevail but the Claimant had satisfied him that there was a genuine interest in seeking to prevent the publication of sensitive private information of a confidential nature. Mr Justice Kitchin made an interim order restraining the publication of the journals pending a further hearing of the application.

Breaches of confidentiality in relation to the Royal family have been numerous. Usually the cases have involved their private life. What make this case extraordinary is the Prince's constitutional role and the political issues discussed in these journals. His comments were not presented in a very diplomatic way and may not have been meant for public consumption, although more recent press comment suggests the Prince was adept at leaking such comment when it suited him.

Technology

11. MICROSOFT AGREES TO LICENCE WINDOWS SOURCE CODE

Software giant Microsoft announced, on 25 January 2006, that it is prepared to disclose portions of its Windows source code to allow rival firms to develop compatible programs, though only for an undisclosed licensing fee. Microsoft has proposed this arrangement in order to meet an antitrust ruling given by the European Commission in March 2004. Microsoft has previously opened up source code to a restricted list of customers and governments, but never to direct competitors.

Microsoft already offers 12,000 pages of technical documents and 500 hours of free technical support to anyone applying for a licence. Companies making software which interacts with Microsoft servers may use this information to make their products compatible with Microsoft products. Such licence-holders will now also get to look at the source code, but will not have the right to publish the code or include it in their own products.

The European Commission ruled in March 2004 that Microsoft had abused its dominant market position in PC desktop operating systems to exert its influence in the server software market. Microsoft was fined a record €497 million and was forced to make several key changes to its business practices. Convinced that Microsoft was proving intransigent about sharing data with competitors, the European Commission in December 2005 threatened to fine Microsoft up to €2 million a day for failing to obey.

However, while Microsoft has claimed that their recent move goes beyond the Commission's requirements, rival companies have said the announcement is nothing but a ploy that will see the arguments stretch on into the future. Further, Microsoft's rivals believe that large amounts of the source code that Microsoft will disclose will be useless, and that without a roadmap teaching how to use the code, a software engineer will not be able to design interoperable products.

Microsoft's offer has also been criticised as being designed to lock out open-source software. According to opponents, source code is the last thing that an open-source project would want access to. Open-source licences require that the software does not include any material with other legal encumbrances, such as patents or copyrights. If a contributor to an open-source project had viewed proprietary source code, the owner of the code could allege that the contributor had copied that code.

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